Chapter 5
A Counterintuitive Efficiency Divide Between Common Law and Civil Law: Rules and Structures of Civil Procedure in Eight Developed or Newly Industrialized Countries

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5.1 Introduction

The original interest of legal origins theory (LOT) in the 1990s was to explain why capital flowed so much more massively to New York and London than to Paris and Frankfurt. In what impressed many thoughtful economists as an interesting departure from the efficient market hypothesis, it focused on behavioral patterns and legal rules encouraging the provision of capital to financial markets. LOT's most influential thesis was and still is that common law as applied in New York and London encourages uninformed capital owners to trust professional insiders acting as agents in the best interest of their principals (La Porta et al. 1997, 1998). While not distinguishing explicitly between substantive law and procedural law, their conclusion that common law is superior economically to civil law was generally understood as an argument about substantive rules of corporate law, securities law and regulation of financial markets. Hence the ensuing debate focused on these same areas. Just like the contract laws of the eight paradigm countries discussed in Boucekkine et al. (2010), civil procedure remained a missing variable.

It was left to Simeon Djankov and three leading authors of LOT to enter the field of "Courts" in 2002 in cooperation with Lex Mundi, a worldwide association of law firms (Djankov et al. 2002). They argued that common law civil procedure was closer to the ideal case of two parties informally entrusting their dispute to their neighbor's judgment as conceptualized by Shapiro (1981) than civil procedure in civil law countries, which they assumed to be inefficiently formal. They constructed an index of 44 indicators of procedural formalism of dispute resolution, compared it with data from the World Bank Business Environment Survey (2000) and arrived at the conclusion:

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> Formalism is systematically greater in civil law countries than in common law countries (and) associated with higher expected duration of judicial proceedings, more corruption, less consistency, less honesty, less fairness in judicial decisions and inferior access to justice (Djankov et al. 2002, p.1)

While they were able to reach the impressive level of econometric robustness of most static cross country analyses by collecting responses from Lex Mundi member law firms in 109 countries, they relied on the extremely narrow base of only two types of cases: eviction of tenants for non-payment of rent and collection of bounced checks. They argued that this narrow focus allowed them to highlight procedural differences in their broad sample of countries. Moreover, the two paradigm cases were further narrowed down to a hypothetical situation where the plaintiff is 100 % right and the defendant 100 % wrong, and where the defendant maintains a poorly justified opposition, appears at hearings to deprive the court of the option to shorten the procedure by a default judgment, is unwilling to settle, insisting on the issuance of a formal judgment and prefers enduring the enforcement of the judgment rather than complying with it voluntarily.

In 2007, LOT raised the level of economic relevance of their venture into the procedural field significantly in a study of the much more broadly defined case type of enforcement of contractual debt worth 50 % of GDP pc in 129 countries (Djankov et al. 2007). At the same time, the larger country sample even more clearly revealed the methodological pitfalls of large country samples with overwhelming majorities of former colonies, more than 50 % of which coded as of French legal origin ("LO"; each time I mention "legal origin" in the—often questionable—sense of LOT's coding of countries in this chapter, I will use this abbreviation). Unwittingly, LOT measured the transplant effect of colonial imposition of imperial laws to unreceptive countries rather than the relative quality of common law and civil law. I will briefly survey the most evident methodological strengths and weaknesses of this approach in Sect. 5.2.

In the interest of a sharper focus on the comparative quality of procedural rules and judicial structures of common law and civil law countries not affected by the transplant effect, I propose an alternative strategy in Sect. 5.3, using a broader set of indicators of procedural quality without case type limitation and a much narrower sample of countries whose legal and economic histories can be considered as paradigms of development under common law or civil law. Extending the set of indicators of civil procedure beyond formalism makes it possible to identify crucial cost and time factors in basic procedural rules and structures of judicial supply affecting access to justice and economic development. The indicators I will use are those of the questionnaire on rules and structures of civil procedure prepared for the conference on "Legal Origins and Access to Justice in Developing and Transforming Countries" at the University of Louvain in Louvain-la-Neuve on February 16–17, 2012 (Schmiegelow and Schmiegelow 2012), hereafter cited as "Louvain Questionnaire".

I submit that, before engaging in comparative analysis of civil procedure in different legal systems, one should clarify one's understanding of the functions of substantive law such as contracts, torts or trust and estates as taught in American

law schools on the one hand, and procedural law and judicial institutions on the other. This will also help to organize the debate on access to justice in its two senses of access to justice in the material sense and access to the judiciary or fora of alternative dispute resolution (ADR). In this chapter, I will understand the function of substantive law as the expression of the aspirations of a society to let justice in the large political, economic, social and cultural senses prevail in the relations between citizens as well as between citizens and their government. I will assume the function of procedural law and judicial or ADR institutions to be as follows:

- to transform substantive law "on the books" into applied, practiced law, evolving, in the best cases, by a continuous stream of judicial rulings published and commented on in common law "law books" or civil law "commentaries" as well as in the media;
- to provide access to the judiciary or ADR

  at low cost
  without undue delay (in view of the maxim "justice delayed is justice denied").

The factor "without undue delay" is also present in LOT's focus on duration in civil procedure. The cost factor, however, is conspicuously absent from Djankov et al. (2002, 2007), perhaps not surprisingly, given its reliance on global networks of lawyers as sources, and given the difficulty, for lawyers themselves, to predict levels of lawyers' fees negotiated with clients or calculated per hour of time spent for them. Also absent is the function of procedural law and judicial institutions to transform substantive law into applied law by judicial rulings, which is surely surprising given that LOT bases its very thesis of the superiority of common law on its origin as judge made-law. Elsewhere, in writings on law and finance (Beck et al. 2003; Rajan and Zingales 2003), it does emphasize the functional advantage of judge-made law as an "adaptability channel" (Beck et al. 2003) of the legal process. In contrast, it considers legislated law, such as civil codes, as passing through a "political channel" (Rajan and Zingales 2003) with a "regulatory bias" prone to dysfunctional rent seeking. It is all the more intriguing that LOT remains silent on this distinction in its writings by Djankov et al. (2002, 2007) on procedural law, which is the very *sedes materiae* of judicial decision-making. Therefore, it appears appropriate to have a second look at this subject in the context of civil procedure.

The most important procedural rules are those determining the balance of the roles of judges and lawyers as providers of the necessary knowledge of the substantive law governing the dispute or as managers of the pace of the procedure. Professional judges supplying their legal knowledge as a public good may offer more affordable and speedier justice than judges in the role of a passive referee waiting to be convinced by the arguments on points of fact and points of law offered by the lawyers of both sides. Infrastructures such as training, status and pay of judges and lawyers, as well as the density of courts, judges and lawyers per 100,000 inhabitants are important indicators of how far judicial supply responds to, or encourages, demand for law. Comparative litigation densities may be understood

as a result of the interaction between institutional supply-push and demand-pull. The comparative frequency of published judicial decisions can serve as evidence of how far judge-made law contributes to the adaptive quality of the legal process in common law and civil law countries.

The XVIIIth World Congress of Comparative Law in Washington DC in 2010 issued a report on rules of allocation of court costs and lawyers fees covering common law, civil law and mixed jurisdictions around the world. Cost and fee allocation is a decisive factor of the predictability, or lack thereof, of the costs of going to court and hence indicators of access to justice (Reimann 2012). The European Commission for the Efficiency of Justice (CEPEJ) set up by the Council of Europe in 2002 has done pioneering work collecting data on judicial infrastructures, litigation rates and duration of civil proceedings in the 47 member states of the Council of Europe including the UK (CEPEJ 2008). In the US, the Court Statistics Project (CSP) jointly launched by the Conference of State Court Administrators (COSCA), the Bureau of Justice Statistics (BJS) and the National Center of State Courts (NCSC) in 2011, has chosen a similar approach for the analysis of the functioning of the American state courts system since 2010 (LaFountain et al. 2012). The methods of the CEPEJ reports and of the CSP are transcultural and there is no reason not to use their data or to attempt obtaining similar data through academic research in non-member countries in other parts of the world.

Limiting the sample of countries to paradigms of economic development offers the prospect of correlating their economic and legal history in dynamic panel analysis over long time series. I propose to select the same eight developed or newly industrialized countries already compared by Boucekkine et al. (2010, Chap. 3) in their analysis of the economic impact of substantive contract rules. That sample includes the mother countries of English, French and German LO, three of the largest financial centers (UK, US and Switzerland), the US as the major case of a nation of settlers and traders bringing their English common law with them (Acemoglu et al. 2005), two newly industrialized countries (South Korea and Taiwan), and three divided countries with separated legal and economic trajectories serving as quasi natural experiments of law and economics (China, Germany, Korea). In the case of India, which may be used for the purpose of robustness checks of dynamic panel analysis as in Boucekkine et al., a similar experiment suggests itself in comparison with Burma, which as a part of British India shared the common colonial heritage of Anglo-Indian law before a succession of military coups after independence dislodged it from the common law legal origin (Chap. 3). In this way, the sample illustrates the transplant effect and, at least for three countries of the sample, avoids the objection of reverse causation of wealth leading to institutional development rather than institutions to economic development (Docquier 2012, Chap. 2).

The evidence of cost and time factors of civil procedure and judicial structures in that sample, most of them established at approximately the same period as substantive contract and property laws, suggests conclusions very different from LOT's. There are some surprising similarities in formal procedural and judicial patterns of the common law and civil law countries of the sample. The most striking difference,

however, emerges in the balance of the roles of judges and lawyers as providers of legal knowledge or as managers of the pace of the procedure. This difference most clearly follows the common law/civil law divide, on which LOT continues to insist, but with scores of efficiency, adaptive functionality and judicial productivity squarely contradicting LOT's assumptions on the comparative quality of common law and civil law. If the balance of the roles of judges and lawyers as providers of the necessary knowledge of the substantive law governing a dispute or as managers of the pace of the procedure is taken into account, three results emerge: (1) Civil procedure in common law countries takes more time and is more costly than in civil law countries; (2) Reasoned and published court judgments contributing to the adaptation of the law to economic and social change are more frequent in civil law countries than in common law countries; (3) The cost advantage of civil procedure in civil law countries results in superior judicial productivity in all economic sectors except, under certain conditions and in the absence of financial crises, in financial markets (Sect. 5.3).

This evidence, though based on a small sample of countries, suggests that institutional competition between common law and civil law extends to civil procedure. Both legal traditions face the competition of alternative forms of dispute resolution, especially in cases of evident or perceived inefficiencies of formal civil procedure. LOT is contradicted by evidence of many procedural and judicial patterns cutting across the common law/civil law divide. The adversarial system is not a common law privilege, formalism not a civil law dysfunction. Formal rules may increase or save costs, accelerate or delay justice, protect weaker parties against information asymmetries or impede their access to justice by antiquated and costly traditions. The only stark difference congruent with the common law/civil law divide, namely the balance of the role of judges and lawyers in civil procedure, seriously challenges LOT's assumption of the superiority of common law over civil law.

Micro-economic analyses of the opposite incentive effects of cost and time risks of lawyer-dominated civil procedure for stylized financial investors and of judge-managed civil procedure for stylized industrial engineers (Massenot 2010a, b) suggest, however, that common law procedure may have the favor of financial markets, which will please LOT, while procedural efficiency (PE) of civil law procedure is the preferable solution for industrial and industrializing economies, which has not occurred to LOT. In this chapter, I will call the opposite incentive structures of PE in industrial and financial sectors the "procedural efficiency hypothesis" (PEH). Its confirmation would help explain the remarkable convergence of the long-term evolution of GDP per capita of the two common law countries and six civil law countries of our sample found by Boucekkine et al. (2010) in their analysis of the economic impact of codified default rules of substantive contract law, which I will call the "default rule hypothesis" (DRH). Both hypotheses deal with transaction costs, which is the focus of institutional economics (Coase 1988; North 1990). Default rules in contract law reduce the cost of concluding contracts by making them safe against judicial reversal without requiring lawyers' assistance in drafting them. PE reduces the cost risk of their

judicial enforcement. DRH requires control for PE, just like substantive law would be mere "law on the books" without effective enforcement through civil procedure.

In the case of our eight countries, the broader set of indicators of the Louvain questionnaire will permit to test PEH, and, hence, control DRH for both of the opposite incentive structures of PE in industrial and financial economies. The evolution of per capita GDP of the six civil law countries between 1870 and 2008 converges with, and is at times superior to, that of the two common law countries. In dynamic panel analysis covering the period since the major nineteenth century codifications of substantive law, Boucekkine et al. (2010) have shown that a superior number of codified default rules of contract law can compensate a lack of financial center advantage. DRH was confirmed in the six industrialized civil law countries of the sample, while Switzerland's combination of default rule advantage and financial center advantage has permitted it to outperform the US for prolonged periods of time. This chapter contributes data permitting to control these results by evidence of a structurally higher degree of PE in the six industrial or newly industrialized civil law countries (Massenot 2010b), while the financial centers of the UK and the US were able to turn the inverse incentive structure of the comparative inefficiency of common law procedure (Massenot 2010a) into an advantage against risk averse litigants. The evidence suggests confirmation of PEH, which in turn would confirm DRH.

LOT retains its methodological advantage of econometric robustness thanks to the unrivaled size of its samples of countries. But it would do well to descend from the macro-level of its generalizations about the quality of government in common law and civil law countries to the micro-level of judicial or legislative options for providing markets with the institutional safeguards they need in a variety of evident or foreseeable issues and interests. LOT's reliance on global networks of law firms for data collection on time factors of civil procedure raises methodological questions, as it masks the cost factor of the involvement of lawyers. This is understandable, as lawyers in common law countries may be reluctant or incapable to predict their own or their colleagues' billable hours spent for their clients in procedures, of which they largely determine the pace. It would be desirable for both LOT and alternative approaches to engage in cumulative efforts to entrust global data collection to academic institutions of comparative law and economics, and to replace static cross-country regressions by dynamic panel analysis (Sect. 5.4).

5.2 Strengths and Weaknesses of the Lex Mundi Project

The greatest strength of the Lex Mundi project is the econometric robustness derived from the large size of its samples of countries (Sect. 5.2.1). But this strength comes at the price of considerable methodological and empirical weaknesses, some of them recognized, and partially repaired, by LOT and some of them not. Large country samples are difficult to deal with by other than static cross-country analysis, which cannot capture change over time and must often rely on data sources of

Table 5.1 Duration of contract enforcement procedures in mother countries of legal origins (LO), settler countries of English LO, and former colonies affected by the transplant effect

	Countries															
	Mother countries of LO			Settler and trader countries of English LO						Former colonies affected by the transplant effect						
										French LO 50 countries			German LO	English LO 24 countries		
Duration of contract enforcement procedures	France	Germany	UK	Australia	Canada	Hong Kong	New Zealand	Singapore	USA	Africa 22	Asia 9	Latin America 19	0	Africa 14	Asia 10	Latin America 0
Average number of days per country	75	188	288	157	346	201	50	69	250							
Average number of days per region										494	490	482		333	432	

Sources: Author's own compilation and computation of averages in line 2; data on duration of contract enforcement procedures from Djankov et al. (2007), Appendix A

variable or questionable quality. In LOT's case, these problems resulted in a significant number of errors in the coding of countries in terms of political theory, comparative law and legal history (Sect. 5.2.2). The coding errors aggravate a consistency problem posed by the fact that LOT's own data result in average scores of procedural quality and GDP of the English, French and German LO incongruent with LOT's assumed common law/civil law divide. The scores are decisively influenced by the number of countries having received their legal system as colonial transplant after imperial conquest, the smaller this number, the higher the average score of the entire legal origin. If the duration of contract enforcement procedures of only the "mother countries" of LO are compared, France scores best, Germany second and England third according to LOT's own data. If countries affected by the "transplant effect" are included, the German LO scores best with 0 former colonies, the English second and the French third, as it includes more than 50 % of all former colonies of the world in LOT's coding. Unwittingly, LOT measures the transplant effect of the imposition of colonial laws to unreceptive countries rather than the comparative quality of common law and civil law (Sect. 5.2.3). LOT's explanation of the superior scores of German and Scandinavian LO by reverse causation from wealth to institutional quality fails to persuade, as England's case might inspire a similar argument. More convincing are dynamic panel analyses of the quasi-natural experiments of different trajectories of legal and economic histories in divided countries such as China, Germany and Korea (Sect. 5.2.4).

5.2.1 Econometric Robustness Based on Large Samples of Countries

LOT's samples of 106 countries in the Lex Mundi Project of 2002 and of 129 countries in the 2007 study are large enough to cover all legal origins, regions of the world and stages of development. Smaller samples, such as the eight countries in this paper, invariably face objections of small sample bias and selection bias (Docquier 2012, Chap. 2), however convincing the arguments for the economic impact of institutions on economic development in such paradigm cases may be. Large samples convey econometric robustness and, hence, have greater weight in economic discourse. LOT's regressions of data from up to 150 countries have inspired the World Bank IFC "Doing Business" Reports since 2000 (World Bank 2000, 2012).

5.2.2 *Problems of Static Analysis, Biased Data Sources and Defective Coding of Legal Origins*

Of course, it is difficult to measure the impact of institutions on growth in so many countries other than by static cross-country analysis, which cannot capture legal change (Schmiegelow 2006; Armour et al. 2007; Boucekkine et al. 2010; Deakin and Sarkar 2011; Docquier 2012; Kawai and Schmiegelow 2013, Chaps. 2, 3, 6). Also, the degree of reliability of the countries' own official sources of data varies with their number, and LOT's alternative choice of international networks of law firms as data sources is itself open to objections of bias at least in the field of civil procedure, since lawyers are crucially involved as actors in that field. Moreover, with such a large number of countries, the coding of countries in terms of legal theory, comparative law and legal history is inevitably superficial, resulting in a high incidence of errors (Dam 2006a; Schmiegelow 2006; Boucekkine et al. 2010, Chap. 3).

In fairness, it must be acknowledged that in its second (2007) paper on civil procedure, LOT began addressing at least the first of these weaknesses. While defending cross-country analysis with the argument that the impact of legal origins on growth has been stable since their transplant by imperial powers to former colonies, LOT nevertheless recognized the failure of this method to capture the effect of legal reforms (Djankov et al. 2007). For 32 of the 129 countries, the authors of the paper conducted panel analysis for short times series (3–5 years before and after the reform) for changes in variable creditor rights in both common law and civil law countries during the period of 1978–2004 and their effect on the ratio of private credit to GDP. Although they did not analyze these reforms in any detail permitting an evaluation of targets and effects as did Boucekkine et al. (2010) in the case of codification of default rules in contract law or Kawai and Schmiegelow (2013, Chap. 15) in the case of reforms triggered by the Asian financial crises of the 1990s, LOT's first move from static to dynamic analysis is an encouraging sign of methodological progress.

The same paper illustrates, however, a more fundamental problem, i.e. LOT's generalizing association of civil law with government control of the business environment and inferior economic performance. That association is essentially based on a political evaluation of the role of the state in mercantilist phases of French history. It ignores the liberal phases of the *Second Empire* and the Third Republic as well as the defining role of economic liberalism in Germany at the time of the codification of German civil law at the end of the nineteenth century, in postwar West Germany and in united Germany since 1990 (Schmiegelow and Schmiegelow 1975; Boucekkine et al. 2010). It also turns a blind eye at the massive state intervention in the economic history of common law countries, such as nationalization of banks and enterprises in both the UK and the US as well as regulations limiting the freedom of financial markets as rigorously as the Glass-Steagall Act of 1933 and the Dodd-Frank Act of 2010 in the US (Schmiegelow and Schmiegelow 2013, Chap. 4). The generalization of civil law as a regime of state

control and the assumption of superior economic quality of common law appear confirmed only with three selective foci: i.e., first, only in LOT's defective coding of more than 50 % of the sample as of French LO; second, only if the much smaller group of countries of English LO is compared with those of French legal origin rather than with the German LO, and, third, only if the economic quality of LO is measured in comparative averages (mean and median) of the logs of GDP of all countries of English and French LO.

Indeed, the group of countries coded as French LO is the largest with 65 countries or 50.3 % of the sample of 129 and, partly due to the incorrect (Dam 2006b) inclusion of most Latin American countries, has the greatest share of developing countries with unbalanced economies and problems of access to justice. Countries coded as of English LO, including a smaller number of struggling developing countries such as Nigeria, Sierra Leone, and Zimbabwe, are only half as numerous with 30, or 23 % of the sample. Only 18 countries in Central Europe and East Asia, or 13 % of the sample, are coded as of German LO and the average GDP of the group is decisively influenced by the high levels of performance of Japan, South Korea and Taiwan, whose coding as of German LO is doubtful (Schmiegelow 2006; Boucekkine et al. 2010; Kawai and Schmiegelow 2013). Not surprisingly, then, are GDP scores for the English LO superior to the French LO. Equally unsurprising, but intriguing for LOT's generalization of all civil law as economically inferior, however, is the fact that the German LO scores higher than the English.

The authors do recognize this problem. They acknowledge that the superior average economic score of the German LO is not a mere statistical anomaly, but confirmed by findings of stronger creditor protection not only in substantive law but also in civil procedures of contract enforcement. Indeed, in this area of much broader economic significance than the narrow case-types base of tenant eviction and check collection, they find that the average number of calendar days required to enforce a contract of unpaid debt worth 50 % of GDP per capita in Germany is only 184 as compared to 288 in the UK and 250 in the US (Djankov et al. 2007, Appendix A). Enforcement procedures in most of the other countries of German LO in Boucekkine et al.'s sample of eight developed and newly industrialized countries are even shorter than in Germany: 60 days in Japan, 75 in South Korea, 170 in Switzerland. Taiwan's 210 days are more than Germany's, but still less than those of the UK and the US.

5.2.3 The Challenge of Inconsistency and an Unintended Measure of the Transplant Effect

What is more, if we assume—following LOT—that France as the mother country of the French LO may have some significance as a paradigm, it defies LOT by appearing, in Djankov et al.'s own table just cited, in the top group of procedural speed with just 75 days. This is at least one indication that French civil law is not

necessarily always guided by state control, but as scholars of legal history and comparative law often emphasize (Zimmermann 1996; Robaye 1997; Boucekkine et al. 2010), can be outstandingly focused on private autonomy of contracting parties and creditors' interests.

The striking difference between the superior score of civil procedure for contract enforcement in the mother country of the French LO and the inferior average scores of all 65 countries coded by LOT as of French LO, i.e. mostly former Spanish, Portuguese and French colonies, raises the question of the "transplant effect" (Berkowitz et al. 2003). While LOT uses the imperial histories of conquest and colonization as an argument to avoid the objection of reverse causality of wealth leading to superior institutions rather than institutions to superior wealth as in institutional economics (La Porta et al. 1997, 1998; Docquier 2012), Berkowitz et al. have shown that such imperial imposition of laws to unreceptive countries results in structural impediments to broad-based economic development, measurable as a negative transplant effect. Any one econometric measure of that effect such as attempted by Berkowitz et al. may not do justice to change in receptiveness over time such as reported by Badami and Chandu (2013, Chap. 7) in the case of India. The difficulties of cross-country analysis will further increase with autonomous legislation or judicial rulings after independence overlapping asymmetrically with continued validity of colonial transplants such as reported by Deakin and Sarkar (2011) for the case of post-independence Indian labor law and Bakandeja (2012, Chap. 16) for the case of mostly francophone member states of the *Organisation pour l'harmonization en Afrique du droit des affaires* (OHADA).

Hence, the evidence collected by Djankov et al. (2007) in the area of contract enforcement, the most crucial for all market economies, leads to conclusions on the quality of English, French and German law quite opposite to those drawn by LOT for the groups of countries it codes (misleadingly as it turns out) as of English, French and German LO. The differences in the average efficiency of civil procedure of these groups of countries are primarily characterized by the presence or absence of various and changing degrees of the transplant effect. This becomes immediately obvious in a simple exercise, i.e. by comparing the average numbers of days required for enforcement procedures in mother countries of LO as well as in countries developed by British settlers or traders, who brought English common law with them, with the average numbers of days in former colonies affected by the transplant effect in Africa, Asia and Latin America (Table 5.1).

France's outstanding 75 days are "drowned", as it were, by averages of about six times as many days in 50 countries coded by LOT as of French LO in Africa (494), Asia (490) and Latin America (482). The UK's less impressive 288 days are "improved" by the average score of the four settler countries Australia, Canada, New Zealand, and the US and the two originally uninhabited islands Hong Kong and Singapore which developed from English warehouse economies in the nineteenth century (Schmiegelow 1991; Lee 1960) to major financial centers as seedlings of the City of London. And the record of the English LO is less "submerged" by the scores of only half as many countries with transplant effect as the French in Africa (333) and Asia (432). Of course, no Latin American country is coded as of

English LO. And among the countries coded as of German LO, there is no former colony affected by the transplant effect. Japan is recognized as a paradigm of voluntary reception of various foreign legal patterns in a comparative law design (Berkowitz et al. 2003; Schmiegelow 2006; Boucekkine et al. 2010). South Korea and Taiwan have been Japanese colonies living under Japanese law from 1910 and 1895, respectively until 1945, but they both created their own autonomous legal systems since then. South Korea adopted a new code of civil procedure in 1960 and Taiwan reenacted the Chinese code of civil procedure of 1930 with some minor modifications in 1950 after the Kuomintang's withdrawal from Mainland China to Taiwan (Boucekkine et al. 2010, Chap. 3).

One might well say that what LOT measures with its impressive econometric arsenal is not the comparative quality of LO in the sense of the original procedural laws of the mother countries, but, unwittingly, the impact of various degrees and aggregations of the transplant effect. Inevitably, varying with the very different number of former colonies in each group, the impact is greatest in the group coded as French, less so in the English group, and absent in the group coded as German. Djankov et al. (2002, 2007) come close to admitting this unintended result. They explain the superior score of the German and Scandinavian LO by the fact that the countries of these two groups are on average "wealthy" countries. Indeed, they are, just as the English and French LO would be, if former colonies affected by the transplant effect were not counted.

Djankov et al. (2002) seem to recognize this implicitly when they conclude that the transplantation of foreign laws is not the best method of legal reforms. This conclusion is as easy to agree with as their advocacy of alternative dispute resolution (ADR) for developing countries, which have yet to build or reform their judiciary autonomously. But is does not support LOT's generalizations on the comparative quality of common law and civil law.

5.2.4 Reverse Causation or Quasi-Natural Experiment?

Djankov et al. (2007) attempt to explain the German and Scandinavian scores by assuming reverse causation, where legal development follows financial development. However, their explanation is spurious at first sight, since the scores of the UK and the settler or trader countries Australia, Canada, Hong Kong, New Zealand, Singapore and the US could similarly be explained away by wealth, and perhaps with more justification. Inversely, Boucekkine et al. (2010) have shown that Germany and Japan were financially backward countries when they joined the civil law codification movement in the nineteenth century, and that their new contract laws had a measurable impact on the long-term evolution of per capita GDP since then. We were able to consider the divided country histories of post-war China, Germany and Korea with competing legal and economic systems as quasi-natural experiments in counterfactual analysis (Chap. 3).

Further refinements of such quasi-natural experiments may be needed to understand the causal effect of institutions for economic development (Docquier 2012, Chap. 2). But it is hard to see how LOT can improve its methodology while maintaining its three major deficiencies explained above: the focus on comparisons between English and French LOs, the defective coding of the large majority of countries affected by the transplant effect and still struggling with unbalanced economies as of French LO, and the generalization of civil law as state-centered and economically inferior. Solving the consistency problem posed by the scores of the group of countries coded as of German LO or by the scores of the mother countries of English, French and German LOs remains a serious problem for LOT. More accurate coding of legal origins will be a necessary first step to solving it, increasing the number of indicators a second, and a broader move from static cross-country analysis to dynamic panel analysis a third.

5.3 Raising the Number of Indicators of Procedural Quality and Judicial Supply

I propose to extend the number of indicators of procedural quality beyond LOT's single criterion of formalism to eight categories of rules and structures of civil procedure, of institutional supply and of efficiency of justice affecting access to justice as well as the quantity and quality of judge-made law. The selection of these categories follows the design of the Louvain Questionnaire. The eight categories comprise a total of 55 indicators. They combine basic rules and structures of civil procedure or alternative dispute resolution drawn from sources of comparative law and sociology of law with indicators of judicial supply and efficiency of justice similar to those used by CEPEJ in its yearly reports. No single one of these indicators can account alone for significant degrees of judicial efficiency and access to justice. But each of them constitutes a factor increasing or reducing the cost or duration of civil procedure. Some of them affect judicial supply or the pace and quality of the evolution of law directly. Others can serve to control results.

The Louvain Questionnaire was designed to identify the presence or absence of procedural rules and judicial structures of a country as far as possible by the year of their codification or establishment. The design is similar to the one used by Boucekkine et al. (2010, Table 1) to indicate the presence or absence of codified default rules of contract law for the ten most important contract types in eight civil law and common law countries. While that paper detected the economic impact of such contract rules by econometric analysis based on panel data inference over prolonged periods (1870–2008), it covered only substantive law, though its most important area economically. As stated in Sect. 5.1, substantive law "on the books" would be dead letter without transformation into applied, practiced law, ideally in a legal process continuously evolving through published judicial rulings. Such transformation is the function of procedural law and judicial or ADR institutions

operating under the shadow of the law. For that function to be effective, access to justice at low cost and without delay is required. Hence, to control the results of Boucekkine et al. in their analysis of substantive contract law for PE, data on procedural law and judicial or ADR institutions in the same sample of eight countries and the same prolonged periods are needed. The purpose of this chapter is to gather such data.

The first of the eight categories concerns basic rules and structures capturing the most distinctive features often referred to in generalizations of the common law/civil law divide. As it turns out, rather than distinctive, some of these features are common to civil law and common law. Others distinguish one or the other country without being common to either common law or civil law. The only distinctive common law/civil law divide is counterintuitive and defies LOT's generalizations. It concerns the balance of the roles of judges and lawyers as providers of legal knowledge or as managers of the pace of the procedure, with prominent authors of reform proposals in the UK and eminent American scholars of comparative law pointing out lower patterns of efficiency, adaptive functionality and judicial productivity in the UK and the US than in France and Germany (Sect. 5.3.1). Not surprisingly, therefore, out-of-court settlements, the second category, acquire the greatest importance in the UK and the US, followed by the Asian countries of the sample, then France and Switzerland, and the least in Germany (Sect. 5.3.2). The third category, "Status and pay of judges", combines confirmations of cherished popular perceptions of aristocratic judges in the UK and elected judges in many States of the US—as well as most Cantons and the Federal Supreme Court of Switzerland—with evidence of professional judges in public service not only in most civil law countries but also increasingly so in the modernizing judiciary of the UK as well as in the Federal court system and a number of states of the US. Comparative government analysis reveals that separation of powers is sharper, judicial independence greater, and hence, the risk of corruption lower, in the mother countries of civil law countries than in the UK and the US. Defying LOT's most basic generalizations of common law as judge-made law and civil law judges as mechanistic appliers of codes, French and German judges have become more prolific contributors to the legal process than their American and English colleagues (Sect. 5.3.3). The fourth category, "Status and pay of lawyers" indicates that in both common law and civil law countries of our sample, lawyers need both academic education and practical training to qualify, and that they consider themselves to be in the service of the law. American and English lawyers distinguish themselves, however, by the remarkable feat of understanding their profession as a business at the same time. In the matter of fees, LOT is challenged by an Anglo-French LO/German LO divide. Lawyers of the former cross section of LO's plus Japan charge fees per hour negotiated with the client, whereas in countries of German LO (without Japan) set lawyers' fees by law according to descending schedules of percentages of the matter in dispute. Consequently the cost of lawyers' services is lower and, most significantly, more predictable in the latter group, an important indicator of access to justice (Sect. 5.3.4).

Indicators in the fifth category, "Cost and fee allocation in civil procedure", confirm this intermediate result, except that the UK joins most countries of the German LO by the rule that the losing party pays all court costs and the winning party's lawyers' costs. This rule eases access to justice for parties with meritorious causes and modest means. France, Japan, Taiwan and the US leave each party with their own lawyers' costs. In the US, this may result in the winning party having to pay 100 % or more of the proceeds of its victory to the lawyer. All countries in this group, except the US, provide palliatives against such severe outcomes by leaving it to the judge's discretion to award the winning party reimbursement of its costs as damages or by providing legal aid for indigent parties. An important potential palliative against the particular hardships of the "American cost rule" could be the frequent practice of class actions in the US, were it not for their transformation into a "business model" for lawyers, allowing them to take the "lion's share" of the proceeds (Sect. 5.3.5). The hypothesis of a counterintuitive efficiency divide between common law and civil law for seekers of judicial relief is confirmed in the sixth category, "Density of judicial structures". Whereas the public supply of courts and judges per 100,000 inhabitants in the mother countries of civil law and Switzerland is superior to that in the UK and the US, the latter score by their superior number of lawyers (Sect. 5.3.6). Control by category six, "Comparative litigation densities", not only in Germany, but also in France and South Korea further sustains the hypothesis. The French, Germans and Koreans access their courts in numbers superior to those of Americans and the English and Welsh (Sect. 5.3.7). The seventh category "Duration of civil procedure", tests the hypothesis of a faster pace of proceedings managed by professional judges than those determined by lawyers. It is confirmed when controlled by the CEPEJ and NCSC indicators of clearance rate and disposition time. Germany scored with a clearance rate above 100 % in 2006 according to CEPEJ data, and disposition time is below 200 days in all civil law countries of our sample except Taiwan, as confirmed by LOT's own data (Sect. 5.3.8).

5.3.1 Basic Rules and Structures of Civil Procedure

In most civil law countries of our sample, civil procedure was codified by and large at the same time as the codifications of substantive law (Boucekkine et al. 2010). The French *code de procédure civile* (CPC) was adopted in 1806, the German *Zivilprozessordnung* (ZPO) in 1879, the Japanese *Minjishosho-ho* (MJSSH) in 1890, and the Korean and Taiwanese civil procedure acts in 1960 (KCPA) and 1950 (TCCP) respectively. Switzerland adopted a national code of civil procedure only in 2011, but was able to rely on pre-existing cantonal rules of civil procedure (Brunschweiler et al. 2011), such as the *Zivilprozessordnung* of the City of Basel of 1875, for the transformation of its modern commercial code of 1881 and its civil code of 1912 into practiced law. English common law originated within a century after the Norman Conquest (Baker 2002) and was, in many ways, a French product

(van Caenegem 1988). The conquest by William the Conqueror, the "violent ruler of a turbulent minor principality… of France" (van Caenegem 1988 at 9), was described by Maitland, the classical historian of "English law before Edward I" (Pollock and Maitland 1895), as a major catastrophe, which determined the whole future of English Law. William and his Angevin successors' sense for strong government transformed the early feudal court of the Anglo-Saxon kings into effective departments of state and a unified judicial system (Baker 2002). Procedural rules, especially trial by oath, ordeal or battle, were developed before substantive rules. By the time of Henry II Plantagenet (1154–1189), the King's "Bench" was established at Westminster, and the extremely formal and imperious writ system institutionalized (Baker 2002). As a palliative against such common law rigidity, the equity (Chancery) courts were established in the fifteenth century with the authority to apply principles of equity based on alternative sources, such as Roman law, natural law and principles of good faith in order to achieve justice (Worthington 2006). In the course of the nineteenth century, the writ system was several times simplified, but retained the style of archaic formalism. Only the Civil Procedure Rules of 1998 based on Lord Woolf's Access to Justice Report of 1996 modernized English civil procedure by abolishing the writ system and offering procedures at more reasonable cost and with more reasonable speed (Woolf 1996), unfortunately too late to count significantly in controlling the long run panel analysis of the English case in Boucekkine et al. (2010) for PE. The founders and settlers of the US brought the English rules in their eighteenth century version with them, and these continued to be applied in numerous variations in those states which did not legislate civil procedure in civil law style in codifying statutes, such as the California Code of Civil Procedure of 1872 (CalCCP). The latter influenced the drafting of the Federal Rules of Civil Procedure of 1938 (FRCP), which, in turn, have exerted a unifying influence on state civil procedure rules ever since.

These histories of precedence or parallelism of procedural law in relation to substantive law predestines our sample for the control of dynamic panel analysis of the economic effects of substantive law by indicators of procedural law, judicial efficiency and access to justice. The court systems charged with applying substantive law under these procedural rules were created in France by the *loi de l'organisation judiciaire* of 1790 and subsequent reforms in 1940 and 1995, in Germany by the *Gerichtsverfassungsgesetz* of 1879, in Japan by the *Saibansho-ho* of 1890, in Korea by the Court Organization Act of 1949, in Switzerland by cantonal laws such as the *Gerichtsverfassungsgesetz* of 1911 of the Canton Zürich, in Taiwan by the reenactment, in 1950, of a modified version of the Organic Law of the Courts of China of 1909. In the UK, the medieval institutions of common law jurisdiction were reformed by the Judicature Acts of 1873 and 1875 and the Appellate Jurisdiction Act of 1876, in the US by the Judiciary Acts of 1789 (Supreme Court, Federal Circuit Courts and Federal District Courts) and 1891 (Federal Courts of Appeal) on the national level and by state constitutions or laws on the state level, such as the Constitution of the State of New York of 1846.

Data on the evolution of per capita GDP in constant 1990 International Geary-Khamis dollars (Maddison 1995, 2001) used by Boucekkine et al. (2010) for their

panel analysis of substantive contract law are available only from 1870 on for most countries of our sample. I propose to follow their example of indicating the presence of the relevant procedural rules and judicial institutions in France, the UK and the US by the year 1870 in Tables 5.2, 5.3, 5.4, 5.5, and 5.6 as a starting point for the control of their panel analysis of codified default rules in contract law for PE. For the other five countries I propose to use the years 1879 for Germany, 1890 for Japan, 1960 for post-independence South Korea, 1875 for Switzerland taking Basel as a cantonal paradigm, and 1950 for Taiwan.

Unlike popular discourse would have it, the most basic difference between common law and civil law rules of civil procedure is not the adversarial system of the common law descended from the medieval trial by ordeal or battle. Just like common law procedure, the French CPC, the German ZPO, the Japanese MJSSH, the Korean KCCP, the Basel ZPO and the Taiwanese TCCP are governed by the principle of parties' domination of the initiation, the subject and the ending of the procedure (von Mehren 1982; Langbein 1985; Weber 2002; Deguchi and Storme 2008). The plaintiff states his claim and the defendant declares whether he accepts or rejects it. Both are left with the task of submitting the facts they wish the court to consider and they carry the burden of proof of these facts. They can withdraw, or accept, the claim and agree to settle in court or out-of court at any moment. If they do not settle, they request a court ruling and submit opposing drafts for the tenor of that ruling, i.e. the plaintiff, most often, the award of the amount in controversy for himself and cost allocation to the defendant, the defendant, adversely, the dismissal of the suit and cost allocation to the plaintiff. LOT sometimes mistakenly assumes that public prosecutors are involved in all civil law countries in civil as well as criminal procedure to represent the interests of the state. Indeed, there is a long French tradition first of the King's representatives and then of the procurator of the Republic to intervene under certain conditions in civil and commercial litigation if the public interest or the *ordre public* is touched (Marin 2006). This tradition has found its way into procedural codes of numerous civil law countries by colonial transplant or voluntary adoption. But, then, so it has into American civil procedure, such as in § 415.20 (b) CalCCP, which requires notice to the Attorney General in action based on pollution or adverse environmental effects. An indicator of how massive intervention of American Attorneys General in civil litigation can get, was the $25bn deal forced upon the five largest American banks on February 9, 2012 by a joint effort of the US Attorney General and 49 state attorneys general to solve problems of foreclosure procedures of subprime mortgage borrowers (US Department of Justice 2012; Schmiegelow and Schmiegelow 2013, Chap. 4). The only country of our sample recognized by Djankov et al. (2007) as having 0 inquisitorial elements in its civil procedure, is Germany. Again, there is no clear common law/civil law divide, even in LOT's own data, as far as the much-cited adversarial system is concerned.

This is confirmed by the most authoritative American sources of comparative law, not only for Germany, but also for France. Arthur von Mehren, the prominent postwar scholar of comparative law at Harvard, wrote: "The civil procedure systems of France, Germany and the United States were—and remain—adversarial"

(von Mehren 1982 at 361, n. 3). John Langbein, the eminent historian of common law at Yale, agrees with von Mehren's categorization, although he emphasizes the more active role of the civil law judge in the non-partisan conduct of fact gathering, which he finds superior to the "wastefulness" and "truth-defeating distortions incident to our (US) system of partisan preparation and production of witnesses and experts" (Langbein 1985 at 824, note 4). He concedes that this particular aspect of non-partisan fact gathering by the judge in German civil procedure might be called "non-adversarial". In this last respect, I am inclined to disagree considering the above-mentioned maxim of parties' domination of German civil procedure. The state only supplies "the rules of the game of the litigation" (Weber 2002) and the legal knowledge of the judge. While the judge filters the facts submitted by the parties into contested or uncontested, and legally relevant or irrelevant categories, conducts the hearing of witnesses and discusses the legal significance of submitted facts and evidence with the parties, the theme of the evidence is defined, and controlled, by the party who named the witness as proof. To be sure, the judge is, and must be, non-partisan, or face the risk of appellate reversal, but the control of the evidence procedure (*Beweisverfahren* in German) by the parties remains adversarial. The functional advantages of a more active role of the judge in non-partisan fact gathering and in organizing the pace of procedure have been recognized and emulated in the US in so-call Big Cases with complex constellations of facts and multitudes of plaintiffs such as in class actions. This trend has not led, however, to any change in the still prevailing American theory and popular perceptions of America's adversarial system (Langbein 1985). Similarly, Lord Jackson's review of civil litigation costs in the UK (Jackson 2009) contained a strong plea for a more active role of British judges as a way to improve the efficiency of the country's justice system. Hence, in terms of adversary systems in civil procedure, the civil law/common law divide exists more in perception than in reality.

Nor do indicators 3, 4, 5, 6, 11, 12 and 14 in Table 5.2 on basic rules and structures of civil procedure suggest such a real divide. Line 3: Judges have been applying codes in both legal traditions, in the civil law countries of our sample ever since their civil, commercial and procedural codes came into force, in the UK and the US at least since their major codifying statutes on contract law were enacted for the first time in 1893 (UK) and 1953 (US) (Boucekkine et al. 2010 Table 1, and Chap. 3). Line 4: Judges have nonetheless also been finding the unwritten law, not only in common law countries, but also in civil law countries where judges have been producing judge-made law in the best sense in sometimes hard-won advances against dogmatic positivism clinging to the letter of codified law. These advances are indicated in line 4 by the year of the first seminal court rulings of that kind, in Germany 110 years ago, in France 83 years ago and in Switzerland 54 years ago as reported by Schmiegelow and Schmiegelow (2013, Table 3) on Germany and Japan, by Malaurie (1980) on France, and by Uyterhoeven (1959) on Switzerland, long enough to matter for the control of results in Boucekkine et al.'s panel analysis. In the three Asian countries of our sample, pragmatic judicial reasoning has been a part of their cultures long before 1870 (Haley 1998; Glenn 2004; Fujita 2008). Lines 5 and 6 defy LOT's generalizations about common law procedure as oral and

civil law procedure as written. Claims must be filed in "writs" in common law countries as explained above, whereas in civil law countries the whole (civil) procedure up to judgment may be viewed as essentially a "series of oral conferences" (Kaplan 1960; Kötz 1982a, b) as provided for in all civil procedure codes cited above. Such conferences are held between the judge and the parties in the "tone of routine business meetings" (Langbein 1985) to debate the correspondence of the facts submitted by the parties with the law relevant for the claim in dispute. In that way civil procedure in civil law countries avoids the surprises and *coups-de-théatre* so typical of the concentrated one-day trial in the UK and the US (Langbein 1985; Maxeiner et al. 2010). Written documents, deeds, certificates, letters serve as the most cogent types of proof in both legal traditions. In the best cases, judicial rulings are issued in writing so that their reasoning in terms of fact and of law can be published in printed or electronic records and serve as precedent, inspiration of jurisprudence or trigger of functional interaction with legislative or executive branches of government in civil law countries as well as in common law countries (Schmiegelow 2006; Schmiegelow and Schmiegelow 2013, Chap. 4). In its strategic directions for legal and judicial reforms, the World Bank's Legal Vice Presidency recommends written reasons of judicial rulings as an essential requirement enhancing "the quality, predictability, consistency and growth of jurisprudence" (World Bank Legal Vice Presidency 2003 at 3). Line 11 indicates the well-known fact that lawyers have a unified role of advice and representation in court in all civil law countries as well as in the US, while Line 12 acknowledges the exclusive, but costly, English tradition of a two-tiered structure of solicitors and barristers (Elliot and Quinn 2007). Line 14 shows that the procedural economy of default judgments against a party failing to appear at a scheduled court hearing is a feature of both civil and common law traditions (Articles 471 ss Code de procédure civile, §§ 330 f. ZPO, § 244 Minjishosho-ho, Part 20 UK Civil Procedure Rules, Siegel 2005).

The remaining seven indicators in Table 5.2, however, represent the procedural differences between common law and civil law most crucial for the analysis of comparative efficiency of, and access to, justice. If combined, these indicators reveal very different balances, which the two traditions strike between the role of judges and lawyers as providers of legal knowledge relevant for the issue in controversy and as managers of the pace of procedure. In lines 1, 7, 9 and 13 they are listed in blue as characteristic of civil law, in lines 2, 8, and 10 they acknowledge in red the most traditional and cherished features of common law. Line 1 introduces the principle *jura novit curia* (The Court knows the law). Kaplan et al. (1958 at 1224–1225) recognize this maxim as the "overriding principle of German law". The judge is bound to apply the law without prompting from the parties or face the risk of appellate reversal. The advantage of this principle in John Langbein's view is that it limits the effects of any disparity in the quality of legal representation (Langbein 1985). The legal knowledge of the academically trained judges is supplied as a public good. Lawyers representing the parties may raise questions of law and engage in debate with the judge on issues of interpretation of codes, doctrine or precedent, but there is no burden of proof for the parties on points of law. Whereas this rule is the most distinctive maxim of civil procedure in most

civil law countries, it is not part of the English legal tradition, which assigns responsibility for the correct legal analysis of the case to the parties' lawyers (Kaplan et al. 1958; van Rhee 2005). Line 7 indicates an active role of the judge in managing the pace of procedure. Line 9 reflects that this involves a technique of issue narrowing (*Relationstechnik* in German, Rüßmann 2004), which separates both legally relevant from irrelevant, and uncontested from contested facts, avoiding costly and time-consuming efforts of parties, and their lawyers, to accumulate irrelevant or unnecessary evidence (Langbein 1985; Maxeiner et al. 2010). The efficiency advantage of this technique becomes immediately apparent if compared with the inclination of American litigators characterized by Deborah Rhode as "to leave no stone unturned, provided, of course, they can charge by the stone" (Rhode 1984). John Langbein puts the effect in a nutshell immediately relevant for the economic analysis of law: "avoidance of waste" (Langbein 1985 at 846).

LOT has remained oblivious to the economy of these basic rules of civil law. Although there has been what Langbein describes as a "surprisingly rich English language literature on German civil procedure" (Langbein 1985 at 826, note 8) since the 1950s, LOT's major restatement in 2008 still defends its focus on the negative aspects of the French LO, by default as it were, claiming that "less has been written about German law (than about French law)" (La Porta et al. 2008 at 304). What it does recognize however is what it perceives as a German advantage in terms of efficiency of debt collection, presumably thanks to the *Mahnverfahren*, Germany's version of summary debt procedures. But as line 13 indicates, summary debt procedures are a feature of all five civil law countries in our sample, while they are absent in the two common law countries.

In contradistinction to the civil law maxim of *iura novit curia* in line 1, line 2 highlights the role of the common law judge as a mere referee in procedures dominated by lawyers both in jury trials and bench procedures. Whatever the quality and extent of his actual legal knowledge, the judge is expected to act with "calculated amateurism" (Langbein 1985 at 852). In the UK, the Judicature Acts of 1873 and 1875 relieved the parties from the formal obligation to quote and document the legal rules supporting their arguments (Hazard and Dondi 2006), but the comparative passivity of common law judges has remained an issue of the debate on the cost of civil procedure in the UK and the US, most recently in Lord Jackson's Review of Civil Litigation Costs of 2009 (Jackson 2009).

Consequently, line 8 indicates the dominant roles of lawyers controlling the pace of procedure in the UK and the US. As they leave "no stone unturned" in pretrial discovery of open-ended duration until they reach a settlement or begin coaching their witnesses or experts for the concentrated final drama of their clients' day in court, the procedure is distinguished by an incentive structure in terms of lawyers' fees (Reimann 2012). The result has been an in-built slowness and priceyness of common law civil procedure ever since the days of the Westminster King's court (Baker 2002; Danziger and Gillingham 2003; Woolf 1996; Jackson 2009). In terms of legal philosophy, the question of the compatibility of such a system with the Magna Carta promise: "To no man will we sell, or deny, or delay, right or justice" inevitably arises. Since 1975, this traditional pattern has been enhanced in the US

Table 5.2 Basic rules and structures of civil procedure

Rules/Structures \ Countries	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England, Wales	US
1. "Jura novit curia" rule as a public good ("The court knows the law", there is no burden of proof for parties on questions of law)	(1806) >1870	1879	1890	1960	1875 (Basel)	(1930) 1950	0	0
2. Judges as "referees" in trial dominated by lawyers (may take expert testimony on questions of law)	0	0	0	0	0	0	(12^{th} century) > 1870	(1840s) > 1870
3. Judges applying Codes	(1804) >1870	1861	1896	1958	1883	(1929) 1950	1893	1953
4. Judges "finding the (unwritten) law"	1930	1902	>1870	>1870	1959	>1870	>1870	>1870
5. Written procedure	>1870	1879	1890	1960	1875	1950	>1870	>1870
6. Oral hearings	>1870	1879	1890	1960	1875	1950	>1870	>1870
7. Court controlling pace of procedure	>1870	1879	1890	1960	1875	1950	0	0
8. Lawyers controlling pace of procedure	0	0	0	0	0	0	>1870	1938
9. Court identifying relevant facts	>1870	1879	1890	1960	1875	1950	0	0
10. Lawyers engaging in pre-trial discovery	0	0	0	0	0	0	>1870	1938
11. Lawyers in unified role of advice and representation in court	>1870	1879	1890	1960	1875	1950	0	>1870
12. Two-tier structure of solicitors and barristers	0	0	0	0	0	0	>1870	0
13. Summary debt procedures	>1870	1879	1890	1960	1875	1960	0	0
14. Default judgment routine procedure	>1870	1879	0	0	1875	n.a.	>1870	>1870

Legend: The presence of rules or structures is indicated by the year of entry into force of the rules or the establishment of the judicial structures mentioned, preceded by ">" if the entry into force of the rule or the establishment of the structure predates 1870, the starting year of reliable GDP data for dynamic panel analysis; their absence by "0"

Sources: Authors own compilation; table design: Schmiegelow and Schmiegelow (2012)

Table 5.3 A counterintuitive efficiency divide

		Rules of civil procedure					
		Civil law			Common law		
Efficiency		"Jura novit curia" (legal knowledge of academically trained judges as a public good)	Judge separates contested from uncontested facts	Court manages pace of procedure	Judge in passive role of "referee"	"No stone left unturned": Any facts and questions of law raised by lawyers in "pretrial discovery" irrespective of relevance	Lawyers manage pace of procedure
Cost	Low	X	X	X			
	High				X	X	X
Time	Fast	X	X	X			
	Slow				X	X	X

Source: Author's own schematic; table design: Schmiegelow and Schmiegelow (2012)

by what Steven Harper describes as an "obsession with billable hours" (Harper 2013 at 79) in big law firms, the major players in a legal profession achieving more than 2 % of US GDP (Rickard 2010). Table 5.3 sums up the efficiency divide between common and civil law procedure. It may be counterintuitive for LOT. But it is recognized by the most authoritative voices of comparative law and legal reform in the UK and the US.

But then, as a micro-economic analysis of Baptiste Massenot has shown, the passive role of judges as referees of disputes managed by lawyers in common law countries may serve the interests of litigants in financial markets effectively, as they can be assumed to dispose of sufficient resources to take the cost risk of such a procedure while letting that risk deter financially weaker parties from initiating or continuing a controversy (Massenot 2010a). Litigants with greater cost risk aversion such as small and medium engineering firms, however, will appreciate the efficiency advantage of the role of judges as providers of legal knowledge and managers of the pace of procedure, which is made available as a public good in civil law countries (Massenot 2010b). Massenot's micro-economic approach deserves LOT's attention. I will use it as one of the tests of PEH in this chapter.

Distinguishing the inverse relation of the incentive structures of lawyer-dominated and judge-dominated civil procedure should be an important criterion for legal reforms in many developing and emerging countries. They may wish to adapt the composition of legal reforms to the structural conditions of their economies and the projected paths of their development. Switzerland, the only civil law country enjoying both financial center advantage and a competitive industrial sector (Boucekkine et al. 2010, Chap. 3) might be considered as a particularly interesting case study.

5.3.2 *Out-of-Court Settlements and Alternative Dispute Resolution*

Both common law and civil law traditions face the competition of alternative forms of dispute resolution. There is a large spectrum of evident or conceivable patterns of avoidance of formal civil procedure. There are economic, cultural, political and sociological explanations, which focus on concepts of widely defined justice in clear distinction, if not outright opposition, to what civil procedure of any judiciary of whatever legal origin can offer. LOT, as represented by Djankov et al. (2002), prefers, as explained, to assimilate common law civil procedure with the idyllic setting of two neighbors having their dispute settled by a third neighbor. That assimilation raises the question, however, why out-of-court settlements or ADR avoiding the ruling of a common law judge are so prevalent in the common law countries, in the US to the point of what some lament as the "death of the American trial" (Burns 2009). Erhard Blankenburg, the sociologist of law, analyses changing balances between demand for law and judicial supply in line with changes in mentalities, legal needs and judicial structures. Focusing on the Netherlands, a civil law country coded by LOT as of French LO, he describes how the traditional Dutch preference for dispute settlement by arbitration gave way to increased use of the formal court system since the 1980s due to such a change in demand and supply (Blankenburg 2012, Chap. 11). Linn Hammergren, the political scientist, believes, after decades of work in the World Bank's poverty reduction and economic management programs in Latin America, that access to justice can be improved only outside the hybrid legal systems of Latin America and that even ADR, including its cultural variants usually referred to as CDR, hoping to correspond to the needs of indigenous parts of the population, have failed to reduce poverty. She concludes that in many countries with large geographies, small judiciaries and high rates of poverty, justice in the material sense should be the task of dispute preventing public policies in other than legal areas, such as employment and social security (Hammergren 2012, Chap. 14).

In developed or newly industrialized countries it is safe to assume, however, that the most obvious function of out-of-court settlements and ADR is to serve as a palliative for cost and/or time inefficiencies of civil procedure in the formal judiciary. This should at any rate be the criterion from the perspective of law and economics as it is, indeed, for LOT with Djankov et al.'s (2002) strongly stated preference for ADR to formal civil procedure in civil law countries in view of assumed inefficiencies of the latter. Following LOT's law and economics approach to understanding the function of out-of court settlements and ADR as palliatives against inefficient formal judiciaries, I propose to test the counterintuitive efficiency divide between civil law and common law procedure explained in Sect. 5.3.1 and Table 5.3 by indicators of the comparative prevalence or rarity of the use of these palliatives in the eight paradigm countries studied here.

Given the structural cost and time inefficiency of American and English civil procedure described in Sect. 5.3.1 and Table 5.3, there is an inbuilt pressure on

litigants averse to cost risk and time loss to settle out of court. Hence, as attested by CEPEJ (2008 at 136), "the number of judicial decisions per year in England and Wales is relatively limited if compared with the number of cases filed per year", which puts it mildly considering that the numbers reported for 2006 were 46,198 judicial decisions out of 2,127,928 cases filed, i.e. a mere 2.17 %. Jury trials, once thought to be the Magna Carta paradigm of judgment by one's peers, if not one's neighbors in LOT's version, were effectively abolished for civil cases in England and Wales by the Administration of Justice (Miscellaneous Provisions) Act of 1933. In the US, jury trials, once thought to be the normal way of dealing with civil cases, dropped below 1 % of terminations of civil litigation in 2005. Bench trials declined below that point already in 1998 (Galanter and Frozena 2011). Robert Burns at North-Western University laments that the "American trial (. . .), one of our greatest cultural achievements (. . .), seems to be disappearing in one context after the other" (Burns 2009 at p. 1, 2).

This is not a recent phenomenon. The percentage of cases ending by adjudication has never been as high in the US as the figures attested today by CEPEJ for France or Germany. Marc Galanter quotes from a study of litigation in the St Louis Circuit Court from 1820 to 1970 by Wayne McIntosh: "During the first 100 years of the study period, the percentage of cases culminating in a contested hearing or trial remained fairly steady (around 25 to 30 percent). After 1925, though, the average skirted downward into the 15 percent range. (Figures) . . . reveal that the shift from adjudication to bargaining is . . . wholesale and not restricted to any one issue" (McIntosh 1990, as quoted by Galanter 2005 at 1257–1258). In the early 1980s, Galanter, the sociologist of law, was inclined, as a matter of principle, to prefer "justice in many rooms", i.e. decentralized private ordering "in the shadow of the law", social fora, religious courts, and indigenous laws (Line 4 of Table 5.4) as an alternative to what he called the paradigm of "legal centralism" leading to courts overwhelmed by swollen caseloads (Galanter 1981). Three decades latter, his analysis of the "approaching extinction of the civil trial" (Galanter and Frozena 2011) is tinged with worry and thoughts about how the trend could be turned around. From a law and economics standpoint, I submit that average Americans are risk averse enough to look for "justice in many rooms" rather than surrender to the incalculable cost and time dynamics of lawyer-dominated pretrial discovery and trial in American civil procedure. This might have occurred to Djankov et al. (2002), when they emphasized their preference for alternative dispute resolution, but it does not seem to have done so, since their preference is distinctly stated as one for ADR to civil procedure in civil law countries which they assume, wrongly as I argue, to be less efficient than in common law countries.

The vanishing of civil trials in the UK and the US does not reflect any decline of the demand for law in these countries. As reported in Sect. 5.3.7 and Table 5.9, the number of civil cases filed per 100,000 inhabitants is higher in England and Wales (6,440 in the mid 1990s) and US State courts (5,317 in 2010) than in France (4,040 in the mid 1990s), where 75 % of civil cases end by adjudication (Haravon 2010). The evident explanation for the striking gap between demand for law and adjudication in the two common law countries is that lawyers have replaced judges as

prevailing suppliers of dispute resolution. In all cases between litigants with asymmetrical net worth, i.e. the prevailing type of cases, there is an inexorable pressure on the less well-endowed party to settle out of court before the point of financial exhaustion. The billable hours (Harper 2013) of the lawyers dominating the pace of procedure constitute an effective threshold for eventual access to adjudication by trial. The palliative for this predicament is the lawyer-brokered settlement as early as possible in the pretrial stage. The common law/civil law divide in terms of efficiency of formal civil procedure discussed in Sect. 5.3.1 and schematized in Table 5.3 leads straight to the only clear common law/civil law divide in out-of-court settlements and ADR in line 1 of Table 5.4: the prevalence of lawyer-brokered out-of-court settlements in common law countries and their much lower frequency in civil law countries.

The opposite phenomenon is observable in Germany's case. Not only is the German litigation rate the highest in the sample of countries studied here (12,320 filings per 100,000 inhabitants), so that Erhard Blankenburg speaks of "*Prozessflut*" (litigation flood) in his 1998 comparative analysis of indicators of continental European legal cultures. But German litigants also tend to take advantage of predictable and, by international standards, modest cost and fee schedules set by law in order to seek court rulings usable for reference in future litigation or in adjusting their own behavior with a view to avoiding future disputes. German businesses readily accept the institutional supply of commercial chambers at district courts composed of one professional judge and two lay judges of the local business community in single panels categorized by Langbein (1985) as "mixed courts" combining access to "peers" with access to a court ruling written by a professional judge. Specialized first instance labor, social, administrative and tax courts have similar mixed court structures. Although German first instance courts routinely use the first oral conference as well as any subsequent one in the series of oral conferences with the parties described above to suggest amiable settlements, they must provide, if at least one party insists, a written judgment containing the findings of facts and law. Hence Germany is unsurprisingly the country of our sample combining the highest litigation rate (Sect. 5.3.7, Table 5.9) with the lowest demand for out-of-court settlements or other alternatives to formal civil procedure.

Arbitration was institutionalized in the German ZPO of 1879 just as in France's CPC of 1808, Japan's MJSSH of 1890, South Koreas KCCP of 1960, Switzerland's Inter-cantonal Concordat on Arbitration of 1969 preceding the respective provisions of the new Swiss code of Civil Procedure of 2011, Taiwan's TCCP as well as the Arbitration Acts of 1950 of the UK and of 1925 of the US (Table 5.4, line 2). But in contrast to the importance of international arbitration for cross border disputes, national arbitration has played only a minor role in Germany (Stolle 2005). South Korea's high rate of formal litigation in recent decades (7,806 per 100,000, Table 5.9) correlates with a similarly low role of national arbitration (Lee 2010, 1992), whereas in Japan and Taiwan, the prevalence of a functioning relationship pattern in social interaction and economic transactions has been reducing demand for national arbitration along with demand for formal civil procedure (Allen et al. 2009; Glenn 2004; Haley 1998; Katsuta 1996; Nakano 2004; Nakajima

2012). In France and Switzerland, arbitration proceedings have traditionally been, and still are, used more frequently (Delvolvé et al. 2009; Berger and Kellerhals 2007). In both these European civil law countries, incentives for preferring arbitration to formal civil procedure have been, I submit, greater than in Germany. In France, they are the result of what Michael Haravon, who is now a French judge after having been a lawyer in France, England and the US, calls "*une certaine opacité* (a certain opacity) (Haravon 2010 at p. 33) of the cost risk of a lawyer-assisted civil law suit, though in the French case the opacity is certainly not one of such "thickness" as in the UK and the US. Table 5.7 reflects the difference between the French and German cost rules and structures. In Switzerland, which shares Germany's type of cost rules (Reimann 2012), the attraction of an international arbitration system doubtless results from a different incentive, namely the fact that civil procedure in Switzerland remained divided by cantonal particularism until a federal code of civil procedure was finally enacted in 2008.

In the US, both the aversion against massive cost risk of civil procedure and the preference of all businesses involved in interstate trade to avoid the particularism of State laws and practices of civil procedure led to widespread demand for arbitration and to the Federal Arbitration Act of 1925. Fear of destroying valuable business relationships by years of costly adversarial litigation was an added motivation. After the emergence of consumer protection laws in the 1970s, mandatory arbitration clauses were also used by businesses wary of class actions related to the purchase of consumer products, which, in turn, gave rise to academic proposals to ban such clauses (Brunet et al. 2006). In the UK, somewhat comparable cost and time inefficiencies of civil procedure as in the US should have worked as a similar incentive to use arbitration as an alternative mode of dispute resolution. Three consecutive Arbitration acts adopted in 1950, 1975 and 1979 and a large body of case law were supposed to support that incentive. However, as emphasized by Pendell (2010), English arbitration was criticized for being inaccessible to lay users as well as slow and expensive to the point of being described as "litigation without wigs". Only a fourth arbitration act, of 1996, was widely praised, too late to count in the control of long-term panel analysis of DRH for PE as an effective palliative to the structural inefficiency of common law civil procedure in England and Wales.

Mandatory or optional, but court-supervised, conciliation or mediation procedures have a long tradition in most civil law countries of our sample with incentive structures similar to those just discussed in the area of arbitration. Again, they have played the least important role in Germany. While *Gütetermine* (conciliation hearings) are routinely scheduled at the beginning of first instance civil procedures, litigant's preference for a cost and time efficient court ruling prevails in a large majority of cases for the reasons explained in the preceding section. Mediation procedures as ADR are an innovation by a law adopted in 2012 in response to the European directive on mediation of 2008 (Nettersheim 2012), too late to count in the control of DRH for PE. Inversely, mandatory or optional conciliation has a tradition of more than 200 years in France, where the State's interest in relieving the burden of the courts joined the interest of risk-averse litigants in avoiding the cost and loss of time resulting from continued contentious procedure. First

institutionalized by the *loi portant sur l'organisation judiciaire* of 1790, mandatory conciliation procedure for all matters falling under the jurisdiction of the ordinary district courts and justices of the peace attempting such conciliation in practice remained a feature of the French judiciary in various transformations until 1940, when conciliation became an optional way of ending civil procedure. Extrajudicial conciliation emerged in the 1970s with "mixed results" (Gaillard and Edelstein 2000), only to be partially replaced by court-supervised conciliation or mediation by law No. 95-125 of 1995. The most significant impact of these various forms of mandatory or optional forms of ADR on contract disputes has been in the areas of labor, consumer, rental, commercial, and corporate laws (Gaillard and Edelstein 2000). Switzerland's conciliation and mediation procedures reflect more French than German patterns in spite of German-type cost rules that should reduce the incentive for litigants to avoid formal civil procedure. Mandatory conciliation procedures (*Sühnverfahren*) by justices of the peace before the opening of civil procedure has been a cultural heritage from Switzerland's French period as Helvetic Republic from 1798 to 1803, while optional mediation procedures were introduced in 1989 in the French speaking cantons in the field of family law. In 1992, a Swiss association promoting nationwide mediation was established, but as yet there has been no parliamentary majority for the introduction of mediation procedures on the national level (Meier 2002).

In the Asian countries of our sample, conciliation has the deepest cultural roots, beginning as CDR on the village level and continuing through Confucian rulings of Chinese magistrates, the *Naisai* of Edo period and the *Kankai* of Meiji period Japan (Glenn 2004; Lee 2010; Lee TH 1992; Berat 1992; Katsuta 1996; Kobayashi 2012), until modern codifications or special laws institutionalized mandatory and court-supervised conciliation as follows: In Japan, special laws enacted in 1922, 1924, 1926, 1932 and 1942 institutionalized conciliation in housing and farming tenancy disputes, commercial disputes, and debt collection and, finally, in all civil disputes during the war period respectively. Postwar, the Civil Conciliation Law of 1951 formally introduced general conciliation provisions into postwar Japanese civil procedure in all civil matters except domestic relations (Kobayashi 2012). In South Korea, the Judicial Conciliation of Civil Disputes Act of 1990 introduced optional court-supervised conciliation for the first time in all civil law matters. Previously, mandatory court-supervised conciliation had been imposed only in household and lease matters (Sohn 2002). In Taiwan, optional conciliation at the beginning of first instance civil procedure was provided by the TCCP of 1950, Art 420-1 (Chen 2002).

While the cultural attachment of the Japanese to conciliation procedures has been remarkably stable up to, and through, the postwar period in spite of Japan's tremendous rise to leadership in modernity and technology, South Korea and Taiwan underwent a similarly remarkable process of change towards appreciation of civil litigation ending in court rulings (Berat 1992; Pistor and Wellons 1999). In these two newly industrialized East Asian countries, the same inverse relationship between rising litigation propensity and declining reliance on ADR as in Germany since 1879 seems to be emerging.

Since English common law and its adversarial jury trials are widely considered as a unique cultural achievement both in the UK and the US (Baker 2002; Burns 2009), it is not surprising that court-mandated or -supervised conciliation has not emerged as alternative dispute resolution on cultural grounds. Hence, Line 3 of Table 5.4 indicates another distinctive common law/civil law divide.

However, reflecting Marc Galanter's seminal article on "justice in many rooms" (1981), Line 4 of Table 5.4 indicates a diversity of ADR patterns based on local cultural traditions not only across LOT's divide between common law and civil law, but also as an American particularity within the English LO. The laws and procedures which the countless churches of indigenous or immigrant background coexisting in the US have given themselves are perhaps the best example. It illustrates the double nature of what Galanter calls centrifugal legal orders based on diverse confessional traditions (Line 4 b) but operating in some degree of compliance with, or in Galanter's words, "in the shadow" of, the "central" (State or Federal) laws and procedures (Line 4 b). Of course, complex church-state relations have a long history in England and European civil law countries as well. But the American pattern of "justice in many rooms" is certainly an important deviation from the English case because of the multitude and diversity of such centrifugal institutions. For econometric analysis, it would be important, however, to find a way of distinguishing the cultural, sociological or just "local" motivation for seeking this type of ADR from the economic incentive for using it as a palliative against the inefficiencies of formal civil procedure in the US.

One way towards building hypotheses on this problem would be to compare the American paradigm of "justice in many rooms" to somewhat similar, though far from identical patterns in civil law countries. For example, the American paradigm is much less of an exception if compared to Switzerland with its tradition of local direct democracy and diversity of languages, religious confessions, cantonal histories, and, not the least, cantonal civil procedure. The three Asian countries of our sample as well might invite analysis in Galanter's terms for the same reasons discussed by the large literature cited above in connection with arbitration and conciliation procedures (Allen et al. 2009; Berat 1992, Glenn 2004; Haley 1998; Katsuta 1996; Kobayashi 2012; Lee 2010; Lee G 1992; Nakano 2004; Nakajima 2012, Chap. 12). Again, the Japanese attachment to settle disagreements outside the modern civil courts, which pervades both internal and external relations of households, neighborhoods, villages, businesses, associations, political parties, etc. is an outstanding example. Because of its long history and because of its perceived contrast to Japan's concomitant modernity, this attachment has attracted a far larger sociological literature than Galanter's American paradigm of "justice in many rooms". What distinguishes ADR in the Swiss and the three East Asian cases from the American paradigm, however, is that there is no centrifugal connotation and much less tension with the "shadow of the law" (Haley 1998; Katsuta 1996; Schmiegelow 2006). One might name it as what it is, i.e. relational dispute resolution deserving its own acronym as RDR. Since formal civil procedure in these civil law countries is structurally more efficient than common law civil procedure for reasons discussed in Sect. 5.3.1 and Table 5.3, it is safe to assume

Table 5.4 Out-of-court settlements/alternative dispute resolution (ADR)

Countries / Rules/Structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England, Wales	US
1. Prevalence of lawyer-brokered settlements in pre-trial stage	0	0	0	0	0	0	1933	1925
***2.** Arbitration*	(1806) >1870	1879	1890	1960	1969	(1930) 1950	1950	1925
***3**. Mandatory or court supervised conciliation or mediation procedures*	(1790) >1870 - 1940, 1995	2001	>1870 1951	1950	>1870	1950	0	0
***4.** "Justice in many rooms" (Galanter, 1981)*								
***4.a. "** In the shadow of the law"*	0	0	0	0	>1870	0	0	>1870
4.b. *Following local traditions*	0	0	>1870	>1870	>1870	>1870	0	>1870

Legend: The presence of rules or structures is indicated by the year of entry into force of the rules or the establishment of the judicial structures mentioned, preceded by ">" if the entry into force of the rule or the establishment of the structure predates 1870, the starting year of reliable GDP data for dynamic panel analysis; their absence by "0"

Sources: Authors own compilation; Table design: Schmiegelow and Schmiegelow (2012)

that, here, recourse to RDR is not motivated by the economic incentive of using it as a palliative against the cost risk and time loss of inefficient civil procedure, but by a sense of being part of a relationship and a *sui generis* interest in maintaining it. In the US, however, it would be a worthwhile task for American sociology to define and test indicators permitting to measure how often "justice in many rooms" is sought for the *sui generis* relational interest and how often it is used as a palliative against civil procedure risk. American RDR might turn out more attractive in terms of law and economics than even lawyer-brokered out-of-court settlements, which are only by degrees less costly than civil procedure ending in trial.

American RDR is what Djankov et al. (2002) may intuitively have had in mind in their advocacy for the neighborhood paradigm of dispute resolution. But, of course, as a closer look at comparative law and legal sociology literature cited in this and the preceding sections plainly reveals, common law civil procedure can hardly stand for neighborly dispute resolution, as they have assumed. On the contrary, the lawyer-controlled adversarial pre-trial and trial procedures of common law are so far removed from RDR by their cost, slowness and unpredictability that, quite arguably, a centrifugal movement could arise in the 1970s away from the common law to Galanter's "justice in many rooms". Sadly, however, questions have recently been arising about the vitality of the local relational fabric in America. One of the most alarming voices is Robert Putnam's, the political scientist at Harvard who had inspired LOT's early writings about the cultural foundations of common law as a product of Protestant Anglo-Saxon society built on mutual trust as opposed to "Catholic" civil law imposed on citizens by the will of the ruler (La Porta et al. 1999). Speaking of his hometown Port Clinton, Ohio, on the shore of Lake Erie as a "poster child for changes that have engulfed America", he laments the shredding of the social fabric of the 1950s and 1960s by the mid 1990s. "Traditional community bonds failed", he writes, "to prevent the radical shriveling of the sense of "we", as the once thriving middle class gave way to a disparity of "poverty rates of 1 % in gated communities along Lake Erie and 51 % a few hundred yards inward" (Putnam 2013).

5.3.3 Status and Pay of Judges

Were we nonetheless to espouse LOT's neighborly cliché for the common law judge and its characterization of the civil law judge as an instrument of the state, we would obtain another clear-cut common law/civil law divide. However, as referred to in Sect. 3.1, the King's court in England was a state court since the Norman Conquest and, until the 2006 judicial reforms, the Lord Chancellor and the Lord Chancellor's Department have constituted the state authority appointing judges in England and Wales. Of course, prior to the creation of the Supreme Court in 2009, the English court of last resort was the House of Lords and, hence, the mode of selection of its judges a mixture of aristocratic tradition and legislative process.

Montesquieu's separation of powers has certainly been weaker in England than in the US and most European civil law countries (Dam 2006a).

Nor does the case of the US support LOT's association of the common law judge with the neighbor paradigm. Since the entry into force of the American constitution, at least the Federal Courts system of the US with today roughly 900 life-tenured judges appointed by the US President including the nine judges of the Supreme Court (Title 28 of the United States Code (USC), Gur-Arie and Wheeler 2001; Rottman et al. 2000) stands in the way of such an association. Of course, the States of the US are free to design their judiciaries in whatever variation of the principle of separation of powers reflects the preferences of their own State constitutions. Initially, States appointed their judges just like the Union its federal judges. Since 1846, however, the hope that elected judges would be more amenable to grant strict liability in cases pitting industry against public fears led a growing number of States to adopt judicial elections (Shugerman 2010). Until today, there is a lively American debate between proponents of judicial independence, such as afforded by appointments of judges to life tenure, and democratic accountability guaranteed by judicial elections for limited terms. The scholarly debate has been accompanied by more acerbic accusations of party patronage and cronyism against judicial elections, which, since the 1980s, have become increasingly "nasty, noisy and costly" (Shugerman 2010 at 1351), on the one hand, and of an intrinsic economic conservatism of life-tenured federal judges on the other. Many of these accusations have been refuted by examples of unpopular independent rulings of elected judges and path-breaking decisions of life-tenured judges defying conservative inertia. The best characterization of the aggregate state of affairs of the American case is perhaps that the "US is a laboratory of efforts to adjust judicial independence and accountability to one another" (Gur-Arie and Wheeler 2001 at 133). In 1998, general jurisdiction first instance trial judges in 15 States were appointed by the Governor, in 10 States selected through partisan elections, in 18 States through non-partisan elections, and in the remaining States by various methods of selections for various lengths of terms. At the same time, appellate judges were appointed by the governor in 21 States, by legislative appointment in 3 States, by non-partisan elections in 14 States, by partisan elections in 8 States, by retention elections in 4 States (Rottman et al. 2000, Tables 4 and 7). Hence, in no less than 42 % of American State court systems, appellate judges were appointed by the State just as is the rule in civil law countries. If added to the presidential appointment of all life-tenured federal judges, this indicates that the higher the importance of the judicial function to be filled, the safer aggregate America feels with state appointed judges. Again, there is no clear common law/civil law divide.

While acknowledging the venerable Magna Carta tradition of selection or election of judges as "peers" of the seekers of judicial relief as an emblematical achievement of the history of English common law in Line 2, Table 5.5 nonetheless indicates the commonality of the determining role of state-appointed judges in all common law and civil law countries of our sample, except Switzerland, in Line 1. To be sure, Swiss judges are, on principle, elected (Wittek 2006) and there are lay judges in a few of the oldest and smallest cantons of Switzerland or in the

commercial and labor courts of France (Shugerman 2010). But just as the lay judges in Germany's "mixed" commercial and labor courts designated by chambers of commerce and representatives of labor and employers' organizations respectively (Langbein 1985), they do not affect the characteristic prevalence in civil law countries of professional judges in public service nor do they play the same emblematic role as the "peers" in English Magna Carta tradition. Hence, Table 5.5 (line 2) reserves this tradition to the two common law countries of our sample, the salience of the role of appointed judges in public service in England and Wales as well as the US notwithstanding. Arguably, as the Swiss tradition of elected lay judges dates back to 1291, the century of the Magna Carta, it might just as well be inserted in line 2. But while being an expression of an indomitable spirit of liberty and independence surviving until today in the center of Europe, it was not based on a written document defining the rule of law and forced upon a domestic King with autocratic ambitions in the same way as the Magna Carta. So while keeping the Swiss example in mind, we do not need to insert it in line 2 as a qualification of the cultural uniqueness of English common law. Of course, the defining nature of the Magna Carta ideal of judgment by one's peers has long been the jury trial. As explained in Sect. 5.3.2, this feature was abolished for civil cases in England and Wales in 1933, and is in the process of vanishing in the US, yielding to lawyer-brokered out-of-court settlements in both countries. Yet, while disappearing, it remains an English and American cultural treasure and is recognized as such in line 2.

In connection with lines 3–5 concerning the legal education, training and practical experience of judges, it will become immediately clear, however, that line 1 rather than line 2 will be the one that counts for economic analysis of law. For as explained in Sect. 5.3.1 and indicated in Table 5.2 (line 1) and Table 5.3, an active role of the judge as provider of legal knowledge, identifier of legally relevant facts and manager of the pace of procedure is a crucial factor of efficiency of justice. If legally uninformed plaintiffs, such as buyers of subprime mortgage-backed securities (MBS) suing the investment bank selling such MBS for security fraud, were to rely on equally uninformed "peers" to judge the case, the complexities involved would inexorably expect too much of the judge and lull jurors into "dozing off" as reported in the case *SEC vs. Tourré* by the New York Times (2013). However, while neither in England and Wales nor in the US there have been formal requirements of legal knowledge as prerequisites of the appointment or election of judges for the earlier periods relevant for panel analysis (1870–1940s), there has been a growing recognition in common law countries since then that the complexities of the laws and regulations governing modern economies and societies require a thorough legal education for judges (Thomas 2006; UK Ministry of Justice 2005; US Supreme Court 2013). While the UK has mainly relied on in-service training and accumulation of experience as a prerequisite for senior judicial appointments, there was greater emphasis on academic legal education in the US just as in civil law countries. Many of the eighteenth and nineteenth century Justices of the US Supreme Court studied law under a mentor because there were only few law schools in the country, but all Justices appointed since 1942 had a law degree (US Supreme

Court 2013). By 1998, general jurisdiction trial court judges must possess a law degree in all US States but Maine and Massachusetts (Rottman et al. 2000, Table 8).

There has thus been a remarkable conversion of common law countries to standards of legal education and practical experience, which civil law judiciaries have adhered to much earlier (Thomas 2006; Langbein 1985), i.e. simultaneously with the codification of substantive law and civil procedure in the nineteenth century or, in the cases of South Korea and Taiwan, in 1960 and 1950 respectively or, yet, in the case of Switzerland, where practically all elected judges fulfill the pre-entry requirement of academic legal education plus practical training, except in 4 of the smallest cantons preferring lay judges (Langbein 1985; Thomas 2006 Table 2; Canivet 2012; Ebert 1999; Lühring 1997, § 5; Deutsches Richtergesetz 1972; Supreme Court of Japan 2013; Nottage 2010; Kim 2013; Kwon 2011; Gauch 1991; Schneider 1999; du Pasquier 2000; Chen 2012). Table 5.5 (line 3) indicates the commonality of the entry requirement of academic legal education extending to the US at least since the 1940s and line 4 that of the requirement of practical experience as a criterion for promotion, appointment or election to positions of increasing seniority extending to both the UK and the US (Thomas 2006; UK Ministry of Justice 2005; Rottman et al. 2000). Again, then, there is no clear common law/civil law divide.

The only educational entry requirement, where there is such a divide, is the accumulation of academic legal education and practical judicial training in all civil law countries of our sample (Langbein 1985; Thomas 2006, Table 6; Canivet 2012; Ebert 1999; Lühring 1997, § 5; Deutsches Richtergesetz 1972; Nottage 2010; Supreme Court of Japan 2013; Kim 2013; Gauch 1991; Schneider 1999; du Pasquier 2000; Chen 2012), which indicates that civil law judges begin their career at a young age with fresh knowledge of the law and a broad selection of recent cases relevant for legal and judicial practice (Line 5). Hence, seekers of justice at the edge of legal innovation may be luckier at a first instance general jurisdiction court with judges at the beginning of their career in civil law countries than at "trial benches of elderly lawyers" (Frankel 1975 at 1033) in the US. Judging by the criteria of the American debate on judicial independence cited above, the length of the career of civil law judges with multiple possibilities of promotions to senior judicial appointments leaves no more reason to doubt their independence than that of federal judges in the US. That commonality between American federal judges and judges in Western European and East Asian civil law countries should lay to rest LOT's concern about there being "more corruption, less consistency, less honesty, less fairness in judicial decisions" in civil law than in common law countries as quoted from Djankov et al. (2002) at the beginning of this chapter.

The American case invites a few complementary comparative remarks about the two civil law countries of our sample with a federal constitution, Germany and Switzerland. As a rule, German judges begin their careers at a first instance court in one of the *Länder* (States) of the Federal Republic after having taken their second state examination at an appellate court of the *Land*. Their promotion prospects are nonetheless just as federal as the federal codes they apply, interpret, or, if necessary, complement by *richterliche Rechtsfindung* (judge-made law). At the top of the

court system, the Federal Supreme Court of general jurisdiction (*Bundesgerichtshof*), and the four other federal supreme courts of special jurisdiction, i.e. labor relations (*Bundesarbeitsgericht*), social security matters (*Bundessozialgericht*), tax and customs matters (*Bundesfinanzhof*) and litigation between citizens and public administrations *Bundesverwaltungsgericht*) beckon the ambitious. This is a powerful incentive to maintain high ethical as well as legal standards of judicial decision-making (Langbein 1985), the more so as the judgments of State first instance and appellate courts can easily turn into jurisprudence by publication in law journals and commentaries of the federal codes, if their reasoning stands out by innovative departures from established practice of State or Federal courts. It also explains why the "thoroughness of the German judgment is legendary" (Langbein 1985 at 856). This may hardly impress Erhard Blankenburg, the German sociologist of law (Blankenburg 2012). But it is nonetheless plain evidence of a prolific source of judge-made law in a civil law country (Schmiegelow and Schmiegelow 2013) and, therefore, qualifies LOT's assumptions about the common law/civil law divide as one between "adaptive" judge-made law and "political" codified law (Beck et al. 2003; Rajan and Zingales 2003).

Switzerland, at first sight, comes closest to the US case by its federal structure, and closest to England and Wales by the four smallest Cantons (States) continuing to adhere to the principle of lay judges approximating the Magna Carta ideal of judgment by one's peers. However, at a closer look the Swiss case is fundamentally different from both the US and UK cases. Most fundamentally, each of the 26 Cantons has kept its own judiciary since 1291, and Switzerland does not have a three-level Federal Judiciary like the US, only the *Bundesgericht* (Federal Supreme Court) in Lausanne, created in 1848, which is the court of last resort in civil matters (Brunschweiler et al. 2011). Differing from the UK even more strikingly than the US, Swiss judges are elected as a matter of principle, on the first instance level by direct representation ("*Volkswahl*"), on the appellate level either by the cantonal parliament or by *Volkswahl* and on the level of the *Bundesgericht* by the united chambers of the Swiss parliament, the *Bundesversammlung* (Wittek 2006). On the other hand, just as in France and Germany, substantive contract law and commercial law has been the same for judges in the cantons as well as in the *Bundesgericht* to apply and interpret since its codification in the nineteenth century (Boucekkine et al. 2010). If they have been practicing lawyers before being elected as judges, as most of them are as mentioned above, they will do so with very similar techniques of managing the pace of procedure, fact gathering, issue narrowing and judgment writing as their French or German colleagues (Brunschweiler et al. 2011) thanks to the accumulation of academic and practical training at Cantonal appellate courts before entering their legal profession.

Inversely, the evident question that might be raised about the role of American and English judges would be why they should continue to be restrained to what John Langbein calls their "studied amateurism" and passivity in civil procedure, as cited in Sect. 5.3.1. Their education and practical experience would certainly enable them to supply their legal knowledge as a public good just as the civil law judge striving to implement the principle of *iura novit curia*. If appointed to judgeships in

view of previous experience as trial lawyers, they would just have to operate a mental reorientation from the partisan combat mode of the "sporting theory of justice" (Pound 1906 at 417) to attitudes of calm detachment and impartiality considering the trial as being concerned with facts. And they would have to descend "from the peak of Olympian ignorance" (Frankel 1975 at 1042) of the facts in dispute to managing the pace of procedure in order to avoid waste and partisan distortion in the gathering of facts (Langbein 1985). If giants of American law have been advocating such an adjustment of common law civil procedure to modern times for more than a century, from Roscoe Pound's Address to the American Bar Association in 1906, through Judge Marvin Frankel's Benjamin Cardozo Lecture at the Association of the Bar of the City of New York in 1975 to John Langbein's courageous article in the Chicago Law Review of 1985 just cited, it should not be considered as an entirely outlandish idea. The level of efficiency of justice in the UK and the US would dramatically improve and move, as it were, from the three columns on the right of Table 5.3 to the three columns on the left.

At least in the US, some movement in this direction has taken place since the late 1960s in the form of "managerial judging" (Resnik 1982) in complex federal cases such as antitrust, securities, product liability, and class actions. The Manual for Complex Litigation issued by the Federal Judicial Center since 1969 in a regular sequence of new editions recommends among others that judges narrow the issues in a first pretrial conference and limit discovery accordingly (§ 1.30 Manual 1982). Langbein sees this as a sign of convergence with the "conference method" (Kaplan 1960 at 410) of German civil procedure. Other American legal and sociological scholars have voiced misgivings about the criterion of efficiency in connection with justice (Resnik 1982; Galanter and Frozena 2011). Samuel Gross even considers procedural inefficiency as an "American advantage" (1987). If one considers efficiency of justice as a goal, as LOT does, however, one should welcome this bridge over the common law/civil law divide.

Finally, if Djankov et al.'s (2002) concern about avoiding delay and corruption, assuring consistency, honesty and fairness in judicial decisions, and easing access to justice is to be taken seriously, the salaries of judges would merit LOT's attention as well. All judges should be paid well enough to sustain their "role fidelity" (Shugerman 2010) as diligent, incorruptible, consistent, honest and fair providers of justice. Some graduation between salaries of first instance, appellate and supreme court-judges would correspond to the increasing scale of their experience and responsibilities. Inordinate income discrepancies between judges of the all important first instance courts on the one hand and the socially more dignified senior positions at appellate and supreme courts, however, might easily undermine the incentives for first instance judges to maintain high ethical and professional standards.

Empirical research in African, Asian and Latin American countries has shown this to be a particular source of institutional corruption in the judiciary and an impediment for access to justice (Pistor and Wellons 1999; Buscaglia 1997). The problem may be more pronounced in former British colonies of the British empire, where the transplant of the English tradition of combining appellate and supreme

Table 5.5 Status and pay of judges

Countries / Rules/ Structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England, Wales	US
1 Appointed or elected Judges in public service	(1806) >1870	1879	1890	1960	(1848) 1870	(1930) 1950	(12th century) >1870	(1787) > 1870
2. Judges and juries selected or elected as "peers" *2.a. judges ruling in bench procedure* *2.b. juries deciding in civil trials*	0	0	0	0	(1291) (>1870)	0	(1215) > 1870 >1870 >1870-1933	> 1870 >1870 >1870
3. Academic training required	>1870	1879	1890	1960	1875 (Basel)	1950	0	1940's
4. Practical experience required	>1870	1879	1890	1960	1875	1950	>1870	>1870
5. Academic plus practical training required	>1870	1879	1890	1960	0	1950	0	0
6. Yearly salary roughly in line with civil service *6.a. first instance level* *6.b. appellate level* *6.c. supreme court level*	 >1870 >1870 >1870	 1879 1879 1879	 1890 1890 1890	 1960 1960 1960	 1875 1875 1875	 1950 1950 1950	 0 0 0	 0 0 0
7. Yearly salary significantly higher than civil service *7.a. appellate level* *7.b. supreme court level*	 0 0	 0 0	 0 0	 0 0	 0 0	 0 0	 >1870 >1870	 >1870 >1870
8 Yearly salary significantly lower than civil service *UK first instance level, US state court levels*	0	0	0	0	0	0	>1870	1938

Legend: The presence of rules or structures is indicated by the year of entry into force of the rules or the establishment of the judicial structures mentioned, preceded by ">" if the entry into force of the rule or the establishment of the structure predates 1870, the starting year of reliable GDP data for dynamic panel analysis; their absence by "0"

Sources: Authors own compilation; table design: Schmiegelow and Schmiegelow (2012)

judicial dignity with aristocratic status, social class and wealth may have met with greater receptiveness in traditional societies such as India's and Malaysia's than the substance of the common law would warrant. Traditional societies in former French colonies may have been less receptive for the comparative egalitarianism of the Napoleonic judiciary, but the French régime was transplanted nonetheless. The problem in francophone developing countries may rather be an egalitarian underfunding of the judiciary as a whole.

Lines 6–8 of Table 5.5 indicate clear common law/civil law divides in judicial salaries. The civil law countries of our sample remunerate their first instance, appellate and supreme court-judges roughly in line with the graduations of their respective civil services (CEPEJ 2008). The UK and the US offer their appellate and supreme court judges significantly higher salaries than comparable members of their own civil service or their continental European colleagues. To cite just one example, with the equivalent of 233,742 € in 2006, UK judges at the supreme court level earned nearly thrice as much as their German colleagues with 86,478 € (CEPEJ 2008). First instance judges in the UK, on the contrary, get significantly lower salaries than their civil service colleagues, particularly so part-time and honorary local court judges (UK Ministry of Justice 2005). A report to the Chief Justice of the State of New York laments a similar lag behind civil service salaries for all State court judges (Rottman et al. 2007). This is not to suggest that first instance judges in the UK and the US are corrupt, perish the thought! But, as a model for developing countries considering reforms of their judiciaries, such marked income discrepancies between first instance and appellate or Supreme Court judges do not recommend themselves in view of the transplant effects reported above in former British colonies.

5.3.4 Status and Pay of Lawyers

Distinctive features of the role of lawyers in civil procedure have already been explained in the preceding three sections in terms of their interaction with judges in the eight countries of our sample. This section serves to complement the data on status and pay of judges by those of lawyers. Again, most of the commonalities in relevant rules and structures cut across the common law/civil law divide and some important differences exist within the common law and civil law subsets of countries. Of the 11 indicators of Table 5.6 only 3 signal a clear common law/civil law divide, of which 2 are, in fact, a divide between the US and the rest of the sample. But all three are of central importance as cost factors affecting access to justice.

The most interesting common law/civil law commonality can be detected, many more or less colorful variations notwithstanding, in the rules and structures shaping the standards of education, practical training and professional experience of the legal profession, most of them shared, sooner or later in their careers, by lawyers and judges. Just like lines 3 and 4 of Table 5.5 concerning the status of judges, lines

3 and 4 of Table 5.6 indicate similar entry requirements for the legal profession, i.e. academic legal education and practical experience (Dubarry 2012; Ebert 1999; Lühig 1997; Supreme Court of Japan 2013; Nottage 2010; Kim 2013; Gauch 1991; Schneider 1999; du Pasquier 2000; Chen 2012; The Bar Council 2013; Solicitors Regulation Authority 2011). The only significant difference arises in line 5 of Table 5.6. While the entry requirement of academic plus practical training for lawyers is common to all civil law countries of the sample, it is not so in the two common law countries.

For lawyers, there is also a divide within the common law subset: In England and Wales, aspirant barristers always had, and still have, to go through practical "pupillage" at experienced barristers' chambers (The Bar Council 2013) and solicitors must enter a training contract with a training establishment (Solicitors Regulation Authority 2011) before being admitted to exercising their profession. In the US, however, a law school degree, usually a J.D., is sufficient as a prerequisite for admission to the bar examination at a state board of examiners, most often at the highest state court in the jurisdiction (American Bar Association 2013). Since most law school students aspiring to become lawyers try to be accepted for "clinics" in one of the big prestigious law firms during summers, the exception has perhaps less practical significance, though, than the difference of UK and US regulations of the profession suggests.

In one respect, there is a significant difference in the practical pre-entry training of lawyers in France, Taiwan, the UK and the US on the one hand and Germany, Japan, South Korea on the other. In the latter, the practical pre-entry training at Germany's appellate State courts, at the Legal Research and Training Institute of the Supreme Court of Japan, the Judicial Research and Training Institute of the Supreme Court of the Republic of Korea is identical for future judges and advocates (Ebert 1999; Lühig 1997; Supreme Court of Japan 2013; Kwon 2011). This means that future judges and lawyers are trained together in the art, described in the two previous sections, of seeing the stories of claimant and defendant side-by-side, separating contested from uncontested, as well as legally relevant from irrelevant, facts, managing the pace of procedure, and writing judgments with reasons of fact and of law. Hence, lawyers in these countries are able to anticipate how the judge will narrow down the issues of a case and advise their client accordingly. Litigants interested in avoiding avoidable cost and time risk of protracted litigation will appreciate such counsel.

In Switzerland, judges are elected without formal pre-entry requirement as mentioned, but most of them are lawyers having gone through a practical training at the Cantonal appellate court comparable to the German case, where they learn the technique of issue narrowing, fact gathering and writing of judgments (Wittek 2006; Gauch 1991; Schneider 1999). Such pre-entry education and training for future judges and lawyers at appellate or supreme courts crucially contributes to efficiency of justice in terms of Table 5.6. In France and Taiwan, the practical pre-entry training of lawyers is separated from that of judges for what appears to be rather different reasons. Marie Goré explains the separation of legal professions in France as a cherished and unique French tradition, whereas Thomas Chen interprets

the Taiwanese case as a recent inclination of Taiwan toward the US system rather than to the Japanese and Korean models (Goré 2012; Chen 2012). In the UK and the US, there is, as explained, no pre-entry requirement of practical training for judges.

While, as indicated in line 1 of Table 5.6, lawyers in both civil and common law countries are educated to consider their profession to be in the service of the law (Dubarry 2012; Busse 2008; Haley 2007; Kawamura 2011; Kim 2013; Kwon 2011; Gauch 1991; Chen 2012; Bar Standards Board 2004; Plant 2011; Children 2007), lawyers in the UK and the US tend to practice it as a business at the same time (Line 2). Danziger and Gillingham (2003 at 193) present anecdotal evidence of the "legal business" that sprang up around Westminster in medieval England. Lord Jackson's report of 2009 finds the combination of passive judges and of two-tiered management of the pace of procedure by expensive solicitors and more expensive barristers in urgent need of reform (Jackson 2009).

In the US, the legal business appears to be a more recent phenomenon. Stephen Harper has carefully researched how leading American law firms have moved away from traditional partnership ideals towards what they "euphemistically" call the "business model" (Harper 2013 at 70) now dominating the private practice of law. A 1975 decision of the US Supreme Court outlawed minimum legal fee schedules for various legal services as a violation of antitrust law. It had a dramatic effect on the predictability of the cost risk of litigation: lawyers turned to hourly billing for actual time spent. "Converting time to money" (Harper 2013 at 71) in an adversarial civil procedure, of which lawyers determine the pace, became part of the business model of private legal practice in the US (Maxeiner et al. 2010). Even an important palliative against this cost risk from the point of view of access to justice, i.e. the contingency fee, was turned by American law firms specializing in class action into a lucrative business lamented by the US Chamber of Commerce (Rickard 2010).

To be sure, as indicated in line 8 of Table 5.6, contingency fees have been admitted in some civil law countries as well, such as in Japan and South Korea since their codification of civil procedure, or in Germany most recently in accordance with a ruling of the *Bundesverfassungsgericht* (Federal Constitutional Court), "if necessary to provide access to justice" (BverfGE 2006, pp. 117, 163–202; Hess and Huebner 2012). Lord Jackson's report (Jackson 2009) recommended it for adoption in the UK. Both the German ruling and the English recommendation are too late to count in the control of long term-panel analysis of DHR for PE. The US, however, stands out by the practice of lawyers charging 40 % or more of the proceeds of the case for the claimant (Rickard 2010), which promises huge profits for law firms specializing in class actions for thousands of clients in one big litigation. Lisa Rickard, the President of the US Chamber of Commerce Institute for Legal Reforms (ILR) reported that the cost of tort litigation amounted to 2.2 % of US GDP in 2005 and warned that "the spread of US style legal compensation" had the potential to break the back of global commerce" (Rickard 2010). Even outside the special interest arguments of the American business community, the debate about the pros and cons of class action under the conditions of American practices of legal compensation goes on (Nocera 2013; American Association for Justice 2013). It appears that contingency fees and class action, both of which should serve as

palliatives against the basic structural inefficiency of common law civil procedure have ended up to constitute a sizable economic problem as a consequence of America's legal profession having turned into a business. Lines 9 and 11 of Table 5.6 indicate the American singularity of this adverse economic effect of exorbitant contingency fees and a share of legal costs in GDP of 2 %, in contrast to all other countries of our sample.

On the other hand, the principle of lawyers' fees negotiated with the client is not, as such, a distinctive feature of the common law side of a common law/civil law divide. France, Japan and Taiwan have it, too (Cayrol 2012; Wagatsuma 2012; Chiu and Sung 2004), as indicated in line 7 of Table 5.6. Inevitably, the principle contributes to "a certain opacity" of litigation costs, as quoted above from Haravon (2010), in these civil law countries as well, although certainly not to one so impenetrable as in the US and the UK. The most predictable, and on average, the least costly regime from the point of view of litigants is the setting of fees by law according to a descending scale of percentages of value of the matter in dispute, which has been the case in Germany, South Korea and Switzerland as indicated in line 6 of Table 5.6 (Hess and Hübner 2012; Lee 2012; Zellweger 2012).

On the whole, it seems fair to say, with Reimann (2012), that problems with high civil litigations costs and, hence, access to justice, result mainly from lawyers' fees and are more severe and pervasive in common law than in civil law jurisdictions. This conclusion does not directly challenge LOT, since LOT, as explained in Sect. 5.2, has not focused on comparative cost, but on comparative formalism and duration of civil procedure. What emerges as a sizable methodological problem, however, is the omission of this factor, especially since Djankov et al. (2002, 2007) rely on lawyers as sources for their data. That lawyers do not volunteer to dwell on their fees in response to questionnaire omitting that question is understandable. But that a theory dealing, like most prominently LOT, with the economic analysis of law does not raise the question of costs, is, to say the least, somewhat disappointing.

High and unpredictable legal cost may not be a decisive impediment for aggregate growth in economies enjoying financial center advantage like those of the UK and the US (Boucekkine et al. 2010), however. As explained already in Sect. 5.3.1, financial investors may turn the cost risk and micro-economic incentive structure of litigation under inefficient common law procedural rules into a procedural advantage against financially weaker parties (Massenot 2010a). For countries like France, Germany, Japan, South Korea and Taiwan, however, whose aggregate growth depends to a much greater extent on industrial sectors in which medium and small enterprises, stylized by Massenot as risk averse engineers (Massenot 2010b), play a crucial role, the opposite incentive structure would be a vital institutional requirement. The comparative cost and time efficiency of civil law procedure in civil law countries provides such an incentive structure.

This is a first confirmation of the procedural efficiency hypothesis of this paper, namely that common law and civil law civil procedure, by their very different degrees of efficiency and their relations of complementary opposition with ADR, transmit substantive common law and civil law rules effectively into an institutional environment sustaining the diverse structural characteristics of each of the eight

Table 5.6 Status and pay of lawyers

Countries / Rules/ Structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England, Wales	US
1. Legal profession in the service of the law	(1806) >1870	1879	1890	1960	1875 (Basel)	(1930) 1950	(1215) > 1870	(1840s) > 1870
2. Legal profession as business	0	0	0	0	0	0	> 1870	> 1870
3. Academic training required	>1870	1879	1890	1960	1875	1950	>1870	>1870
4. Practical experience required	>1870	1879	1890	1960	1875	1950	>1870	>1870
5. Academic plus practical training required	>1870	1879	1890	1960	1875	1950	1875	0
6. Fees set by law according to descending scale of percentages of value of matter in dispute	0	1879	0	1960	1875	0	0	0
7. Fees per hour negotiated with client	>1870	0	1890	0	0	1950	>1870	1975
8. Contingent fees admitted	0	2008	1890	1960	0	0	0>	1870
9. Average contingent fee 40% or more of proceeds from case	0	0	0	0	0	0	0	1975
10. Average contingent fee below 40% of proceeds	0	2008	1890	1960	0	1950	0	0
11. Share of legal profession in GDP 2% or more	0	0	0	0	0	0	0	2005

Legend: The presence of rules or structures is indicated by the year of entry into force of the rules or the establishment of the judicial structures mentioned, preceded by ">" if the entry into force of the rule or the establishment of the structure predates 1870, the starting year of reliable GDP data for dynamic panel analysis; their absence by "0"

Sources: Authors own compilation; table design: Schmiegelow and Schmiegelow (2012)

economies of our sample. Boucekkine et al. (2010) argued that the superior number of codified default rules for the ten economically most important contract types was an effective institutional environment for industrialized civil law countries without financial center advantage leading to a long term evolution of their GDP per capita converging with, and at times superior to, common law countries with financial center advantage. Indeed, after having surveyed the first 4 of our 8 categories of indicators, there are prospects that the PEH of this chapter might sustain the DRH of the Boucekkine et al. (2010 and Chap. 3 of this book).

Switzerland, of course, has it both ways, combining financial center advantage and a dynamic industrial sector with a balanced mix of small, medium and big enterprises (Boucekkine et al. 2010, Chap. 3). Zellweger's (2012) characterization of the costs of Swiss civil procedure as "pricey but predictable" appears to fit the composite structure of the country's economy with uncanny accuracy. Indeed, in Massenot's terms, the "priceyness" should please financial market litigants used to let risks work in their favor, whereas the "predictability" should encourage risk-averse engineers to go, if necessary, to court for contract enforcement or other judicial relief, if their cases are evidently meritorious. With this particular composition, Swiss civil procedure appears to serve both the major sectors of the country's economy as a functional institutional framework.

5.3.5 Cost Rules and Structures

PEH is further confirmed by a comparison of rules on cost and fee allocation between the litigants as well as structures of court costs and levels of lawyers' fees. This is not obvious at first sight. None of the seven lines of indicators in Table 5.7 presents a clear common law/civil law divide. But if seen in light of the counterintuitive efficiency divide explained in Sect. 5.3.1 and schematized in Table 5.3, the most striking features of the incentive structures of the cost regimes of the eight countries become immediately apparent. As indicated in lines 1 and 2, all 8 countries shift the burden of court costs of the winning side to the loosing side, while only Germany, South Korea, Switzerland and the UK do so also for the lawyers' fees of the winner. France, Japan, Taiwan (except in appeals to the Supreme court) and the US follow the principle that each party pays its own lawyer's fees (Cayrol 2012; Hess and Huebner 2012; Wagatsuma 2012; Lee 2010; Zellweger 2012; Chiu and Sung 2004; Moorhead 2012; Maxeiner 2012).

In the US, this is called the "American rule", while the allocation of lawyer's fees of the winning party to the loser is called the "English rule" (Maxeiner 2012). In principle, this is a fundamental difference between the two leading common law countries in terms of access to justice. The shifting of the winning party's lawyer's fees to the looser is considered, as a rule, to ease access to justice for poor or middle class claimants with meritorious cases. This incentive in favor of financially weaker claimants is confirmed by high litigation rates in German speaking civil law countries (Reimann 2012) as well as in South Korea (Lee 2010). But, as discussed

in the preceding sections, these are also countries with efficient civil procedures managed by judges. Hence the downside risk of having to bear both sides' lawyers' costs rather than none in case of an unexpected dismissal of the claim is much smaller, and moreover, more predictable, than in American or English civil procedure.

The same cannot be said about the English cost-shifting rule. On the contrary, given the much more sizeable cost risk of accumulated solicitors and barristers fees in the case of dismissal after a more lengthy procedure controlled by lawyers rather than the ideal-typically passive common law judge, potential claimants will think twice before going to court. The original intent of the English rule may well have been to discourage "frivolous suits" rather than easing access to justice. To wit, Lord Jackson, in his 2009 report on the review of civil litigation costs in the UK, proposed to introduce contingency fees as well as a more active role of judges for the purpose of easing access to justice (Jackson 2009). Until such reforms are implemented however, the commonality of the incentive structure of inefficient lawyer-dominated civil procedure in the UK and the US continues to favor the financial markets which have crucially contributed to the aggregate growth of their economies in the period from 1870 to 2008.

Line 3 of Table 5.7 indicates the contrast between lawyers' fees set by law in descending scales of value of the matter in dispute on the one hand and fees freely negotiated with clients on the other. For the former, the German example is straightforward and well documented by Hess and Huebner (2012), while Koreans routinely negotiate supplements to the scheduled fees, which are difficult to document (Lee 2010). The problem is even greater in the case of countries privileging freely negotiated fees. Given the difficulty of predicting the time lawyers need to spend for their clients, data for France, Japan, Taiwan, the UK and the US are almost impossible to obtain. Fortunately, however, Maxeiner (2010) has constructed an ideal-typical case, "Roe vs. Doe", detailing how the American rule easily leads to a sum of lawyers' fees for the winner Roe alone in excess of his $75,000 claim awarded him by the court, i.e. $77,500 or 103 %. This compares with a total cost in scheduled fees for both sides of only 10,664 € ($14,220), or 10,7 % of an amount in controversy of 100,000 € ($133,350), to be paid by the looser in the straightforward case of Germany (Hess and Huebner 2012). In Maxeiner's words (Maxeiner et al. 2010 at 32), "without control of costs, and in the absence of a loser pays system, defense counsel, through a vigorous defense, can render a $75,000 claim valueless" in the US. This example illustrates how major American mortgage lenders could turn the comparative inefficiency of American civil procedure into an advantage against financially weak mortgage borrowers in order to avoid mortgage modification in the subprime crisis of 2007, while two major industrial enterprises fought it out on a long term delivery contract in *Alcoa vs. Essex Group* in the oil crisis of the 1970s on the basis of the common law default rule of frustration of purpose (Schmiegelow and Schmiegelow 2013, Chap. 4). Alcoa and Essex Group were perhaps among the last few American enterprises to take the risk of a trial, before the obsession with billable hours took hold of the legal profession as a result of the 1975 Supreme Court decision discussed in the previous section.

In 1923, Austin W. Scott of Harvard Law School, took issue with LOT by anticipation, as it were, when he wrote in a seminal article in the Harvard Law Review reprinted in the ABA Journal of the same year: "The common law system of civil procedure, in its essential principles so sound, has been applied, however, with such technicality, as frequently to defeat its own purpose. (. . .) There are two classes of controversies in particular in which our ordinary legal procedure has broken down to such an extent that it may fairly be said that the result has frequently been a denial of justice: First, those cases in which the amount in controversy is small; and second, those in which one of the parties is so poor that he cannot afford to wage a legal battle" (Scott 1923 at 457). Lines 4–7 of Table 5.7 deal with solutions, or for want of solutions with palliatives, to the problems of these two classes of controversy in the eight countries of our sample.

Self-representation is the obvious solution for both small claims and poor parties (Line 4 of Table 5.7). All civil law countries of our sample have allowed self-representation in first instance courts for amounts of small claims level since the codification of their civil procedure. For Germany, Hess and Huebner (2012) document total court cost of 165 € for both parties, i.e. 16 % for a value of the matter of 1,000 €, which the looser must pay. In England and Wales, a special small claims track was created in county courts in 1973 (UK Ministry of Justice 1973), where the cost risk for the looser for an amount in controversy equivalent of 1,000 € today is a similar 16 % (UK Government 2013). In the US, Austin Scotts' 1923 article was the trigger of a movement for the establishment of special small claims courts first in bigger cities and then in all states. Here the "American Rule" of each party pays its own cost turns out as a small advantage. The cost of a claim in the equivalent of 1,000 € in California is just 2 % for each party (California Department of Consumers 2010).

Unlike the US, the three civil law countries sharing both the "American" rule and the principle of negotiated lawyer's fees, France, Japan and Taiwan, offer an important palliative for financially weaker parties against the incalculable cost risk resulting from that combination. The CPC, the Minjishosho-ho and the TCCP give the judge discretion to award the winning party reimbursement of its costs by the losing party as damages (Line 5). Japan has permitted the palliative of class actions in 1969, but so far without the unintended consequence of triggering a new business model for law firms as discussed in the previous section in the case of the US (Line 6). France, Germany, Japan, South Korea and Taiwan provide legal aid for civil procedure since its codification (Cayrol 2012; Hess and Huebner 2012; Nakajima 2012; Lee 2010; Chiu and Sung 2004). The UK followed suit by the Legal Aid and Advice Act 1949, which was part of the emergence of the welfare state in the UK and attempted to compensate the high cost level of common law procedure (Goriely 1999). Switzerland and the US are the only countries of our sample, which have not committed themselves to public legal aid until today. In Switzerland, the allocation of court costs and lawyers' fees to the loosing side functions as a procedural rule keeping access to justice nonetheless open for poor claimants with meritorious cases. In the US, the absence of public legal aid in civil cases, combined with the "American rule" of each party having to pay its own lawyers fees, has been, and still

Table 5.7 Cost rules and structures

Countries / Rules/ Structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England, Wales	US
1. *Loosing party pays*								
1.a. *all court costs*	(1806) >1870	1879	1890	1960	1875 (Basel)	(1930) 1950	(1215) > 1870	(1840s) > 1870
1.b. *all court costs and winning party's lawyer's costs*	0	1879	0	1960	1875	0	>1870	0
2. *Each party pays its own lawyer's costs*	>1870	0	1890	0	0	1950	0	1870
3. *Total cost for both sides of one claim in absolute numbers (court costs plus lawyers' fees)*								
3.a. *set by law according to descending scale of value of matter in dispute*	0	1879	0	1960	1875	0	0	0
(in € or equivalent of € in other currencies:								
3.a.a. *claim of 1,000 €*		709 € (70,0%)						
3.a.b. *claim of 10,000 €*		3,519 € (35,2%)						
3.a.c. *claim of 100,000 €*		10,664 €(10,7%)						
3.a.d. *claim of 1,000,000 €)*		40,159 € (4,0%)						
3.b. *estimated average allowing for wide margins of hourly lawyers' fees*	n.a.	0	n.a.	n.a.	0	n.a.	n.a.	n.a.
3.b.a. *claim of 1,000 €*								77,500 € (103% of 75,000 in controversy)
3.b.b. *claim of 10,000 €*								
3.b.c. *claim of 100,000 €*								
3.b.d. *claim of 1,000,000 €*								
4. In countries allowing self representation for small claims, total cost, if neither party involves lawyers: claim of 1,000 €	>1870	1879 165 € (16,5%)	1890	1960	1875	1950	1973 164 £ (16%)	1923 30 $ (2 %)
5. Judge may award winning party reimbursement of its costs as damage	>1870	0	1890	1960	0	1950	0	0
6. Class action admitted	0	0	1969	0	0	0	0	1938
7. Public legal aid (Counsel or Cost assistance) for indigent parties available	>1870	1879	1890	1960	0	1950	1949	0

Legend: The presence of rules or structures is indicated by the year of entry into force of the rules or the establishment of the judicial structures mentioned, preceded by ">" if the entry into force of the rule or the establishment of the structure predates 1870, the starting year of reliable GDP data for dynamic panel analysis; their absence by "0"

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is, a structural problem of access to justice, except for small claims. It was left to civic initiative to establish the Legal Services Corporation (LSC) in 1974 (Kilwein 1999).

In the 1980s and 1990s, however, both public legal aid in the UK, once disposing of the largest budget in the world for that purpose, and the LCS in the US went into decline (Regan et al. 1999). This happened to occur simultaneously with the rise of the share of the financial sectors in the UK and the US economies. According to Massenot's (2010a) micro-economic hypothesis, the decline of legal aid must have reinforced the inverse incentive structure of common law procedure as a deterrent of litigation against financial actors. The financial sector advantage of the two common law countries compensated the default rule advantage of the six civil law countries (Boucekkine et al. 2010). Control for PE further confirms DRH.

5.3.6 Density of Judicial Structures

For access to justice narrowly defined as access to the judiciary, the number of courts, judges and lawyers per 100,000 inhabitants is the most important structural indicator. Lines 1–3 of Table 5.8 indicate the numbers, both absolute and relative per 100,000 inhabitants, of first instance courts, appellate courts and supreme courts as courts of last resort respectively. Data of absolute numbers of these courts in France, Germany, and the UK are documented by Youngs (2007) and CEPEJ (2008), for Japan by Tanaka and Smith (2000), for South Korea by the Korea Court Organization Act (1949), for Switzerland by CEPEJ (2008), for Taiwan by Taipei District Court (2013), Taiwan High Court (2013), Judicial Statistics of the ROC (2012) and Judicial Yuan (2013), and for the US by National Center of State Courts, 2013 and US Courts (2013). Lines 1 and 2 indicate that the density of first instance and appellate courts is highest in Switzerland, Germany, and France followed by Japan, the US, the UK, South Korea and Taiwan for first instance courts, and by the US, Taiwan, Japan, South Korea for appellate courts with England and Wales coming last. All countries have, of course, supreme courts of last resort in civil matters. In six countries, these courts are, at the same time, constitutional courts, whereas Germany and South Korea have separate constitutional courts offering a "fourth instance", as it were, on questions of constitutionality of the civil law norms applied in the previous three instances.

Overall, Switzerland, the mother countries of LOT's French and German LO and Japan score in terms of access to justice as measured by the density of their court systems, especially the nearness of the first instance courts. If it were not already for the businesslike "conference method" of civil law procedure as opposed to the high drama of the concentrated common law trial explained in Sect. 5.3.1, this local nearness brings them, in fact, much closer to the neighborly function of courts, stylized by Shapiro (1981), than American and English courts actually are. The UK stands out by its highly centralized appellate court system with the High Court and the House of Lords in London (Youngs 2007), the US by its relatively modest score

of density in spite of the duplication of three-tiered court systems on both State and Federal levels. Hence, on the point of accessibility of courts by neighborly nearness, too, Djankov et al. (2002) are challenged in one of their basic assumptions cited in the beginning of this chapter. And, of course, superior access to justice by density of the court system is one more confirmation of PEH in the civil law countries mentioned.

So is access to justice as measured by the number of judges per 100,000 inhabitants. The data for line 4 were supplied by CEPEJ (2008) for all European countries, for Japan by Prof. Hiroshi Matsuo of Keio University to the author in 2011, for South Korea and Taiwan by Pistor and Wellons (1999) and for the US (judges in general jurisdictions courts and single-tiered courts separately) by LaFountain et al. (2012). Here, Germany stands out with what is considered the worldwide highest number of judges (Blankenburg 2012), followed by Switzerland and France in the next two top spots before the US, England and Wales, Taiwan, South Korea and Japan.

Predictably, considering the dominant role of lawyers in common law procedure explained in Sect. 5.3.1, the "tables are turned" when it comes to lawyers as part of judicial structures (Line 5). The two common law countries leave the six civil law countries of our sample far behind, with 387 lawyers per 100,000 inhabitants in the US, and 243 solicitors plus 22 barristers in England and Wales, as against 168 in Germany and a decreasing scale of density in the other five civil law countries (American Bar Association 2011; CEPEJ 2008, Prof. Matsuo to the author in 2011 concerning Japan, Schwartzmann 2008 concerning South Korea, Winkler Partners 2012 concerning Taiwan). With these numbers, the UK and the US might have scored in terms of access to justice. But, the dominant role of lawyers in common law procedure and the high cost risk for litigants resulting from that role, as explained in Table 5.3 and Sect. 5.3.7, tends to impede rather than ease access to justice. At best, the numbers illustrate Massenot's (2010a) inverse incentive structure of inefficient common law procedure, which might have helped sustain the financial center advantage of the US and the UK. Indeed, if one accepts the arguments of the financial industry in favor of deregulation and the phenomenon, described by Soros (2008), that financial regulation is always "behind the curve of financial innovation", it does not take a large step to follow Massenot's thesis that the cost inefficiency of the role of lawyers in common law procedure is an advantage for the financial industry.

While, as argued in Chap. 4, substantive common law will never be behind the curve of financial innovation thanks to its timelessness, the inefficiency of its lawyer-dominated common law procedure may well fail to transmit it into practice. The ruling on contract modification in *Aluminum Co. of America* (*ALCOA*) *v. Essex Group* (1980) cited in the preceding section may serve as a case in point. Applying the common law default rule on "frustration of purpose" to a long-term industrial contract concluded in 1967 running until 1983 which assumed normal inflation and could not foresee the extraordinary rise in electricity prices triggered by the 1973 oil crisis, it certainly broke an innovative path of judge-made law. DRH, controlled for PE, was confirmed for the American economy in this one outstanding industrial

Table 5.8 Density of judicial structures per 100,000 inhabitants

	Countries							
Rules/structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England Wales	US
1. Civil law 1st instance Courts	(640[a])	(902[b])	(867[c])	(161)	(302[d])	(66)	(220[e])	(1,836[f])
	1.0	1.1	0.68	0.3	3.95	0,28	0.40	0.58
2. Civil law appellate courts	(30[g])	(144[h])	(15[i])	(6)	(26[j])	(6)	(1[k])	(163[l])
	0.04	0,17	0.014	0.012	0.43	0,02	0.001	0.05
3. Civil law Supreme courts and/or constitutional courts controlling the constitutionality of civil law norms	(1[m])	(2[n])	(1[o])	(2[p])	(1[q])	(1)	(1[r])	(1)
4. Judges[s]	(7,532)	(20,138)	(3,026)	(1,212[t])	(1209)	(1,252)	(3,774)	(7,590)
4.a Number of non-professional judges per professional judge	11.9	24.5	2.3	2,42	16.5	5,3	6.9	(3,439)
	0.4	4.9					7.6	6,8[u] 2.8[v]
5. Lawyers (in UK England, Wales: barristers)[w]	(47,765)	(138,104)	(30,447)	(10,000[x])	(7,530)	(7000[y])	(12,034)	(1,225,452[z])
5.a. Solicitors in UK England, Wales	76	168	23,7	20	101	30	22,2	387,7
							(131,347)	
							243	

[a]460 Tribunaux d'instance, 180 Tribunaux de grande instance, Youngs (2007)
[b]782 Amtsgerichte, 120 Landgerichte in 2006 Youngs (2007), CEPEJ (2008)
[c]575 Summary Courts, 292 District Courts, Tanaka and Smith (2000)
[d]Zivilgerichte in 2006, CEPEJ (2008)
[e]County Courts, Youngs (2007, p. 89)
[f]National Center of State Courts (2013)
[g]Cours d'appel, Youngs (2007, p. 92)
[h]120 Landgerichte hearing appeals from Amtsgerichte, 24 Oberlandsgerichte hearing appeals in 1st instance cases from Youngs (2007, p. 93)
[i]15 appellate courts, including 6 branch offices and 1 for intellectual property cases, data kindly contributed by Prof. Hiroshi Matsuo (December 2011)
[j]Obergerichte of the 26 Swiss Cantons
[k]Court of Appeal in London, Youngs (2007, p. 92)
[l]13 Federal Appeal Courts, 101 State Courts of Appeal, 49 State Supreme Courts with appellate divisions
[m]Cour de Cassation in Paris
[n]Reichsgericht in Leipzig 1879–1945, since 1949 Bundesgerichtshof for civil cases and Bundesverfassungsgericht for constitutionality control in Karlsruhe

[o]Supreme Court in Tokyo
[p]Supreme court of general jurisdiction and constitutional court
[q]Bundesgericht in Lausanne
[r]House of Lords until 2009, since then Supreme Court
[s]All numbers from CEPEJ (2008), except data for Japan, contributed by Prof Matsuo
[t]In 1999, Pistor and Wellons (1999, p. 234)
[u]Judges in general jurisdiction courts in 46 states LaFountain et al. (2012)
[v]Single-tiered courts in six states LaFountain et al. (2012)
[w]All numbers from CEPEJ (2008), except data for Japan, contributed by Prof Matsuo, South Korea (note 24) and Taiwan (note 26)
[x]Schwartzmann (2008)
[y]Winkler Partners (2012)
[z]American Bar Association (2011)
Source: Authors own compilation; Table design: Schmiegelow and Schmiegelow (2012)

case. In the subprime crisis three decades later, the American financial industry appeared to prefer this ruling to remain "law on the books" without its logic being applied by efficient civil procedure to mortgage modification in the subprime crisis. This crisis was one of extraordinary deflation. It frustrated the purpose of millions of mortgage contracts sold by leading financial institutions on the premise of continuously rising house prices. This premise was based on the seeming mathematical persuasiveness of the Gaussian copula function used by the community of Wall Street "quants" (Schmiegelow and Schmiegelow 2013, Chap. 4). In this case DRH was not confirmed until today for the US economy, if controlled for PE, except for US financial institutions, which were able to avoid litigation from millions of subprime mortgage borrowers facing foreclosures while being bailed out effectively by the US government and supported in their recovery by the Federal reserve through successive programs of quantitative easing.

5.3.7 Litigation Density

Litigation density is the subject of ongoing discussions among sociologists of law, about whether high litigation rates are indicators of social dysfunction (Blankenburg 1988; Rickard 2010) or of increasing economic development (Crossman and Sarat 1975; Wollschläger 1998) or of institutional variation within countries (Clark 1990). I submit that the least one may say is, that statistically significant litigation rates, on national or subnational levels, are an unmistakable control of any hypothesis on access to the judiciary or comparative efficiency of civil procedure, i.e. PEH in this chapter.

Data on civil law cases per 100,000 inhabitants in line 1 of Table 5.9 are obtained for the mid 1990s from Wollschläger (1998), except for Japan (Prof. Matsuo to author for data of 2010), South Korea (Lee 2010 for data of 2005), Switzerland (CEPEJ 2012 for data of 2010), and the US (LaFountain et al. 2012 for data of 2010). In spite of the variation of sources and years of the data, significant structural differences emerge from the ranking of litigation densities as follows: Germany, South Korea, UK, US, France, Switzerland, Japan, Taiwan.

The two top rankings confirm PEH in civil law countries with the following efficiency advantages: active judges in public service applying their legal knowledge as a public service, narrowing issues, managing the pace of procedure, and writing judgments containing reasons of fact and of law (Sects. 5.3.1 and 5.3.3), absence of demand for ADR as a palliative against judicial inefficiencies (Sect. 5.3.2), lawyers sharing academic and practical training with judges and considering their profession as being in the service of the law rather than as a business (Sect. 5.3.4), and, finally, cost rules making court costs and lawyers fees comparatively predictable and modest as well as shifting them to the losing party (Sect. 5.3.5). In addition, Germany relies on the highest densities of courts and judges per 100,000 inhabitants to ease access to justice (Sect. 5.3.6).

That the following two ranks go to the two common law countries of our sample may surprise at first sight in view of the inefficiency of lawyer-dominated (Sect. 5.3.1 and Table 5.3) and, hence, high cost (Sects. 5.3.4 and 5.3.5) of common law procedure. However, since demand for law in the UK and the US can be assumed to be just as inelastic as in other developed civil law countries, the palliatives for claimants against procedural inefficiency in both countries must be reflected in higher litigation rates than an elastic reaction to the inverse incentive of procedural inefficiency would generate in the absence of such palliatives. Most important for the UK is the rule shifting costs to the losing party, which eases access to justice in the same way as in German speaking countries and Korea. The fast track for small claims has been the next most important palliative since 1973 (Sect. 5.3.5) and must have contributed a share of filed cases comparable to the summary debt procedure in Germany, which was 67 % in Wollschläger's 1995 data (Line 1.b). Legal aid may still have financed some share of litigation for poor claimants in the postwar period up to the 1970s before the decline of this palliative began in the 1980s (Sect. 5.3.5). Both the UK and the US share the rise of lawyer-brokered out-of-court settlements as a palliative for financially weaker parties against the cost risk of continued controversy through protracted pre-trial discovery procedures up to the unpredictable drama of what Benjamin Kaplan (1971) has called the "single-episode trial" (Sect. 5.3.2). The abolition of the civil trial in England and Wales in 1933 (UK Administration of Justice (Miscellaneous Provisions) Act 1933) and the vanishing of the trial in the US discussed in Sect. 5.3.2 indicate the strength of the incentive to settle out of court after filing the case. However, American claimants are in a weaker position than English ones, because the "American rule" (Sect. 5.3.5) prevents them from using cost shifting to the loser as a bargaining chip. Contingency fees (Sect. 5.3.5), and class actions (Sect. 5.3.6) have been compensating palliatives for American seekers of access to justice unable to take alone the entire cost and time risk of lawyer-dominated common law procedure.

That France, Japan and Taiwan share the "American" cost rule (Sect. 5.3.5) explains a good deal of their trailing places in litigation density and the more prominent role of ADR in these three civil law countries, with Japan enjoying the particular benefit of a cultural tradition of relational dispute resolution (RDR) as explained Sect. 5.3.2. As reported by Nakajima (2012, Chap. 12), however, a recent legal aid reform has resulted in a significant increase of the litigation rate, which speaks in favor of an institutional explanation of changes in litigation density. That Switzerland trails France in spite of sharing Germany's and Korea's cost shifting to the looser and scheduled lawyers' fees, is well explained by the important share of the financial sector in the Swiss economy and Massenot's (2010a) disinclination of financial market agents for efficient judge-managed civil procedure. Some of Massenot's (2010b) stylized engineers who, on the contrary, appreciate efficient civil procedure might yet be deterred by the "priceyness" of Swiss scheduled court costs and lawyers' fees (Sect. 5.3.5).

Cross-country differences in appeal rates (Line 2 of Table 5.9) may be explained by restrictions imposed by law. Appeals may be restricted to cases above a certain

Table 5.9 Litigation density (number of civil law cases per 100,000 inhabitants)

	Countries							
Rules/ structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England Wales	US
1. Civil law cases	4,040	12,320	1,701	7,806	2,172	1,690	6,440	5,317
1.a. of which Contract law cases	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	3,243 (61 %)
1.b. of which summary debt procedures	1,100	8,340 67 %	520	n.a.	n.a.	960		
2. Appeals (in percent of first instance judgments)	12 %	1 %	16.8 %	3.5 %	6 %	9.4 %	7 %	
3. Cassation/ Revision (in percent of appeal court judgments)	n.a.	n.a.	24.9 %	n.a.	n.a.	3.3 %	n.a.	n.a.

Sources: Authors own compilation; table design: Schmiegelow and Schmiegelow (2012)

monetary value of the claim or subject to admission from either the lower court or the court of appeal. Monetary restrictions prevail in countries of French and German LO. Their impact is statistically not significant (OECD 2013). In spite of such "astonishingly liberal" (Langbein 1985 at 857) accessibility of second instance courts, which raises access to justice to a further level, Germany's appeal rate reported by the OECD is surprising low with 2 %. The OECD associates low appeal rates with high predictability of appellate court decisions. I would rather submit that the low German rate is a result of the "legendary" (Langbein 1985 at 856) care, which German career first instance judges invest in the reasoning of fact and of law of their written judgments in order to reduce the risk of appellate reversal, as discussed in Sect. 5.3.3. French and Japanese judgments tend to be much more succinct by cherished traditions of judicial style, which may explain the rates of appeal of 12 % in France and 16.8 % (Prof. Matsuo to author 2011) in Japan. Restrictions by the requirement of leave to appeal prevailing in countries of English LO reduce appeal rates significantly, to 7 % in the case of England and Wales (OECD 2013). As the figures for South Korea, Switzerland and Taiwan are below 10 % as well, there is definitely no common-law/civil law divide in appeal rates. This commonality loses most of its apparent significance, however, if one considers the paucity of procedures ending in a judgment in England and Wales (just 2 % of

filed cases as reported by CEPEJ 2008) and the vanishing of the trial in the US as discussed in Sect. 5.3.2.

To conclude this section, it is fair to say that litigation density reflects both higher PE in civil law countries and the effect of palliatives against low PE of common law procedure as explained in Sects. 5.3.1–5.3.6. PEH, controlled for litigation density, is confirmed.

5.3.8 Duration of Civil Proceedings

Higher PE for civil law procedures is also indicated by the category duration of civil procedure. This is particularly striking as duration is the single procedural factor of control used by LOT to support its thesis that "formalism is systematically greater in civil law countries than in common law countries and is associated with", among other social dysfunctions, "inferior access to justice" (Djankov et al. 2002). Unfortunately, the available CEPEJ data on clearance rates of incoming first instance civil law cases per year do not go back further than 2004 (CEPEJ 2006), and those of the National Center for State Courts, not further than 2010 (LaFountain et al. 2012). Building a long time series as in Boucekkine et al. (2010) is impossible. Therefore, for the purpose of controlling LOT's broad-brush assertion of "higher expected duration of judicial proceedings in civil law countries" (Djankov et al. 2002), I propose to be content with the binary checks of clearance rates above 100 % by year-end in line 1 of Table 5.10. Only Germany got through the 100 % goal in 2006 and the following years (CEPEJ 2008, 2012). The notes to line 1 indicate rates between 96 and 99 % for France, Switzerland, the UK and the US with references.

The binary check for disposition times for first instance civil cases below 200 days in line 2 is based on the same data on duration of civil procedure as Table 5.1, i.e. those collected by Djankov et al. (2007) for enforcement of contractual debt worth 50 % of GDP pc in 129 countries. As explained in Sect. 5.2, this is a case type more relevant economically than the case types "eviction of tenants" and "collection of bounced checks" used by Djankov et al. (2002). It is also more relevant for the control of DRH in Boucekkine et al. (2010) for PE in this chapter.

In all civil law countries of our sample, except Taiwan, disposition time is below 200 days. In the UK and the US it takes longer, as indicated in Table 5.1. Why our sample of countries, which includes the mother countries of English, French and German LO, three financial centers (London, New York and Zurich) and two newly industrialized countries (South Korea and Taiwan) offers a more accurate measure of the intrinsic qualities of civil law and common law than Djankov et al.'s (2007) sample of 129 countries, is explained in Sect. 5.2.

Hence, PEH is also confirmed if controlled for duration of judicial proceedings. Contrary to LOT's assumptions, PE is higher in industrialized civil law countries than in common law countries.

Table 5.10 Duration of civil law proceedings

	Countries							
Rules/structures	France	Germany	Japan	South Korea	Switzerland	Taiwan	UK, England, Wales	US
1. Clearance rate[a] of incoming 1st instance civil cases above 100 %	0[b]	1[c]	n.a.	n.a.	0[d]	n.a.	0[e]	0[f]
2. Disposition time for 1st instance civil cases below 200 days[g]	1	1	1	1	1	0	0	0

Notes: Clearance rate and disposition time as defined by the European Commission for the Efficiency of Justice of the Council of Europe (2008)

[a]Percentage of cases pending on January 1, which are cleared by December 31: clearance rate (%) = resolved cases/incoming cases × 100

[b]96 % in 2006, CEPEJ (2008 at 135)

[c]143 % in 2006, CEPEJ (2008 at 135)

[d]99.5 % (in 2010), CEPEJ (2012 at 193)

[e]2 % in 2006, CEPEJ (2008 , p. 136) explains: "It should be noted that the clearance rate for UK–England and Wales is low. Due to their legal system (common law) many cases do not end in a judgment"

[f]99 % in single tiered state courts (including traffic courts), 98 % in general jurisdiction state courts (without traffic courts), LaFountain et al. (2012)

[g]Based on data collected by Djankov et al. (2007) for the enforcement of a contract of unpaid debt worth 50 % of GDP per capita in 129 countries, for data on average number of days, see Table 5.1

Source: Authors own compilation; table design: Schmiegelow and Schmiegelow (2012)

5.4 Conclusion

The eight categories of the Louvain Questionnaire on rules and structures of civil procedure identify more significant and reliable cost and time factors affecting access to justice in common law and civil law countries than LOT's single category of formalism. The most critical divide between the two legal traditions is the very different balance between the roles of judges and lawyers in providing knowledge of the relevant laws, narrowing issues of facts and managing the pace of procedure. The most authoritative American and English sources of comparative law and of reforms of civil procedure in the UK acknowledge or imply that judge-managed proceedings in civil law countries are more efficient than traditional lawyer-dominated proceedings in common law countries. Out-of-court settlements and ADR are important palliatives against common law procedural inefficiencies. This comes at the cost, however, of the "vanishing of the civil trial" both in the UK and the US. Hence, civil law procedure has been producing more judge-made law since the beginning of the twentieth century than common law procedure, serving an "adaptive" legal process rather than assuming the "political" functions attributed to it by LOT.

The categories status and pay of judges and lawyers, cost and fee allocation, as well as density of judicial structures confirm the efficiency divide from the point of view of the users of the judicial systems. These results are controlled for litigation rates, clearance rates and LOT's own single variable of control, namely duration of proceedings to enforce contractual debt worth 50 % of GDP pc, using LOT's own data. One obvious problem with LOT's 2002 and 2007 ventures into the subject of civil procedure was their reliance on the single factor of formalism and the single control variable of duration just mentioned, both of which masked the decisive factor of cost as one of the most important thresholds for access to justice. Another problem is the price LOT had to pay for the robustness of its cross-country analyses with samples of between 106 and 129 countries. With these samples, overwhelmingly composed of former colonies, more than 50 % of them coded as of French LO, LOT's authors unwittingly measured the negative transplant effect of imperial imposition of the laws of colonial powers to unreceptive countries rather than the intrinsic efficiency of common law or civil law judicial procedures. In order to identify the rules and institutional structures determining the comparative efficiency of common law and civil law procedures, it is necessary, to isolate them as much as possible from distorting effects, such as reverse causation by wealth, the relative importance of financial and industrial sectors, or, most importantly for cross country analysis with large country samples, the transplant effect in former colonies. Although LOT recognizes the first of these three distortions, it remains oblivious of the second and the third.

The sample of eight countries used in this chapter makes it easier to avoid all three distortions. With the mother countries of English, French and German LO, it includes one which was wealthy at the time of the major civil law codifications in the nineteenth century (UK) and two which were relatively backward industrially and financially (France, Germany). The sample also includes three countries with financial center advantage, two of English LO (UK, US) and one of German LO (Switzerland), which permits consideration of micro-economic analyses of diverse incentives resulting from procedural efficiency for financial and industrial litigants. The sample also comprises two former colonies (South Korea, Taiwan), which having developed their own substantive and procedural laws after independence just like the US, became newly industrialized countries. But it does not contain any former colony not having followed that path of institutional reform.

The major methodological economy of this sample is that it is identical to the one used by Boucekkine et al.'s 2010 analysis of the transaction cost benefit from codified default rules in substantive contract law. This chapter was able to complement Boucekkine et al.'s hypothesis, that the superior number of codified default rules in the contract laws of industrialized civil law countries compensated the financial center advantage of the UK and the US in the evolution of their GDP pc from 1870 to 2008 (DRH). DRH was incomplete without a corresponding hypothesis on procedural efficiency (PE), just like substantive law would remain dead letter as mere "law on the books" without being transformed into social and economic reality by effective civil procedure (PEH). Data for all 8 categories of rules and structures of civil procedure in the Louvain Questionnaire confirm PEH

for the civil law countries of the sample. Recent micro-economic analysis suggests, however, that the financial centers of our sample may have benefited from the inverse incentive structure of inefficient common law procedure, which tends to deter litigation from more risk-averse representatives of other sectors. But this aspect, too, is well reflected in the comparative performances of Switzerland, the UK and the US in Boucekkine et al.'s analysis and conclusions (Chap. 3). DRH is confirmed, if controlled for PE in both of its opposite incentive structures for industrial and financial sectors.

This result suggests important alternatives to consider for developing countries intent on autonomous legal reforms. If they hope to develop as financial centers, like the former English settler colony US or the former English "warehouse" economy Singapore (Lee 1960, 1972), they might favor lawyer-dominated judicial procedure. Inversely, if they wish to industrialize like France, Germany and Japan in the nineteenth century, or Korea and Taiwan in the mid-twentieth century, they will be better served by judge-managed civil procedure. If they hope for a composite economy with equally strong financial and industrial sectors, they might wish to opt for Switzerland's hybrid pattern.

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