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Legal Tech in Consumer Relations and Small-Value Claims

A Survey

*Francisco de Elizalde**

9.1 INTRODUCTION

Legal tech (LT) companies operating in litigation predominantly address B2C relationships, which is odd against the overall LT backdrop where B2B solutions prevail.[1] A 'no win no fee' policy, whereby consumers are only charged for success, is popular among LT companies that manage claims.[2] Even though their contingency fees tend to be significant,[3] they attract consumers who would otherwise have abandoned a claim as a result of rational apathy due to its small value. The automated management of claims has impacted consumer access to justice as the activity of LT companies has led to an increase in redress for small value claims.[4]

Unlike the more individualised approach of traditional law firms, LT companies preselect the types of claims they handle. Specialisation makes the management of a large portfolio possible and suitable for automation.[5] The preselection of claims is also important in respect of access to justice as non-selected claims remain under-redressed.

The option that LT companies give for certain claims, with their corresponding applicable laws, could reveal important data on the relationship between law and automation. Some claims could be more suitable than others for automation depending on the laws applicable to them. In fact, the argument that this chapter makes is that legal rules in many cases do not meet the needs

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[1] See M. Barendrecht et al., 'Charging For Justice, SDG 16.3 Trend Report 2020' at 87, www.hiil.org/wp-content/uploads/2020/04/HiiL-report-Charging-for-Justice-3.pdf (accessed 27 July 2020). A. Hook, 'The Use and Regulation of Technology in the Legal Sector beyond England and Wales', Research Paper for the Legal Services Board (2019) at 6, www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf (accessed 22 July 2020). See M. Ebers, Section 11.1.1.

[2] M. Hartung, 'The Digital Transformation' in M. Hartung, M.-M. Bues and G. Halbleib (eds.), *Legal Tech: How Technology Is Changing the Legal World. A Practitioner's Guide* (Munich: Beck-Hart-Nomos, 2018) 10.

[3] Ibid.

[4] C. Hipp, 'The Enforcement of Air Passenger Rights: An Analysis and Comparison of Claims Management Companies and Recently Established Conciliation Bodies' in M. Huseyin Bilgin et al. (eds.), *Eurasian Business Perspectives. Proceedings of the 22nd Eurasia Business and Economics Society Conference* (Cham: Springer, 2019) 342.

[5] Hartung, n. 2.

of automation and that the quality of the drafting of each law determines its fate vis-à-vis automation. This argument is made against the backdrop of litigation, a contextualisation that is relevant because it involves legal reasoning, which is probably one of the most difficult activities to automate.[6]

To achieve the aim of understanding the relationship between law and automation, it was deemed necessary to conduct a survey on LT companies involved in the litigation of small value claims. Information from participants in that market was relevant for the purpose of gathering data on the reasons underlying the selection of claims and on the impact of law on the automation of legal services. The main findings are presented in Section 9.2. A qualitative assessment of the data collected, with a focus on law and automation, is conducted in Section 9.3. The chapter ends with concluding remarks (Section 9.4).

9.2 SURVEY

9.2.1 *Methodology*

The survey was prepared for this book and the participants were informed of that intention. The target population of the survey comprised LT companies involved in litigation of consumer and small value claims. In the absence of a harmonised classification of LT companies,[7] the target population was limited to those platforms that are not traditional law firms or technologised versions of them and that, notwithstanding, represent clients vis-à-vis businesses out of court and before the courts. Due to this restriction, electronic marketplaces that enable clients to find a lawyer were discarded. For the same reason, the survey included neither mediation nor dispute resolution platforms. Companies that do not represent clients in court were not targeted.

Geographically, the target population included all LT companies in the defined field in France, Germany, Italy, Spain and the United Kingdom, which are the five largest markets for legal services in Europe.[8] It is important to recall that the purpose of the survey was to serve as a benchmark for the automation of legal services in respect of claims rather than to comprehensively map LT.[9] The survey was meant to gather data on how significant law is in the degree of automation of legal services in the area of claims/litigation. Therefore, it was considered appropriate to address different legal systems that hail from a variety of legal families (common law and civil law of Germanic and Romanistic traditions, with all the caveats applicable to this classification).[10] The selection of countries complies with these parameters.

The sampling frame of the survey (i.e., the sources from which the individuals in a sample are drawn)[11] was obtained from the available lists of LT companies from the target

[6] See C. Markou and S. Deakin, 'Ex Machina Lex: The Limits of Legal Computability', papers.ssrn.com/sol3/papers.cfm?abstract_id=3407856 (accessed 22 July 2020).

[7] See the variations among popular classifications such as those of the Tech Index of the CodeX Center for Legal Informatics at Stanford University (techindex.law.stanford.edu) and the Legal Geek Startup Map (www.legalgeek.co/startup-map) (accessed 29 June 2020). A simpler classification divides LT companies into those that provide automated legal advice products, electronic marketplaces, legal process outsourcing and e-Discovery and document review. The companies under analysis would be included in the first category. On this, see Hartung, n. 2 at 7–8. See also Ebers, n. 1.

[8] J. Leason, A. Connor and J. Vestbirk, 'Legal Tech Startup Report 2019: A Maturing Market' (2019), Thomson Reuters and LegalGeek at 4, https://blogs.thomsonreuters.com/legal-uk/2019/10/18/a-new-report-legaltech-startup-report-2019-a-maturing-market/ (accessed 10 July 2020).

[9] The participants were aware of this. Before the first question of the survey, it was stated: 'The following questions are meant to understand how your company interacts with technology'.

[10] See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1998) 63–73.

[11] S. Diamond, 'Reference Guide on Survey Research' in National Research Council (US) (ed.), *Reference Manual on Scientific Evidence*, 3rd ed. (Washington, DC: National Research Council, 2011) 421.

population,[12] which was checked with requests to legal innovation centres.[13] The sampling frame was supplemented by a plethora of searches in internet search engines of the countries of residence of the targeted companies, in their own languages.

The sample of the survey was selected following stratification of the targeted companies, which were partitioned into subpopulations according to the sector in which they operate: air carriage, debt collection, employment, banking, telecommunications, insurance, tenancy and general claims platforms.

The survey data was collected through the Internet, complying with the GDPR.[14] Using the Internet as the mode of data collection was deemed optimal as the targeted companies are IT savvy. In this respect, the risk of noncoverage error (i.e., ignoring relevant populations whose responses the survey was designed to measure)[15] was trivial, if it existed at all. Companies in the sample received the survey in a corporate email, after agreeing to have it sent to them. The responses were anonymous, untracked, and the only corporate information that was requested from the participants was their country of residence. This information was considered necessary to link the data collected with a specific legal system in order to test the basic proposition of this chapter: that law could determine the fate of automation of legal services. Without country information it would have been impossible to conduct that assessment, which is expounded in Section 9.3 of this chapter.

The survey was drafted in clear and unambiguous language, which was pretested by a small sample of the targeted population.[16] All questions were close-ended except for one that was open-ended. In order to avoid bias arising from close-ended questions such as, for example, ignoring possible answers that a participant could have, the options presented to the participants were exhaustive. In several questions, participants could select more than one option and the option 'other' was recurrently offered, giving the possibility of a personalised answer. A concern raised when drafting the survey was the likelihood that participants would inflate their answers to present a better picture of themselves (in this context, of higher automation). To tackle that bias, control questions were frequent in the survey[17] and the websites of all companies of the target population were conscientiously scrutinised to understand how they operate.

9.2.2 *Results*

9.2.2.1 Companies by Sector

The classification of companies by sector and country is a precondition of the assessment of automation of legal services as it indicates the applicable legal framework for the claims that

[12] In addition to those mentioned in n. 7, the following lists were consulted: terminosycondiciones.es/2016/07/20/legaltech-espana-mucho, www.village-justice.com/articles/Les-start-up-droit,18224.html?secteur=Justice per cent20as per cent20service#annuaire-legaltech, lespepitestech.com/startup-collection/legaltech (accessed 25 May 2020).

[13] Forschungsstelle Legal Tech (Germany), Incubateur du Barreau de Paris (France) and IE Legal Tech Innovation Farm (Spain). I am grateful for their support.

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2018] OJ L119/1.

[15] Diamond, n. 11 at 407.

[16] A member of the targeted population in each of the countries involved was approached for this purpose.

[17] For example, to determine the degree of automation, Question # 3 asked about automation in general, Question # 4 about automation by sector and Questions # 5 and # 6 addressed specificities of automation such as the capacity of a company to determine if the client has a valid claim without the intervention of a lawyer and whether its IT system could autonomously calculate compensation. Additionally, Question # 15 aimed at determining the type of technology used. The direct questions supplemented with the control ones were intended to reduce the margin of error.

those companies manage. Only by matching LT companies with a specific substantive law is it possible to ponder the relationship between law and automation.

A website analysis of the target population determined the specific industry sectors in which the LT companies operate within the broader field of litigation. Participants were requested to select their own sectors among a list that had been drawn up from the website analysis. The questionnaire also allowed participants to include uncontemplated sectors.

The website analysis determined that, in the field of litigation, air carriage is the industry in which LT companies are clearly more numerous. Platforms that manage flight claims exclusively, including delay, cancellation and denied boarding amount to 44.44 per cent of the total. The figure is even larger if we also include those platforms that manage flight claims in addition to others.[18] The significant share of LT companies in air carriage claims, compared to other industries, is constant in the targeted countries with slight variations.[19]

Second in the numerosity rank of LT companies are general claims platforms, that is, those that do not focus on claims arising from a specific industry but, instead, deal with a broad spectrum of matters. They represent 13.33 per cent overall.[20] It is to be recalled that the sample excluded companies that do not represent clients in court.

The third level of companies by number is composed of those that claim employment rights, which amount to 8.89 per cent.[21] That group is followed by those LT companies that focus on debt collection in general (i.e., not sector specific), amounting to 6.67 per cent. They are spread equally between France, Italy and Spain.[22] The same share goes to companies that manage cumulatively air carriage and banking claims.[23] The subsequent level comprises companies that deal with train carriage or tenancy claims (in Germany). Each one represents 4.44 per cent overall.[24] The less frequented sectors are insurance, telecommunications, accidents and fines, as well as insurance and banking when handled by the same company.[25] Each type of business model represents 2.22 per cent overall, considering the targeted countries jointly.[26]

Participants were asked to explain why they had chosen those types of claims as the bases for their business models. They could select more than one option and, additionally, they could personalise their answer. Most respondents declared that the reason was the 'homogeneity of the applicable law (i.e., variations between cases being marginal or non-existent)'. An equally important number of answers justified their choice by the 'breadth of the potentially affected parties'. In third place, participants chose that '[t]hey are usual instances of non-claimed rights'. Personalised answers were seldom given.[27]

[18] Those companies amount to 6.67 per cent overall.

[19] France, 50 per cent; Germany, 52.38 per cent; Italy, 40 per cent; Spain, 50 per cent and the United Kingdom, 57.14 per cent. These shares include companies that manage flight claims in addition to others.

[20] In France they amount to 33.33 per cent, in Germany, 4.76 per cent, in Italy 20 per cent, and in the United Kingdom 28.57 per cent.

[21] LT companies that claim employment rights amount to 14.28 per cent in Germany and 16.66 per cent in Spain.

[22] I.e., 33 per cent of that figure in each country with no representation from Germany or the United Kingdom.

[23] The cumulative management of air carriage and banking claims was found in Spain (33.33 per cent of the overall companies) and in the United Kingdom (14.28 per cent).

[24] LT companies solely handling train claims were detected in Germany (9.52 per cent in that country). The same was detected in respect of tenancy claims (9.52 per cent in Germany).

[25] This type of business model was found in Spain only.

[26] The share at a national level of those companies is indicated next. In Spain, LT companies that deal with insurance and banking represent 16.66 per cent. In the United Kingdom, accident LT companies amount to 14.28 per cent. In Italy, LT companies that manage fines claims represent 20 per cent overall.

[27] The rates of each option were as follows: 78.57 per cent of respondents for the first and second ones, 57.14 per cent selected the third one, while personalised answers amounted to 21.43 per cent. Adjusted per mention (instead of per

Participants were also asked why they do not manage other consumer-related cases, beyond those that they currently handle. Those 'other' cases were exemplified with claims arising from car accidents or defective consumer goods. Participants could select more than one option and, additionally, they could personalise their answer. To this, 42.85 per cent of respondents declared that they do not manage those cases but that they would be able to do so without major changes to their business models. In contrast, 35.71 per cent of respondents justified not handling those types of claims on the grounds that the application of the law must be done on a case-by-case basis, which complicates automation. In a similar vein, 14.28 per cent of respondents explained the rejection of those other cases on the basis that they require the intervention of experts and, because of this, are more difficult to automate. A personalised answer was provided by 21.43 per cent of the surveyed companies.[28] Evidently, some respondents chose more than one answer.

9.2.2.2 *Self-Assessment of Automation*

After selecting the industries in which they operate, participants were asked to self-assess the degree of automation of their businesses. For this purpose, they were requested to inform to what extent they automate claims in general and, next, they had to answer a multiple-choice question on automation of claims (out of court) in the specific sectors in which they work. The survey did not provide a definition of automation; at this stage it was left open to the interpretation of participants. The companies' self-assessment was scrutinised with control questions, which will be explained in Sections 9.2.2.3 and 9.2.2.4.

The results of the self-assessment exercise do not follow a common pattern. There is great variation in the automation rate between businesses that operate in the same industry and offer comparable legal services. In the air carriage industry, there is a range of automation of activities starting with less than 50 per cent and reaching, in certain companies, 90–100 per cent. In banking, automation ranges from 50 to 90 per cent. In debt collection, telecommunications and employment claims, the range is 75–100 per cent. In insurance and general claims platforms, automation was self-assessed in less than 50 per cent in all cases.

If those results are organised according to the degree of automation, they show that this reaches its highest levels (90–100 per cent) in air carriage claims, debt collection, employment, telecommunications and, in Germany, tenancy. Whereas, it is weaker in general claims platforms and in insurance-related claims (less than 50 per cent). In turn, banking claim companies appear in between, as the highest levels of automation are in the range of 75–90 per cent.

9.2.2.3 *Degrees of Automation and Control of the Self-Assessment Exercise: Technology and Success Rates in Court*

The existing definitions of automation are broad and so include '[t]he use or introduction of automatic equipment in a manufacturing or other process or facility'.[29] From this it can be established that automation of a service could be high but not necessarily sophisticated. For example, automation of a vending machine is high as it requires little human intervention but, under current standards, it applies quite a simple mechanism. In contrast, an IT system that

respondent), the first and second options represent 33.33 per cent each, the third option amounts to 24.24 per cent and personalised answers make 9.09 per cent overall.

[28] The most extended personalised answer was related to specialisation in the type of claims.

[29] Oxford Dictionary, www.lexico.com (accessed 24 June 2020).

resorts to machine learning would be more sophisticated than a vending machine, allowing for smarter outcomes, although it could reach lower rates of automation if it required a more fluent interaction with humans.

Therefore, it could occur that the rates of automation arising from the self-assessment exercise that were presented in Section 9.2.2.2 paint an untrue picture of unequally sophisticated business models. To avoid that, the results of the self-assessment exercise were controlled with specific questions to obtain a more accurate picture of automation in the claims/litigation sector. With the same aim, those questions were supplemented with a website analysis of the targeted companies.

In LT, automation should be measured by the capacity of technology to operate autonomously, without the intervention of lawyers.[30] The more autonomous an IT system is, the less it requires the intervention of lawyers. If an IT system is fully autonomous, it is capable of replacing lawyers in the provision of legal services. This understanding of automation not only considers the extent to which a process is self-executed but also assesses the sophistication of automation as it relates it to the possibility of substituting lawyers. Against this backdrop, automation is deemed to be higher when the likelihood of technology operating without lawyers is also higher.

In litigation, automation in its compound meaning (i.e., autonomous operation that reduces or eliminates the intervention of lawyers) is benchmarked by the answers to two fundamental questions: first, whether an IT system can determine if a client has a plausible claim without the intervention of lawyers in the assessment of every single case; second, whether an IT system can autonomously calculate the exact compensation that is due. In both cases, of course, this needs to be done in a way that is likely to be confirmed in court. If an IT system is able to conduct a legal assessment on the plausibility of a claim and can determine the exact compensation that is due, automation is high, as technology would be substituting for lawyers in providing legal advice.

Automation is hindered if the claim has to be lodged with courts, as legal systems require the intervention of lawyers, of the parties themselves and, in some jurisdictions, of a lay representative. Moreover, in the evolution of courts into an online setting, the replacement of lawyers in court is forecasted to come in the final stage, if at all.[31] Even though LT companies have succeeded in automating their internal claims management, allowing them to handle a large portfolio,[32] physical interaction with courts is still required.

Therefore, the survey focused on the pre-contentious (out of court) phase of claims to determine the degree of automation of the targeted companies at that stage. The questions were drafted based on the notion of automation that was previously explained, that is, considering the extent to which technology can replace lawyers. Participants were asked to inform whether their IT systems could determine if a client has a plausible claim without the intervention of lawyers and, in a separate question, whether they could calculate the exact compensation due. In a third (control) question, participants were asked about their success rate in court in order to confirm the accuracy of their IT systems in conducting legal assessments. Later in the order of questions, companies were offered the possibility to indicate the technology they use. The purpose of that question was to frame the relationship of automation and technology.

[30] Hartung, n. 2 at 6. See Eric Tjong Tjin Tai, Section 12.2.1.
[31] R. Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019) 274.
[32] Interview with a LT company in Spain (anonymous).

The answers of participants to this section of the survey reflect the heterogeneity in automation. Comparable companies that deal with the same type of claims and in the same sector automate their clients' claims to a very different extent. For LT companies in the air carriage sector, the range goes from those that cannot determine whether a client has a plausible claim nor calculate compensation[33] to others whose IT systems can do both.[34] The same occurs in banking,[35] while in employment claims, all participants are able to automate the plausibility of the claim but diverge in their ability to autonomously calculate compensation.[36]

However, there is some homogeneity within certain sectors. In telecommunications, IT systems can autonomously assess claims but cannot estimate compensation. In general claims platforms, all LT companies have reported being unable to determine the plausibility of the claim and calculate compensation. In debt collection, IT systems cannot assess the claim, although they can estimate the compensation due.

The results can also be organised around the degrees of automation, taking into consideration the extent to which IT systems can operate autonomously without the intervention of lawyers in every case. The survey reveals that only in respect of four types of claims can IT systems determine the plausibility of claims and calculate the exact compensation due without lawyers: air carriage,[37] banking,[38] employment[39] and, in Germany, tenancy.[40] In telecommunications claims, IT systems can determine the plausibility of claims but not compensation.[41] In the general debt collection sector, they can determine compensation but not the plausibility of claims.[42] In general claims platforms, according to the data collected, IT systems do not establish the plausibility of claims nor determine compensation without the intervention of lawyers.[43]

As a further control question on automation, participants were requested to inform about the technology deployed in the service. Overall, the responses included the following: traditional coding (only),[44] blockchain,[45] predictive analytics,[46] natural language processing[47] and other forms of machine learning,[48] alone or combined.[49] By sector, traditional coding (only) is used in general claims platforms and debt collection.[50] Blockchain has been reported in air carriage.[51] Predictive analytics is used in air carriage, banking, insurance and employment claims.[52]

[33] 33 per cent of respondents.
[34] 50 per cent of respondents.
[35] 50 per cent of respondents on each side.
[36] 50 per cent on each side.
[37] 50 per cent of respondents.
[38] 50 per cent of respondents.
[39] 50 per cent of respondents.
[40] 100 per cent of respondents.
[41] 100 per cent of respondents.
[42] 100 per cent of respondents.
[43] 100 per cent of respondents.
[44] 28.57 per cent of respondents chose coding as the sole technology used.
[45] 7.14 per cent of respondents.
[46] 35.71 per cent of respondents.
[47] 21.43 per cent of respondents.
[48] 50 per cent of respondents.
[49] This is why the precedent figures add up to more than 100 per cent. Adjusted per mention, the figures are as follows: 20 per cent for coding only, 5 per cent for blockchain, 25 per cent for predictive analytics, 15 per cent for natural language processing and 35 per cent for other forms of machine learning.
[50] 100 per cent of the sample of each of those sectors uses coding only.
[51] 16.67 per cent of respondents.
[52] 50 per cent of respondents in air carriage, 50 per cent in banking, 100 per cent in insurance and 50 per cent in employment claims.

Natural language processing has been reported in air carriage and banking.[53] Other forms of machine learning are used in air carriage, telecommunications, employment, banking and tenancy claims (the latter in Germany).[54]

The survey additionally sought information on the success rates in court of the target population. The purpose of gathering that information was to further control for automation. It was stated before that automation in LT depends on the possibility for companies of assessing the plausibility of claims and determining compensation without the intervention of lawyers. The accuracy of the answers on that aspect should be benchmarked with the success rates in court of LT companies.

Respondents that declared to automate both the assessment of the claim and the calculation of compensation reported a success rate in court in the range of 75–100 per cent. Within those, participants in air carriage claims declared a success rate of 90–100 per cent. In banking, the rate is 90–95 per cent. In employment and, in Germany, tenancy, the success rate in court is in the range of 75–90 per cent.

Participants that automate the assessment of the claim but do not autonomously calculate compensation reported a success rate of 75–100 per cent. In contrast, companies that do not automate the assessment of the claim but calculate compensation reported a success rate of 25–100 per cent.

9.2.2.4 Applicable Law and Automation

As explained in the Methodology section,[55] the survey intended to gather data on the significance of law to the degree of automation of legal services in the area of claims/litigation. Therefore, a block of questions in the survey was designed for the express purpose of collecting information on the relationship between law and automation. The questions were aimed at determining whether the drafting of the applicable law has an impact on the automation of claims.

On this, it was assumed that laws can either be drafted to address the subtleties of individual situations or regulate them in a more homogeneous or standardised manner. For example, traditional rules on damages for breach of contract establish compensation on a case-by-case basis (individualised approach). In contrast, the European Flight Compensation Regulation (FCR) predetermines compensation based on the flight length – whether short, medium or long haul – among other non-individualised factors.[56] Section 9.3 delves into that. Participants were not informed of this distinction, although one question explicitly addressed homogeneity and individualisation in the drafting of law. Additionally, one question contained an example of homogeneity (compensation in air carriage) and another included an example of individualisation (damages exceeding the fixed amounts of compensation in flights).

Participants were asked whether homogeneity/standardisation of law is an important factor in the automation of their businesses. The options were as follows: essential, very important, important, not important and insignificant. Overall, 28.57 per cent of respondents chose the

[53] 50 per cent of respondents in air carriage and 50 per cent in banking.

[54] 66.67 per cent of respondents in air carriage, 100 per cent in telecommunications, 50 per cent in employment claims and 50 per cent in banking.

[55] Section 9.2.1.

[56] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1. See Section 9.3.3.1.

option 'essential', 64.28 per cent preferred 'very important', and 7.14 per cent went for 'insignificant'.

Companies were also required to justify the success rates in court that were presented in the previous section.[57] Several options were available to participants; they could select more than one and even personalise their answer. The results show that 78.57 per cent of respondents explain their success rate by the fact that 'the applicable law is homogeneous and it is possible to standardise with optimal results'. Second in preference, 42.86 per cent of respondents selected 'the law interacts with concrete facts which vary from case to case, making standardisation difficult'. The third most selected option (7.14 per cent) was 'the applicable law is not homogeneous but we are able to foresee an outcome based on predictive analytics'.[58] Evidently, some companies selected more than one option.

In a further question, participants were asked whether they claim individualised damages. There was no definition provided as to what 'individualised damages' meant. However, these were exemplified with compensation in air carriage beyond the fixed amounts of the FCR. On this, 35.71 per cent of respondents declared they do not claim individualised damages, whereas 64.29 per cent disclosed that they do. Those in the latter group were additionally asked if they automate individualised claims to the same extent as the non-individualised ones. A slight majority answered in the negative (55.56 per cent) over those that answered in the positive (44.44 per cent). All companies that manage flight claims gave a negative answer, whereas the positive answers came from a variety of sectors including telecommunications and employment and tenancy in Germany.

At the time of drafting the survey, it was considered that out-of-court settlements of claims could provide further clues about the relationship between law and automation. Settlements, especially if they occur on a large scale, could signal homogeneity in the claims. However, other unrelated factors could influence settlements, such as a concealed strategy of defendants not to settle in order to deter claims. Therefore, participants were asked about settlements, but the questions were drafted as stand-alone ones without an aim of controlling others. On this topic, the answers to the survey were varied. The rate of settlements covered the full range (i.e., 0–100 per cent), with over 70 per cent of respondents declaring that they settle in the range of 50–90 per cent.[59] Massive settlements were the most frequent in banking, followed by air carriage claims.[60]

9.3 A QUALITATIVE ASSESSMENT OF THE SURVEY

Following the presentation of the data that was collected under the survey, this section will assess it. The answers to the survey show heterogeneity in automation in LT companies operating in the claims/litigation sector. The lack of homogeneity permits a classification of companies to be drawn up according to the degree of automation (Section 9.3.1). It also calls for an explanation of

[57] Section 9.2.2.3.

[58] If the figures are adjusted per mention, the result is, correspondingly, as follows: 57.89 per cent, 31.58 per cent, 5.26 per cent. Personalised answers make up the rest.

[59] 14.28 per cent of respondents settle less than 25 per cent of their claims. 7.14 per cent of respondents declared a settlement rate of 25–50 per cent. 35.71 per cent of respondents settle 50–75 per cent of the claims they manage. Another 35.71 per cent of respondents settle 75–90 per cent of the claims. Finally, 7.14 per cent of respondents settle more than 90 per cent of their claims.

[60] 57.14 per cent of respondents selected banking; 21.43 per cent chose air carriage claims.

the causes of heterogeneity (Section 9.3.2), with a description of the relevant legal background of automated claims (Section 9.3.3).

9.3.1 *Classification of Companies by Degree of Automation*

As previously stated,[61] automation in LT should be measured by the capacity of technology to operate autonomously, without the intervention of lawyers. The more an IT system can operate without human intervention, the more automated the provision of legal services will be.

In the field of litigation, the service that lawyers provide to potential claimants can roughly be divided into four activities, two of them occur out of court and two in. First, lawyers assess the plausibility of claims, taking into consideration factual and legal materials. Second, they estimate the compensation that can be claimed in court. These two activities often require the support of non-legal experts, such as economists and engineers, depending on the nature of the claim. The assessment of claims and their estimation are the bases of the advice that lawyers provide clients to decide if they want to lodge a complaint in court. The other two activities are related to court: drafting and filing the complaint and representing clients before the courts.

The survey focused on the first two activities in order to frame automation: to establish whether an IT system can autonomously determine if clients have a plausible claim and calculate the exact compensation due. These predictive activities are central in the advice that litigation lawyers should provide.[62] As Oliver W. Holmes observed: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law'.[63] Whether or not one agrees with this dogma of Legal Realism, predicting the likelihood of success of a case in court is very relevant in litigation.

The execution of legal advice in a case by drafting the complaint could also be automated but automation of that task is not particular to litigation. In fact, it is part of the more general automation of documents. Lastly, as stated, representation of clients in court is still a human activity that has not yet been automated, at least in the targeted countries. Therefore, both activities were not surveyed.

In respect of automation of the advice that clients should receive in litigation, companies can be classified into four groups depending on whether their IT systems can autonomously determine if clients have a plausible claim and can calculate the exact compensation due without the intervention of lawyers.

The first level of automation (*high degree of automation*) is occupied by those companies that can do both: assessment of the claim and calculation of compensation. In the second level (*medium-high degree of automation*) are those companies that can determine the plausibility of the claim but cannot determine compensation. In the third level (*medium-low degree of automation*) rank those companies that cannot determine the plausibility of the claim but can determine compensation. This level is lower than the previous one because compensation is normally based on information provided by clients and requires less sophisticated technology. The fourth level (*low degree of automation*) is occupied by those companies that can neither determine the plausibility of the claim nor calculate compensation without the intervention of a lawyer.

[61] Section 9.2.2.3.
[62] Susskind, n. 31 at 285.
[63] O. W. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457 461.

The survey reflects heterogeneity in automation between companies operating in the same sector, which can be attributable to different business models. However, when comparing companies with similar business models and technologies but operating in different sectors, heterogeneity in automation is still present. Hence, the sector in which the LT company operates, with its corresponding applicable law, impacts the degree of automation of legal services.

Only in respect of four types of claims (sectors) have participants reached a *high level of automation* (first level): air carriage, banking, employment and, in Germany, tenancy. In those sectors, IT systems of the best performing companies can autonomously determine if clients have a plausible claim and estimate compensation. The *medium-high level of automation* is reached by companies involved in telecommunications claims. They can determine the plausibility of claims but not compensation. Companies in the general debt collection sector can only determine compensation but not the plausibility of claims and so occupy the *medium-low level of automation*. Last, in the fourth level (*low degree of automation*) rank general claims platforms and insurance-related claims. They have reported not being able to establish the plausibility of claims nor determine compensation without the intervention of lawyers.[64]

This classification of companies by degree of automation and sector, according to their capacity to provide legal advice without lawyers, is largely consistent with the self-assessment exercise on automation that participants undertook.[65]

Importantly, the data collected under the survey shows that high levels of automation not only means executing tasks but also rigorous takeover of legal advice. Those companies that can determine the plausibility of claims (*high- and medium-high levels of automation*) obtain the best results in court and the range of their success rates is more stable (always above 75 per cent, reaching 100 per cent).[66] These data are key indicators of accuracy in the automated provision of pre-litigation legal advice.

9.3.2 *Suitability of Law for Automation: Variations in* Technological Efficiency

This section explores the reasons underlying heterogeneity in automation, which led to the classification of companies by degree of automation.

Heterogeneity in automation could derive from the particular business models of companies, whereby they have decided to automate the management of cases to a different extent. This is evident for LT companies operating in the same sector. For example, companies in air carriage claims have reported both high and low levels of automation, according to the categories defined in the previous section.[67] If reaching a high level of automation is possible, it can be assumed that not accomplishing it responds to a business decision, which is linked to a lower investment in technology. This is a fact that arose from the data collected.

However, diversity in business models seems insufficient to explain heterogeneity in automation across sectors. It is true that participants that report higher levels of automation use advanced technology including machine learning, natural language processing and predictive analytics, whereas those with lower degrees of automation tend to rely on simpler algorithms. The question when comparing extremes is whether the different investment in technology is a

[64] Section 9.2.2.3.
[65] Section 9.2.2.2.
[66] Section 9.2.2.3.
[67] The data collected is aggregated and anonymised so further breakdown cannot be provided. This applies to all data provided in this section except otherwise stated.

cost decision only or if the investment is unjustified because the company believes it would not lead to significant improvements in the degree of automation. For example, it would be pointless for general claims platforms, which rely on coding, to invest in a more sophisticated AI toolkit if, by doing so, they would still not be able to assess the plausibility of claims.

The insufficiency of the business model explanation becomes clear when comparing companies with similar business models and technologies but operating in different sectors: for example, when companies in air carriage claims (*high level of automation*) are compared with telecommunications claims platforms (*medium-high level of automation*), or when companies in banking (*high level of automation*) are contrasted with those dealing with insurance-related claims (*low level of automation*). Strikingly, this sometimes occurs within the same company if it manages claims in multiple sectors.

This particular data shows that the business model and the technology deployed are important but not determinant in the degree of automation of legal services. The relationship between technology and automation is direct, not proportional. A more sophisticated technology tends to improve automation, but the improvement does not depend on the investment in technology only. With the same technology, companies operating in different sectors reach varied degrees of automation.

This leads to an alternative explanation for heterogeneity in the automation of legal services in litigation. That explanation would exceed the scenario under analysis of private LT companies, as it purports to elucidate the reasons behind automation in the assessment of claims, which is a cornerstone in adjudication. On this, it is claimed here that law could determine the fate of automation and, more precisely, that the actual drafting of the law influences the possibilities of automation of legal services. The results of the survey support this hypothesis, as they show that sectors in which companies operate, with their corresponding applicable law, are key factors in automation. The variety in legal rules is central to the explanation of heterogeneity in the automation of legal services.

Therefrom, laws seem to be unequally fit for automation. Some lead to better results than others when used as an input to an IT system, leading to variations in the technical efficiency of the system (i.e., the effectiveness with which a given set of inputs is used to produce an output).[68] If instead of looking at the IT system, the focus is put on law and its suitability to interact with technology, it is possible to designate that fitness as the *technological efficiency* of law. This term is used here for the first time to describe that some legal rules are better inputs to IT systems than others, leading to higher levels of automation.

The technological efficiency of a legal rule seems highly dependent on how standardised and objectivised it is. In this context, standardisation refers to the applicability of a legal rule to numerous cases without variations. For example, compensation under the FCR is predetermined based on the flight length, among other non-individualised factors.[69] It is a more standardised rule than traditional compensation for damages, which requires a case-by-case assessment. In the same context, objectivisation of a legal rule describes its interaction with facts. A rule would be objectivised if its breach is not open to interpretation. For example, the rule that grants compensation for a delayed flight is more objectivised than compensation arising from a defective good, as delay follows a binary logic (yes/no or 1/0) whereas a defect could have multiple causes and even responsible parties. Of course, this does not mean that the airline

[68] www.economicshelp.org/blog/glossary/technical-efficiency/ (accessed 7 July 2020).
[69] Section 9.3.3.1.

would always be responsible for delays. It only implies that the breach and the remedies arising therefrom are more objectivised.

The technological efficiency of legal rules depends on their degree of standardisation and objectivisation because they lead to higher levels of automation, that is, an autonomous provision of legal services without the intervention of humans. As regards standardisation, it permits better predictability of outcomes. If the rule applies equally to all cases in the same situation, an IT system can predict more accurately their outcome without the need of a legal expert assessment in every single case. Objectivisation also allows for greater autonomy of an IT system, as it diminishes the need for human intervention. For example, blockchain technology can operate more autonomously with a rule such as the one that grants compensation for delayed flights than with the corresponding one that protects buyers from defective goods. Blockchain applies a conditional logic, for example, 'if the plane is late, then pay compensation'. The technology is able to determine the breach, that is, whether the plane arrived late or not, by using flight data, without human intervention. In contrast, in the case of goods, a human expert must establish whether and why the good is defective. The determination of the breach, in both cases, is an off-chain event but the latter is not computationally verifiable.[70]

The survey reflects the impact of standardisation and objectivisation of law in LT. When participants to the survey were asked to explain the selection of the sector in which they provide their services, the majority declared that the reason underlying the selection was the 'homogeneity of the applicable law (i.e., variations between cases being marginal or non-existent)'.[71] In the same vein, more than 90 per cent of respondents affirmed that homogeneity and standardisation of the law is either an essential or a very important factor for automation of their businesses.[72] This data reaffirms the relevance of law and its varied technological efficiency for the automation of legal services in litigation/claims management.

9.3.3 *How Law Determines Automation*

Standardisation and objectivisation in drafting legal rules determine the fate of automation. Rules that embrace those characteristics are technologically more efficient, as they serve as better inputs to IT systems, allowing them to reach higher levels of automation. The purpose of this section is to contrast this proposition with the applicable laws in the surveyed sectors to analyse if and to what extent they are standardised and objectivised. The assessment is restricted to sectors in which companies can reach high- or medium-high levels of automation.

9.3.3.1 Air Carriage

Nearly half of the target population of the survey are companies whose sole purpose is to seek redress from airlines under the FCR. The FCR applies to flights departing from the EU or incoming to the EU, in the latter case if the carrier is a 'Community carrier', that is, a company with a valid operating license granted by a member state.[73] It is a legislative instrument aimed at ensuring a high level of protection for consumers.[74]

[70] E. Mik, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (2017) 9 *Journal of Law, Innovation and Technology* 269 297–298.
[71] Section 9.2.2.1.
[72] Section 9.2.2.4.
[73] Arts 2(c) and 3(1) FCR.
[74] Recital (1) FCR.

The FCR grants redress for denied boarding, cancellation and delay of flights. Denied boarding is defined as 'a refusal to carry passengers on a flight',[75] typically in the event of overbooking. Cancellation is not defined. In respect of delay, the FCR establishes three layers to trigger redress: for flights of 1,500 km or less, a minimum of two hours of delay; for all intra-EU flights of more than 1,500 km and all other flights between 1,500 and 3,500 km, three hours; and for the remaining flights, four hours of delay. The remedies that the FCR grants to passengers include compensation, reimbursement of the ticket, re-routing and assistance (meals, refreshments, hotel accommodation, free phone calls and others).

Compensation under the FCR is flat-rated: EUR 250 is granted for all flights of 1,500 km or less; EUR 400 is the redress for all intra-EU flights of more than 1,500 km and all other flights between 1,500 and 3,500 km and passengers in all other flights receive compensation of EUR 600.[76] In the event of re-routing, the air carrier may reduce compensation by 50 per cent if pre-established thresholds of delays are not met.[77] These amounts are without prejudice to a passenger's right to further compensation[78] according to national law or the Montreal Convention. Although the FCR only foresees compensation for cancellation of flights and denied boarding,[79] the Court of Justice of the European Union (CJEU) extended the remedy to delays exceeding three hours.[80]

The redress of damages under the FCR is highly standardised and objectivised. Unlike compensation in contract law, the FCR enshrines fixed amounts that depend on the flight length, disregarding individual circumstances (*standardisation*). On this, the CJEU has pointed out that the FCR 'seeks to redress damage in an immediate and *standardised* manner'.[81] Additionally, breach of contract is objectivised as it is not open to interpretation. Delay is defined by a combination of time and flight distance. Denied boarding means a refusal to carry a passenger onboard for whatever reason. These, as well as the undefined 'cancellation' of a flight, are facts that are easy to assess without major controversy and largely rely on flight and weather data (*objectivisation*).

Air carriers can be exempted from liability arising from cancellation and delay in the event of 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.[82] However, the CJEU has interpreted this exemption narrowly, in line with the protective character of the FCR.[83] Extraordinary circumstances should not be inherent to the normal exercise of the activity and must exceed the carrier's sphere of control.[84] For example,

[75] Art 2(j) FCR.
[76] Art 7(1) FCR.
[77] Art 7(2) FCR.
[78] Art 12(1) FCR.
[79] Arts 4(3) and 5(1)(c) FCR.
[80] Joined Cases C-401/07 and C-432/07, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon* v. *Condor Flugdienst GmbH, and Stefan Böck and Cornelia Lepuschitz v Air France SA*, ECLI:EU:C:2009:716, para 61.
[81] Case C-354/18, *Radu Lucian Rusu and Oana Maria Rusu* v. *SC Blue Air - Airline Management Solutions SRL*, ECLI:EU:C:2019:637, para 28; Joined Cases C-402/07 and C-432/07, *Sturgeon*, para 51, and Case C-549/07, *Friederike Wallentin-Hermann* v. *Alitalia - Linee Aeree Italiane SpA*, ECLI:EU:C:2008:771, para 32. (emphasis added). See G. Hindriks, 'Bumped into Differences on the Possibility of the Air Passenger to Claim Further Compensation', (2020) 9 (3) *Journal of European Consumer and Market Law* 116 117; P. Markova, 'Consumer Protection while Travelling: Enforcement of Air Passenger Rights during "Extraordinary Circumstances" in Light of Regulation (EC) No 261/2004', (2019) 8(3) *Journal of European Consumer and Market Law* 114 114.
[82] Art 5(3) FCR. Case C-501/17, *Germanwings GmbH* v. *Wolfgang Pauels*, ECLI:EU:C:2019:288, para 31, and Joined Cases C-402/07 and C-432/07, *Sturgeon*, para 67.
[83] Markova, n. 81 at 115.
[84] Case C-315/15, *Marcela Pešková and Jiří Peška* v. *Travel Service a.s.*, ECLI:EU:C:2017: 342, para 22; Case C-549/07, *Wallentin-Hermann*, para 23.

technical problems are in principle not treated as extraordinary circumstances,[85] except if they are caused by foreign objects such as birds[86] or loose debris lying on a runway.[87] Moreover, the onus of proving extraordinary circumstances is on the air carrier seeking to rely on them, which must additionally have taken all the measures to avoid their occurrence.[88] The narrow interpretation of the exemption reinforces the objectivisation of the breach that triggers compensation.

Standardisation and objectivisation of compensation under the FCR make this regulation *technologically highly efficient*, as it is an excellent input for IT systems, improving their technical efficiency. Following data collected under the survey,[89] the best performing LT companies in this sector are able to autonomously assess the plausibility of the claim, that is, whether the plane arrived late, a passenger was denied boarding or a flight was cancelled (*objectivisation*). Additionally, the IT systems can calculate compensation without the intervention of experts. With fixed amounts of compensation, it is relatively easy to standardise. These two activities, which were traditionally carried out by lawyers with the support of non-legal experts, have been heavily automated. Consequently, the best performing companies in air carriage claims were classified as reaching a *high level of automation*.[90]

The FCR does not impede compensation of further, individual, damages.[91] However, among those companies that take care of individual damages, none of them automate those claims to the same extent as they do with the fixed amounts of the FCR.[92] Additionally, LT companies focus on compensation only, usually not dealing with the additional remedies foreseen in the FCR: reimbursement of the ticket, re-routing and assistance,[93] which are more dependent on a case-by-case assessment. These facts illustrate the importance of standardisation and objectivisation for the automation of legal services.

9.3.3.2 *Banking*

The best performing LT companies among those that manage banking claims can determine the plausibility of claims and estimate compensation without the intervention of lawyers or other human experts. Therefore, they also classify as companies that have reached a *high level of automation*.[94]

A website analysis of the target population in this stratum shows that a significant number of claims that LT companies manage have been litigated in court under the Unfair Contract Terms Directive (UCTD), an EU legislative instrument.[95] For example, floor clauses in loans, loans denominated in foreign currencies or convertible to them and mortgage expenses.

The UCTD controls unfair terms in non-negotiated B2C contracts, which are non-binding on the consumer.[96] It controls the substantive fairness of ancillary terms included in standard form

[85] Case C-257/14, *C. van der Lans* v. *Koninklijke Luchtvaart Maatschappij* NV, ECLI:EU:C:2015:618, paras 41 and 42.
[86] Case C-315/15, *Pešková and Peška*, para 24.
[87] Case C-501/17, *Germanwings*, para 26.
[88] Case C-315/15, *Pešková and Peška*, para 28.
[89] Section 9.2.2.3.
[90] Section 9.3.1.
[91] Art 12(1) FCR. Case C-354/18, *Rusu*, para 36. Hindriks, n. 81 at 117–119.
[92] Section 9.2.2.4.
[93] See Hipp, n. 4 at 347.
[94] Section 9.3.1.
[95] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. This section is an adapted and updated presentation of the main features of the UCTD that were expounded in F. de Elizalde, 'Standardisation of Agreement in EU law. An Adieu to the Contracting Parties?' in T. Tridimas and M. Durovic (eds.) *New Directions in European Private Law* (Oxford: Hart Publishing, 2020) 42–46.
[96] Arts 3(1) and 6(1) UCTD.

contracts directly if grey-listed in the Annex of the Directive, which some member states have turned into blacklists, following the minimum harmonisation approach of the UCTD.[97] Ancillary terms can also be controlled when they reunite the characteristics of the general criteria set forth in Art 3(1) UCTD: contrary to good faith, the term causes a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer.

The control of terms under the UCTD does not reach the essential obligations under the contract, namely, 'the definition of the main subject matter of the contract nor ... the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange'.[98] However, those essential obligations under the contract can be controlled if they are not drafted in 'plain intelligible language',[99] which is the requirement of transparency, additionally set forth in Art 5 UCTD, for all terms (ancillary and main). The CJEU advanced the interpretation of the UCTD by defining that transparency has the same substantive meaning throughout the UCTD,[100] which exceeds mere grammatical control. Moreover, as consistently held by the CJEU, this substantive interpretation depends on the capacity of an 'average consumer' to understand the legal and economic implications of a term.[101] The 'average consumer' benchmark was developed by the CJEU and is already decades old.[102] It refers to a consumer who is 'reasonably well-informed, reasonably observant and circumspect'.[103] The average consumer is a legal standard.[104]

A special characteristic of EU consumer law is that the definition of 'consumer' is objective.[105] In the UCTD, it means 'any natural person who ... is acting for purposes which are outside his trade, business or profession'.[106] In *Costea*, the CJEU clarified that the category of consumer (and the protection arising therefrom under the UCTD) is to be determined solely by the purpose of the contract, the actual knowledge or expertise of the actual consumer being immaterial.[107] The claimant of the case was a commercial lawyer, who challenged the validity of a credit agreement into which he had entered for non-professional purposes. Therefore, under

[97] Civic Consulting (for the European Commission), 'Study for the Fitness Check of EU consumer and marketing law' (2017), ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332, 77–78 (accessed 23 July 2020).

[98] Art 4(2) UCTD.

[99] Ibid.

[100] Case C-621/17, *Gyula Kiss and CIB Bank Zrt.* v. *Emil Kiss and Gyuláné Kiss*, EU:C:2019:820, para 36; Joined Cases C-154, 307 & 308/15, *Francisco Gutiérrez Naranjo* v. *Cajasur Banco SAU*; *Ana María Palacios Martínez* v. *Banco Bilbao Vizcaya Argentaria SA (BBVA) and Banco Popular Español SA* v. *Emilio Irles López and Teresa Torres Andreu*, EU:C:2016:980, para 49; Case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai* v. *OTP Jelzálogbank Zrt*, EU:C:2014:282, para 69; Case C-143/13, *Bogdan Matei and Ioana Ofelia Matei* v. *SC Volksbank România SA*, EU:C:2015:127, para 73.

[101] Case C-26/13, *Kásler*, paras 71–75.

[102] M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Oxford: Hart Publishing, 2016)24 ff.; V. Mak, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive' (2010) 4(10) *TISCO Working Paper Series on Banking, Finance and Services* 4 ff.

[103] Case C-26/13, *Kásler*, para 74.

[104] Recital 18 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (UCPD). See V. Mak, 'Standards in European Private Law. A Model for European Private Law Pluralism' (2013) 15(20129) *Tilburg Law School Legal Studies Research Paper Series* 18. On the use of empirical evidence, see B. B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Cham: Springer, 2015) 20 ff.

[105] E. Terryn, 'Consumers, by Definition, "Include Us All" ... but Not for Every Transaction' (2016) 24(2) *European Review of Private Law* 271 273–274.

[106] Art 2(b) UCTD.

[107] Case C-110/14, *Horațiu Ovidiu Costea* v. *SC Volksbank România SA*, EU:C:2015:538, para 21.

the UCTD, a consumer is treated and protected as such even if he or she is, in fact, a knowledgeable and experienced person.

Standardisation in the UCTD results from its homogeneous application to a multiplicity of cases, that is, to all parties bound by the same standard term. If a term is deemed unfair, it taints all standard form contracts that contain it, for example, when a term is considered to hinder the consumer's right to take legal action.[108] However, the extent of *res judicata* remains uncertain to some extent and, on occasion, the control of an unfair term can require further action.[109]

Standardisation is a characteristic of the UCTD for the purpose of controlling ancillary terms such as the one exemplified in the previous paragraph and to assess the lack of transparency of a term, even when it is a main one. This follows the objective definition of 'consumer' in the UCTD, whereby actual knowledge and expertise are immaterial, and the 'average consumer' is treated as a legal standard. Therefore, if a term is deemed non-transparent, it will taint all standard form contracts that contain it, even if a consumer does understand it. Standardisation of the UCTD makes it highly predictable and fit for automation.[110]

In respect of objectivisation in the UCTD, it is less evident than in the FCR. If a term is grey- or blacklisted, in some cases a breach can be determined objectively, for example, if it excludes liability of a seller for the death of a consumer.[111] In contrast, other unfair terms, including those affected by a lack of transparency, require an assessment of courts or other competent bodies. However, once a term is controlled and declared unfair, it will taint all standard form contracts that contain it without the need for a case-by-case assessment. Therefore, the breach (in this scenario, the unfairness) is only determined once.[112] Additionally, an unfair term contributes to the control of similar terms, which is a consequence of objectivisation and is a task that can be automated.[113]

LT companies that manage banking claims rely on the standardised character of the UCTD to predict outcomes in contracts that contain the same term as the one that has been deemed unfair. They normally collect claims only if a court or competent body has previously declared the term unfair. The prior declaration of unfairness justifies that those companies treat the breach as objective, in all contracts. This is how the best performing companies can determine the plausibility of claims. However, the need for a prior legal assessment of terms could explain why in the self-assessment exercise of the survey, respondents confirmed automation of banking claims to a lesser extent than air carriage claims.[114] As regards the estimation of compensation, an algorithm can calculate undue payments under the unfair term.

[108] Annex to the UCTD, 1(q).

[109] Joined Cases C-381 & 385/14, *Jorge Sales Sinués and Youssouf Drame Ba* v. *Caixabank SA and Catalunya Caixa SA (Catalunya Banc S.A.)*, EU:C:2016:252, paras 37, 39 and 43. Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság* v. *Invitel Távközlési Zrt*, EU:C:2012:242, para 43. See C. Leskinen and F. de Elizalde, 'The Control of Terms That Define the Essential Obligations of the Parties under the Unfair Contract Terms Directive: Gutiérrez Naranjo' (2018) 55 *Common Market Law Review* 1595 1610; H. W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771 794–796.

[110] Predictability leads to very high success rates in court. For example, it has been reported in Spain that 96.32 per cent of floor clauses claims have been upheld, https://elpais.com/economia/2019/05/21/actualidad/1558460686_067476.html (accessed 17 July 2020).

[111] Annex to the UCTD, 1(a).

[112] Micklitz and Reich, n. 109 at 796.

[113] On this, see the project Claudette, http://claudette.eui.eu/.

[114] Section 9.2.2.2. 75–90 per cent v. 90–100 per cent.

9.3.3.3 *Tenancy in Germany*

LT companies that manage tenancy claims in Germany have been classified among those that reach a *high level of automation* as they are able to determine the plausibility of claims and calculate compensation without the intervention of lawyers.[115]

An assessment of the types of claims that those companies manage reflects that rental prices are a major source of cases. They are subject to control in Germany (*Mietpreisbremse*). In fact, in order to counteract the exponential rise of prices on the housing market in Germany, the Tenancy Law Amendment Act (*Mietrechtsnovellierungsgesetz*, MietNovG)[116] was enacted in 2015 and incorporated into the German Civil Code (*BGB*).[117] It coexists with other rent controls.

The MietNovG allows regional state governments (*Landesregierungen*) to designate areas with tight housing markets for a maximum period of five years.[118] Areas with strained housing markets exist when, under reasonable conditions, an adequate supply of rented housing in a municipality is at particular risk. This may be the case where: (1) rents rise significantly faster than the national average; (2) the average rental load of households clearly exceeds the nationwide average; (3) the resident population is growing without the necessary housing being created through new construction or (4) there is low vacancy with high demand.

Tenancy agreements concluded in an area with a tight housing market cannot specify at the beginning of the tenancy (i.e., a new lease) rent that exceeds the local comparative rent (*ortsübliche Vergleichsmiete*) by more than 10 per cent.[119] Any agreement that exceeds that cap is invalid and the landlord is obliged to compensate the tenant for overpaid rent according to the rules on unjustified enrichment.[120]

The local comparative rent 'is formed from the usual payments that have been agreed or that have been changed in the last four years in the municipality or in a comparable municipality for residential space that is comparable in type, size, furnishings, quality and location, including the energy systems and characteristics'. This local comparative rent forms the basis of the rent index (*Mietspiegel*).[121]

The scope of application of the rental break is subject to several exceptions. The rent cap of the MietNovG does not apply to pre-existing leases that, notwithstanding, are affected by other price limitations.[122] Neither does it apply to apartments that are used and rented for the first time since 1 October 2014,[123] or which were substantially renovated in the last three years before the beginning of the tenancy.[124] Moreover, if the last rent owed by the previous tenant exceeds the otherwise maximum rent, the landlord may agree to a new tenancy price up to the amount of this previous rent when re-letting (i.e., he/she does not have to adjust to the price cap).[125]

Rent control is a highly objectivised legal rule, as the breach can be determined by data, without human intervention. A rental price can be algorithmically benchmarked with the local comparative rent to establish whether it exceeds the 10 per cent cap. It is also highly

[115] Section 9.2.2.3.
[116] *Gesetzes zur Dämpfung des Mietanstiegs auf angespannten Wohnungsmärkten und zur Stärkung des Bestellerprinzips bei der Wohnungsvermittlung (Mietrechtsnovellierungsgesetz – MietNovG)*, BGBl. 2015, Teil I Nr. 16, S. 610.
[117] §§ 556d–g BGB and other cross-referred sections.
[118] § 556d(2) BGB.
[119] § 556d(1) BGB.
[120] § 556g(1) BGB.
[121] § 558c BGB.
[122] §§ 557 ff. BGB.
[123] § 556f BGB.
[124] § 556e(2) BGB.
[125] § 556e(1) BGB.

standardised, as every tenant affected by a violation of the maximum rent has the same claim, that is, the amounts overpaid, with variations that can be easily calculated, also autonomously. However, the regulations on price control are certainly less standardised than compensation under the FCR. The peculiarities of the scope of application of the MietNovG, the exceptions to the application of the cap under the MietNovG and the coexistence with other rent controls may require an individualised assessment of facts. It comes as no surprise that in this sector fully automated claims management leads to lower success rates in court compared to those achieved in air carriage claims.[126]

9.3.3.4 *Telecommunications*

The management of telecommunications claims, among which nonconforming internet services stand out, has allowed the best performing LT companies to assess the plausibility of claims. However, they cannot determine autonomously the compensation due for such a nonconforming service. Therefore, they have been classified as *medium-high* in terms of automation.[127]

Regulation (EU) 2015/2120[128] ensures that the actual quality of internet services, especially regarding speed, matches that promised under a contract.[129] The breach is to be established by a monitoring mechanism certified by the national regulatory authority.[130] Nonconformity of performance triggers the remedies available to the consumer under national law, that is, they are not harmonised at an EU-level.[131]

Breach of contract under Regulation (EU) 2015/2120 is highly objectivised. The flawed provision of the promised internet speed can be determined without human intervention by speed tests, which, for the purposes of this legislative instrument, have to be certified by the national regulatory authority. Any stakeholder can easily determine the breach of an internet services contract by resorting to a speed test.

However, the second important element for automation, that is, standardisation of the legal rule, is absent. The remedies available to the consumer remain individualised and must be determined on a case-by-case basis. For example, compensation for a nonconforming service will depend on each contract and on the particular circumstances that surround it. Traditional rules for compensation will apply, taking the consumer protection framework into account.

Objectivisation in establishing a breach of contract explains that the IT systems of the best performing LT companies in this sector can autonomously assess the plausibility of claims. However, they cannot estimate compensation nor other available remedies under national law due to their individualised character. Current limitations on this aspect could be overcome if LT companies were to gain access to enough data on the resolution of telecommunications claims. If so, they would be able to predict compensation and the fate of other remedies. Nevertheless, even in that event, the lack of standardisation of Regulation (EU) 2015/2120 indicates that its technological efficiency as compared to the FCR, for example, will remain lower.

[126] Section 9.2.2.3. 75–90 per cent v. 95–100 per cent, in both cases taking into consideration the best performing companies.
[127] Section 9.3.1.
[128] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No. 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1.
[129] Art 4(4) Regulation 2015/2120.
[130] Ibid.
[131] Ibid.

9.4 CONCLUSION

This chapter purported to analyse the impact of law on the automation of legal services in litigation. The underlying hypothesis was that the drafting of law could determine automation. It was tested with data collected under a survey on LT companies that manage small value claims. It was then assessed against the backdrop of the laws applicable to the claims that participants to the survey handle.

The main finding of the chapter is that legal rules are unequally fit for automation. The way in which a legal rule is drafted determines its suitability for automation. This characteristic has been labelled here as 'technological efficiency'. The degree of standardisation and objectivisation of law contributes to its technological efficiency. Standardisation refers to the applicability of a legal rule to numerous cases without variations. Objectivisation of a legal rule describes its interaction with facts, whereby a rule would be objectivised if its breach is not open to interpretation.

A legal rule that is better in terms of technological efficiency serves as a better input to IT systems, leading to a higher technical efficiency. In LT, this means an increased automation, which leads to the substitution of lawyers in the provision of legal services. The best performing companies surveyed can determine the plausibility of claims and estimate compensation without the intervention of lawyers or other experts.

Business models and the technology deployed in a particular service are insufficient explanations for heterogeneity in the degree of automation of legal services. Variations in technological efficiency of law, which are determined by standardisation and objectivisation have a significant impact. These characteristics were assessed and detected in those types of claims that lead to higher levels of automation.

The unequal fitness of legal rules for automation is an issue that stretches beyond LT private companies. Taking this aspect into consideration would contribute to the task of building a framework for online justice, which could begin with those claims to which a highly technologically efficient rule applies. The key to success in automation seems not to be the amount of the claim but how the law is drafted. This approach to automation of law could impact legislators willing to draft laws that are suitable for automation. It could also determine success in the 'market' for law as has occurred to the common law in commercial transactions, for example, where a technological solution is foreseen. Parties would be more inclined to choose an applicable law to a contract that serves as a better input to IT systems.[132] The empirical and legal findings of this chapter would be reinforced if benchmarked with predictive analytics, a task that will hopefully be undertaken in the future.

[132] See, on the choice of law for smart contracts, G. Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' at 20, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552004 (accessed 28 July 2020).