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Introduction

From our cell phones to our cars, foreign products permeate American society. The expanding global economy depends on contracts, which provide companies with a degree of predictability to hedge against uncertain-

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ties in their business transactions. But not all contracts are created equal. All too often, contracting parties fail adequately to anticipate disputes that lie dormant during negotiations but wreak havoc during performance. These disputes frequently arise from the complexities of international commercial transactions, which befuddle even the most seasoned lawyers.

Lawyers can minimize the disruptiveness of these disputes by stipulating in the contract a method of resolving all potential disputes. Arbitration and litigation are two such methods; however, choosing between these can be difficult, particularly when contracts involve parties from different countries. Even the objective of drafting a dispute resolution clause may escape the purview of lawyers negotiating international contracts. After all, negotiations typically focus on key business features of a transaction rather than "boilerplate" provisions in the contract, such as dispute resolution clauses.[1] Failure to consider the ramifications of including an arbitration or litigation clause may produce serious unintended consequences. For instance, after a dispute arises, two parties that had consented to litigate disputes in an American court may be surprised to learn that they do not satisfy the court's jurisdictional requirements, and that to adjudicate their dispute the parties may need to appear before the court of another country. Further, even if a claimant prevails in an American court, the victory may be meaningless if the claimant cannot attach its adversary's assets. Assets located in another country, however, are generally unreachable if courts of that country do not recognize judgments from American courts.[2]

Perhaps stipulating to litigate potential disputes in a foreign court would solve the dilemma. Yet, understanding the language of foreign courts and navigating their complex procedural laws are anathema to many American businesses and their lawyers. Moreover, arbitration, despite its growing popularity, often fails to extricate the claimant from this conundrum. Many arbitrators prefer resolutions that do not produce total victory for either party but rather allocate evenly responsibility for damages. As a result, the parties may obtain more or less favorable decisions than an American court might render.[3]

Given the complications of resolving international commercial disputes, the primary objective of this Note is to answer the following question: Are parties to international contracts stipulating arbitration or litigation clauses in a manner that minimizes the risk of biased or unpredictable decisions? Part I of this Note summarizes the literature analyzing the advantages and disadvantages of using litigation and arbitration to resolve commercial disputes. Part II describes the data underlying the

1. Fredric D. Tannenbaum, *International Contracts: Practical Considerations to Maximize Enforcement*, PRAC. LAW., Oct. 1998, at 72.

2. The United States is not party to any treaty recognizing American judgments abroad.

3. Charles N. Brower & Abby C. Smutny, *Arbitration Agreements Versus Forum Selection Clauses: Legal and Practical Considerations*, *in* INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 37, 49-50 (Jack L. Goldsmith ed., 1996).

empirical analysis that follows in Part III. These include all ninety-six merger, acquisition, combination, share and stock exchange, and reorganization contracts filed with the Securities and Exchange Commission between January 1, 2002 and March 31, 2003 and involving at least one foreign party. Part III begins by comparing the relative frequency of arbitration and litigation clauses in these contracts. Part III then considers whether these usage rates are consistent with the analytical framework established in Part I for how parties should select dispute resolution clauses. Part III suggests possible explanations for the observed frequency of arbitration and litigation clauses, and ends by describing the location of the courts selected by parties that stipulated to litigate potential disputes. Part IV discusses limitations to the study and presents suggestions for future research. Part V provides a conclusion.

I. Background

When prudent parties negotiate the terms of a contract, they generally specify a method to resolve potential contractual disputes. Two types of clauses are commonly used.[4] The first triggers arbitration or litigation when a dispute arises. If parties stipulate a litigation clause, arbitration clause, or both, they may also include the second type of clause—a forum selection clause—setting forth the location and often the court in which parties will resolve potential disputes.[5]

A. Dispute Resolution Clauses

The importance of stipulating the method of resolution *before* a dispute arises is apparent in light of the alternative.[6] In the absence of a dispute resolution clause, the disputing parties confront two unappealing choices.[7] They may try, on the one hand, to find a mutually acceptable resolution method, undergoing the very negotiating process avoided earlier. Their strained relationship, however, may significantly diminish the prospects of a successful compromise.[8] A party may search, on the other hand, for a court with both subject matter jurisdiction over the dispute and personal jurisdiction over its adversary.[9] For a claimant whose adversary is from a foreign country, however, this search can be daunting.[10] Supposing that the claimant is able to find a qualified court, he then faces the

4. Mediation, a third method of resolving disputes, is not analyzed in this Note.

5. Tannenbaum, *supra* note 1, at 76-79.

6. *See* Brower & Smutny, *supra* note 3, at 37; *see also* Bernard E. Le Sage, *The Choice of an International Arbitration Forum: Contracting Parties can Avoid the Uncertainty of Foreign Courts*, LOS ANGELES LAWYER, Sep. 1998, at 19 (noting the importance of "certainty and predictability in international dispute resolution"); ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSACTIONAL LITIGATION 275-77 (2003).

7. Brower & Smutny, *supra* note 3, at 37.

8. *Id.* at 37-38.

9. *Id.* at 38.

10. *See* William W. Park, *The Relative Reliability of Arbitration Agreements and Court Selection Clauses*, *in* INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 3, 5-6 (Jack L. Goldsmith ed., 1997).

possibility of litigating in a foreign language, under unfamiliar procedural law, and before a partial judge.[11] Even if the claimant manages to prevail in a United States' court, no international treaty compels a foreign court to recognize the American judgment.[12] Worse yet, the judgment from an American court does not guarantee attachment of the assets located in foreign countries.[13] Astute parties can avoid many of these complications simply by stipulating to arbitrate or litigate any potential dispute.

Choosing between litigation and arbitration, however, requires careful consideration of several factors. For this inquiry, it is helpful to compare the differences between domestic and international commercial dispute resolution.

I will begin by discussing dispute resolution between domestic parties. Many American businesses and lawyers believe that courts resolve disputes more fairly than arbitrators.[14] They also suspect many arbitrators issue unanimous awards merely to compel the parties to accept the award as final.[15] A party convinced that it has either a strong claim or skilled lawyers capable of compensating for a weaker case may prefer to litigate in court. Moreover, unlike litigation, arbitration in the United States is not governed by formal rules of evidence, precedents, or appellate review, injecting additional uncertainty.[16] Although arbitration is widely touted for its speed and affordability, these advantages largely depend on the facts of the transaction.[17] Finally, a party can specify the dispute resolution forum in the litigation clause to achieve certain intangible benefits.[18] A contract may, for example, contain a clause securing exclusive jurisdiction in a court that provides the dominant party with a "hometown" advantage in litigation.[19] This example illustrates that, contrary to popular perception,[20] the drawbacks of arbitration are often unable to overcome the advantages of litigation for resolving commercial disputes between domestic parties.

Achieving the twin objectives of neutrality and predictability demands a different approach, however, when the transaction involves parties from

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11. Park, *supra* note 10, at 5-6.

12. RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 775-76 (8th ed. 2003); WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 46-47 (1995).

13. Park, *supra* note 12, at 46-47.

14. *See* Brower & Smutny, *supra* note 3, at 49-50.

15. *See id.*

16. *Id.* at 48-50.

17. Park, *supra* note 10, at 4; *see* John Y. Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 COLUM. J. TRANSNAT'L L. 11, 12-13 (2001) ("While international arbitration has indeed become the method of choice for many parties when resolving international disputes, it has experienced growing pains. Many complain that arbitration is often expensive and rarely results in a quick decision.").

18. Related to this point, Professor Park discusses the use of forum selection clauses by the dominant party to a contract as a tool of oppression against the weaker party. *See* Park, *supra* note 10, at 4.

19. *See id.*

20. *Id.* at 4 ("Despite the practitioners and scholars who wax eloquent about arbitration's high speed and low costs . . . .").

different countries.[21] In international business transactions, arbitration confers special advantages that often outweigh its perceived shortcomings. Indeed, it serves as an effective "tool to minimize the real or imagined dangers of litigation abroad: a mechanism to reduce the risk of ending up before a biased foreign judge who will apply unfamiliar procedures in a strange language."[22] Alternatively, parties may minimize the risks involved in litigating before a biased foreign judge by stipulating, along with a litigation clause, a court selection clause specifying an exclusive list of courts that may resolve potential disputes between the parties.[23] The following two sections discuss both options and explain why arbitration is preferable to litigation for resolving contractual disputes between parties from different countries.

B. Using Court Selection Clauses to Resolve Disputes

Parties may consent to litigate in courts of a particular city, state, or province to improve predictability or assure impartial adjudication of the dispute.[24] To achieve neutrality, the chosen court may sit in a country unaffiliated with any of the parties;[25] to achieve predictability, it may be one with which both parties are familiar.

A careful examination of the legal and practical implications of court selection clauses, however, reveals their limitations for resolving potential disputes arising from international business transactions. A court located in a third country may refuse to hear the case on grounds of *forum non conveniens* because the court will often lack a significant connection with the parties or the dispute.[26] In addition, selecting a court based on hometown advantage may prove less desirable than at first blush. To American businesses and their lawyers, the intuitive choice is to select a United States court to resolve disputes involving foreign adversaries.[27] Litigating in the United States means familiar judges, language, customs, and rules of procedure.[28] However, several obstacles may limit realization of these benefits. First, no other country is compelled to recognize a judgment from an American court. Because the U.S. is not a party to any treaty guaranteeing

21. *Id.* at 3 (analogizing forum selection clauses to a cow—quite a good animal on a field but not welcome when trampling through a vegetable patch).

22. *Id.* at 4; *see also* Mark R. Joelson, *Litigating International Commercial Disputes, by Lawrence W. Newman and David Zaslowsky*, 30 GW J. INT'L L. & ECON. 159, 159 (1996) (book review) ("Unfortunately for many litigants, the local judicial system involved may be ill equipped to deal effectively with the international aspects of the dispute—a task requiring a significant degree of sophistication and sensitivity.").

23. Park, *supra* note 10, at 6-7 (presenting arbitration agreements and jurisdiction clauses as two alternatives to litigation agreements).

24. *Id.* at 7.

25. William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 137 (1995).

26. *See id.* at 137.

27. Park, *supra* note 10, at 7.

28. *Id.* at 7-8. FIELD ET AL., *supra* note 12, at 775-76.

enforcement of American judgments abroad,[29] a claimant who prevails in an American court may be unable to attach any of its adversary's overseas assets.[30] Second, court selection clauses are not dispositive in the United States, with the exception of New York in limited cases.[31] Although several Supreme Court cases defer to court selection clauses, courts will only enforce "reasonable" clauses.[32] Multiple factors inform this reasonableness inquiry - a test that itself varies across judicial circuits.[33] Third, federal courts vary in their rules on whether state or federal law governs the enforcement of court selection clauses.[34] Federal courts that regard these clauses as matters of substantive contract law apply state law, while other courts apply federal law.[35] Fourth, subject matter jurisdiction and *forum non conveniens* could completely bar a court from hearing a dispute.[36] Under 28 U.S.C. § 1332, a federal court lacks subject matter jurisdiction over the dispute of two foreign parties that attempt to assert jurisdiction on the basis of diversity of citizenship.[37] *Forum non conveniens* may also preclude disputes when witnesses and documents are located in a distant location, or when adjudication threatens to drain public resources.[38]

C. Using Arbitration Clauses to Resolve Disputes

A World Bank survey of corporate executives revealed that predictability and neutrality were principal concerns of international investors.[39] Therefore, in order to avoid unfamiliar judicial procedures, foreign languages and customs, and the potentially partial courts of their foreign trading partners, international business managers would be expected to include arbitration clauses in their contracts.[40] Indeed, arbitration clauses confer at least six distinct advantages that litigation clauses alone cannot

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29. *See generally* Park, supra note 10, at 8-9. Donald C. Dowling, Jr., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses*, 7 PACE INT'L L. REV. 465, 469 (1995) ("As a practical matter, a U.S. party which gets a judgment in a U.S. court against a European defendant which does not have sufficient assets in the U.S. will end up re-litigating in a European court, in order to get the Europeans to enforce the judgment against the defendants' European assets.").

30. PARK, *supra* note 12, at 46.

31. Park, *supra* note 10, at 9.

32. *See id.* (referring to the following Supreme Court cases: Bremen v. Zapata Off-Shore, 407 U.S. 1 (1972); Stewart Organization Inc. v. Ricoh Corp., 487 U.S. 22 (1988); Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991)). *Bremen* held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10.

33. Park, *supra* note 10, at 9.

34. *Id.* at 10.

35. *Id.*

36. *Id.* at 11.

37. *See* 28 U.S.C. § 1332(a) (2005).

38. Park, *supra* note 10, at 11.

39. *See* Le Sage, *supra* note 6, at 19 (providing the cite, "[s]*ee, e.g.*, a 1994 World Bank survey of corporate executives that ranked Latin America's judicial system as one of the most significant constraints to private development in the region. Similarly, the World Bank in its 1997 annual report noted that corruption in law enforcement and the judiciary is a key factor holding back development of the former Soviet states.").

40. *See id.* at 19.

provide: predictability, neutrality, enforceability, confidentiality, finality, and expertise. I address each factor in turn.

1. *Predictability*

Arbitration often produces more predictable outcomes than litigation for international disputes.[41] Unlike courts, which can refuse to hear a dispute even if parties consent to a court selection clause, arbitrators will generally hear a dispute, provided the parties pay an arbitration fee.[42] Moreover, a court may transfer a dispute to a country where the courts are unpredictable or entirely unfamiliar to one of the parties. In this case, an arbitration clause will provide at least one of the parties with more predictable outcomes.

2. *Neutrality*

Arbitration provides for neutrality and fairness by allowing parties to have their dispute resolved in a "in a mutually accessible country, chaired by someone of a nationality different from the parties, with proceedings in English or some other common language, and according to procedural rules that give neither side an unfair advantage."[43] To the contrary, a party forced to litigate in a court of its adversary's country may encounter a biased judge and be less familiar with the court's customs and procedural laws.[44]

3. *Enforceability*

A prevailing party in arbitration benefits substantially from the ability to enforce an award in almost all countries where the losing party has its assets. Enforceability of arbitration clauses and awards are provided by three major treaty networks to which the United States is a party: the New York, Washington, and Panama Conventions.[45] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, frequently called the New York Convention, mandates that signatory countries recognize and enforce written arbitration agreements and arbitration awards.[46] As of

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41. Although Professor Park uses the term "reliable," we focus on predictability because, for purposes of this Note, a more reliable outcome is generally more predictable. *See* Park, *supra* note 12 at 53. *See* Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Award: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 869 (1996); *see also* Tannenbaum, *supra* note 1, at 76-79 (arguing that both larger and smaller corporations should select arbitration over litigation in their dispute resolution clauses for international contracts).

42. Park, *supra* note 10, at 12.

43. *Id.* at 6; *see also* Gotanda, *supra* note 17, at 12.

44. *See* GIUDITTA C. MOSS, INTERNATIONAL COMMERCIAL ARBITRATION: PARTY AUTONOMY AND MANDATORY RULES 149-50 (1999).

45. PARK, *supra* note 12, at 55.

46. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Arbitration Convention), (June 10, 1958) 330 U.N.T.S. 38, 21 U.S.T. 2517. Article II of the Convention provides in relevant part:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have

January 2006, 137 countries have signed the Convention.[47] To the contrary, judicial decisions do not receive the same uniform recognition. Although many states recognize the principle of comity of judicial awards, only the legislatures of the state are empowered to implement this principle.[48]

4. Confidentiality

Compared to judicial adjudication of a dispute, which courts hold before the public, arbitration provides an important measure of confidentiality, particularly to parties sensitive about public perception or the disclosure of proprietary information. Indeed, for larger corporations, the costs of damage to its commercial reputation can easily dwarf the costs of an award to its adversary.[49]

5. Finality

Most arbitration awards are final and binding, either because the arbitration clause explicitly provides for this, or because the governing rules of arbitration exclude any appeal from an award.[50] Thus, the total duration of arbitration proceedings may be shorter than that of judicial proceedings in which appeals are permitted.[51]

6. Expertise

Parties can select arbitrators with special expertise in the subject matter of the dispute. This expertise enables the arbitrators readily to appreciate the subtleties and complexities of the parties' transactions.[52] Judges, more typically, possess a general knowledge of private and commercial practice and, therefore, may require more time than an arbitrator to understand the technical or commercial nuances and implications of complex transactions.[53]

In sum, litigation is frequently a disfavored method for resolving international commercial disputes because of its inherent complications and the numerous advantages of arbitration. Nonetheless, if a contracting party consents to litigation, it should verify that the chosen court may

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arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article III of the Convention provides in relevant part: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."

47. Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 10, 2006).

48. Moss, *supra* note 44, at 152.

49. *Id.* at 150-51.

50. *Id.* at 151.

51. *Id.*

52. *See id.* at 150.

53. *See id.*

properly adjudicate any potential dispute, and that it can attach the assets of the other party.

D. Empirical Study

Given the advantages of arbitration in resolving international commercial disputes, do they appear with greater frequency than litigation clauses? That question forms the heart of my empirical study. At the outset of this inquiry, I recognize that American parties entering into international contracts may be reluctant to stipulate arbitration clauses unless they or their lawyers comprehend the potential disadvantages of litigation and the concomitant advantages of arbitration. My empirical examination also focuses on two corollary questions: When parties select litigation clauses, do they always specify a court? And, if so, where do these courts sit? This Note, I believe, yields key insights into how lawyers actually draft international contracts.

To provide context for understanding the results of the study, I will note that Professor William W. Park, an expert in international dispute resolution, has commented that few attorneys drafting international contracts carefully compare the merits of arbitration with court selection.[54] For instance, when Park asked a group of lawyers who worked on international business transactions why they chose particular courts or arbitration rules, many of them were unable to explain their decisions.[55] Additionally, another commentator and international contracts scholar has observed that American lawyers have been slow to adapt their approach from negotiating domestic contracts to international contracts despite the increasing number of international business transactions.[56]

II. The Data and Statistical Analysis

This Note involves two datasets. The first consists of all ninety-six merger, acquisition, stock exchange and share exchange, reorganization, and combination contracts filed with the Securities and Exchange Commission (SEC) between January 1, 2002 and March 31, 2003 and involving at least one foreign party. For purposes of this study, a contract involves at least one foreign party when either the acquiring or acquired party was incorporated or had a place of business in a country other than the United States. These contracts were obtained by reading over 1,000 merger, acquisition, reorganization, and exchange contracts filed with the SEC during the identified fifteen-month interval.

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54. Park, *supra* note 10, at 4.

55. *Id.* at 5. *But cf.* Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, 49 DISP. RESOL. J. 12, 12 (1994) ("Within the last 35 years, arbitration, rather than litigation in national courts, has become the preferred method of resolving international commercial disputes. To a large extent, this modern day reliance on the international arbitration process . . . .").

56. Tannenbaum, *supra* note 1, at 72 ("Despite the increasing reliance on world trade as a reality of American life, many lawyers' approach to negotiating contracts between parties from different countries has not undergone the same profound change.").

The second dataset consists of 187 merger, acquisition, stock and share exchange, reorganization, and combination contracts filed with the SEC between March 1, 2002 and June 30, 2002. Unlike the first dataset, the second consists only of domestic contracts. A contract is only domestic when both parties had their place of business and incorporation in the United States. This dataset will be compared with the first dataset to identify differences between international and domestic contracts.

A brief discussion of the process used to obtain the data is warranted. The contracts in both datasets were accessed via the searchable EDGAR-Plus® Database on LexisNexis.[57] Of the various fields coded for in each contract, the following are pertinent to the analysis: (i) date of SEC filing; (ii) name of acquiring firm; (iii) name of acquired firm; (iv) type of transaction; (v) acquiring firm's place of business; (vi) acquiring firm's place of incorporation; (vii) acquired firm's place of business; (viii) acquired firm's place of incorporation; (ix) law governing the contract; (x) presence of an arbitration or litigation clause; (xi) consent to jurisdiction of one or more forums; and (xii) location of forum. The type of transaction involved was determined by reading each contract and either identifying the contractual clause that expressly describes the transaction type or analyzing the structure of the transaction described in the contract.

The selected data was then imported into Stata 9.0, a statistical analysis software package. Stata's "tabulate" command was used to display the field (e.g., the frequency of litigation clauses) I wished to observe. After identifying the relevant fields, the Fisher's exact test was used to determine the statistical significance of certain results. Stata supports the Fisher's exact test through the "Chi2 exact" command. Another test employed in this analysis is the test of power, which Stata supports through the "sampsi" command. The power calculation reveals whether the sample size is large enough to observe a statistically significant difference in the results.

III. Analysis

A. Frequency of Arbitration and Litigation Clauses

Given that arbitration is preferable to litigation in resolving international commercial disputes, this section presents the observed rates of arbitration and litigation clauses among international and domestic contracts. Table 1 shows the rates of both types of clauses for international contracts.

57. From LexisNexis, the path to the EDGARPlus database is as follows: "Legal" > "Area of Law - By Topic" > "Securities" > "Filings" > "SEC Full-Text Filings" > "EDGAR-Plus® Database." After arriving at the Database, which features a searchable textbox, two search terms were entered: exhibit type 2 (EXHIBIT-TYPE (2)) and the filing date of the contract in the "FILING-DATE IS" field. The number two (2) in exhibit type corresponds to acquisition and reorganization plans. This search produces all merger, acquisition, reorganization, stock and share purchase, stock and share exchange, combination, and spin-off contracts filed with the SEC on the entered date. As an example, the search term for contracts filed on February 1, 2002 would be: EXHIBIT-TYPE (2) and FILING-DATE IS (2/1/2002).

It indicates that of the ninety-six contracts, only 15% contain an arbitration clause, while 67% contain a litigation clause, signifying that there are over four times as many litigation clauses as arbitration clauses.

The remarkably low percentage of arbitration clauses is startling.[58] One might suspect, consistent with the commentaries of Professor Park and legal scholars, that the parties to the contracts did not fully consider the different implications of domestic and international dispute resolution. If this were true, one would expect to observe similar rates of arbitration and litigation clauses. On the other hand, the parties may have fully recognized the precarious nature of litigating international commercial disputes but continued to perceive arbitration as too troublesome. Unfortunately, only a modicum of relevant literature exists on the perceptions and behaviors of lawyers negotiating contracts.[59]

To better understand the different manner in which the parties and their lawyers drafted domestic and international contracts, I compared the rates of arbitration and litigation clauses between the two types of contracts. Table 2 shows these rates for domestic contracts. A comparison of Table 2 and Table 1 reveals a similar frequency of arbitration clauses in domestic and international contracts. 21.9% of domestic contracts and 14.6% of international contracts contain arbitration clauses. Likewise, 57.8% of domestic contracts and 66.7% of international contracts contain litigation clauses. Although the frequency of arbitration clauses is slightly higher in domestic than in international contracts, the difference, $p = 0.156$, is not statistically significant.[60] The statistical insignificance means

58. See the discussion below on the test of powers for what might have been a meaningful difference between the frequency of arbitration clauses in international and domestic contracts.

59. *See generally* Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, *in* BEHAVIORAL LAW AND ECONOMICS 116, 116-17 (Cass R. Sunstein ed., 2000) (discussing the "effects that the status quo bias can have on the negotiation of contract terms").

60. One can view the test of statistical significance as analyzing the hypothesis that international and domestic contracts are equally like to contain arbitration clauses. This hypothesis is called the null hypothesis. The reported significance levels, also called p-values, represent the probability of rejecting the null hypothesis when it is in fact true. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1127 n.17 (1996) (citing GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, STATISTICAL METHODS 64 (8th ed. 1989)) ("The p-value measures the likelihood that the observed differences in win rates are attributable to mere random variation rather than real differences. If the p-value is 0.05, for example, there is a 5% probability that the observed or larger differences could occur by chance if in fact the null hypothesis were true. Convention dictates that p-values at or below the 0.05 level are described as statistically significant."); THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 197 (Stephen E. Fienberg ed., 1989).

The following table was used to determine the statistical significance of the frequency of arbitration clauses. The table categorizes contracts based solely on the presence of an arbitration clause.

	Arbitration Clause (Number of clauses in parentheses)	
	Yes	No
International	14.6% (14)	85.4% (82)
Domestic	21.9% (41)	78.1% (146)

that the hypothesis that arbitration clauses appear with similar frequency in domestic and international contracts is not necessarily false. As a practical matter, this is equivalent to concluding that no difference exists between the rates of arbitration clauses in domestic and international contracts. Thus, the frequency of litigation clauses betrays the significant risk of unpredictable or biased outcomes associated with this method of dispute resolution.

Table 1. Frequency of Arbitration and Litigation Clauses: International Contracts

	Arbitration Clause	*Litigation Clause*
Yes	14 (14.6%)	64 (66.7%)
No	82 (85.4%)	32 (33.3%)
Total	96 (100.0%)	96 (100.0%)

Note: This data consists only of contracts filed from January of 2002 through March of 2003.

Table 2. Frequency of Arbitration and Litigation Clauses: Domestic Contracts

	Arbitration Clause	*Litigation Clause*
Yes	41 (21.93%)	108 (57.8%)
No	146 (78.07%)	79 (42.2%)
Total	187 (100.0%)	187 (100.0%)

Note: This data consists only of contracts filed from March through June of 2002.

Table 3. Frequency of Arbitration and Litigation Clauses: International and Domestic Contracts

	Arbitration only	*Litigation only*	*Both types*	*None*	*Total*
International	5	55	9	27	96
	(5.21%)	(57.29%)	(9.38%)	(28.13%)	(100.0%)
Domestic	16	83	25	63	187
	(8.56%)	(44.39%)	(13.37%)	(33.69%)	(100.0%)
Total	21	138	34	90	283
	(7.42%)	(48.76%)	(12.01%)	(31.80%)	(100.0%)

Note: P = 0.225 (Fisher's exact)

The power value of a statistical test should be indicated when claiming

A two-sided Fisher's exact test shows a p-value of 0.156, meaning that there is a 15.6% probability that the difference between the rates of arbitration clauses in international and domestic contracts occurred by chance. The Fisher's exact test is preferable when the cell counts are small. *Id.* Because the computed p-value is significantly larger than the selected significance level of 0.05, we cannot reject the null hypothesis. When the null hypothesis cannot be rejected, the outcome of the experiment is not statistically significant because one cannot rule out mere chance as an explanation of the difference. Note that no amount of data will permit us to accept the null hypothesis as true.

that no statistically significant effect is discernible.[61] The power test determines whether the sample size of a study is large enough to reveal socially meaningful differences in the results.[62] In this study, the power value represents the likelihood of detecting a specified change in the frequency of arbitration clauses when comparing domestic and international contracts at the 0.05 significance level.[63] Unless a test is powerful, the likelihood of detecting the effect is small.[64]

Calculating a power value requires specifying a value representing a socially meaningful change in the frequency of arbitration clauses from domestic to international contracts. Before specifying this value, note that the observed change, a decrease of 7.1%—from 21.9% (domestic contracts) to 14.6% (international contracts)—is not socially meaningful. Indeed, it is contrary to expectation because international contracts should have contained more, not fewer, arbitration clauses. Therefore, I dismiss the usefulness of calculating the power value of the observed change and instead calculate the power value of two changes that one would consider meaningful. Suppose I specified an increase in the frequency of arbitration clauses from 21.9% (domestic contracts) to 32.9% (international contracts). The power of our test would be 0.46. In other words, the sample size yields a 46% chance of detecting an increase from 21.9% to 32.9%. Alternatively, suppose I specified a change from 21.9% to 43.8%. The power of the test would be 0.95 and therefore, I have a high chance of detecting this difference if it exists.

The preceding analysis compares data collected from fifteen months of international contracts (January 2002 through March 2003) with four months of domestic contracts (March through June of 2002). One can address this discrepancy in the dates of the contracts by including in the dataset domestic contracts filed during the same fifteen months as the international contracts. Numerous practical constraints, however, made gathering a sufficient amount of data for this comparison prohibitively difficult. I was able, however, to determine the frequency of arbitration clauses for international contracts filed during the same four-month period as the domestic contracts. The data reveal no significant difference from the frequency of arbitration clauses for the fifteen-month period; therefore, the results of the study are not suspect. Among the twenty-one international contracts filed during these four months, only three (14.3%) had arbitration clauses. This percentile figure, although based on a relatively sparse dataset, corresponds with the 14.6% frequency of arbitration clause for international contracts filed during the entire fifteen month period. Similarly, there does not appear to be any reason (e.g., temporary fluctua-

61. *See* Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of the BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will be Reduced*, 7 S. CT. ECON. REV. 59, 80 (1999).

62. *See id.*

63. *See id.* at 79-80 ("The power of a statistical test is the likelihood of detecting an effect of a specified size at a specified significance level.").

64. *Id.* at 80.

tions in market conditions) to infer that the 21.9% of arbitration clause for domestic contracts would fluctuate significantly if the dataset were extended from four to fifteen months.

B. Factors Influencing Frequency of Arbitration and Litigation Clauses

The following section attempts to identify factors that may have influenced the relative reliance on arbitration and litigation clauses. To identify these factors, the section examines a possible correlation between the use of arbitration clauses and the presence of particular factor.

1. Reliance on Litigation

Parties may perceive marginal benefits from adding an arbitration clause to a contract already containing a litigation clause. Thus, the pertinent question is whether parties have stipulated litigation clauses in place of arbitration clauses. Table 3 shows the number of international contracts that contain only an arbitration clause, only a litigation clause, both types of clauses, or neither type of clause. It indicates that of the eighty-two international contracts without an arbitration clause, twenty-seven (33%) contain no litigation clause.[65] This indicates that in nearly one-third of the contracts without an arbitration clause this omission did not result from any reliance on a litigation clause. Conversely, 67% of the international contracts without an arbitration clause contained a litigation clause. We cannot conclude, of course, that the inclusion of a litigation clause *caused* the exclusion of an arbitration clause.[66] That is, we cannot decisively say that these parties adopted litigation clauses *in lieu of* arbitration clauses.

Determining whether parties relied on litigation clauses provides us with another opportunity to compare the frequency of dispute resolution clauses in international and domestic contracts. Table 3 shows that, among the 146 contracts without an arbitration clause, sixty-three (43%) contain no litigation clause.[67] This percentage is similar to the corresponding figure of 33% for international contracts.[68]

2. Type of Transaction

Because the datasets include contracts representing different types of transactions (e.g., mergers, acquisitions, combinations, exchanges, and reorganizations), it is possible that a disproportionately large percentage of the dispute resolution clauses appeared in only certain types of transac-

65. The eighty-two international contracts consist of the fifty-five contracts with only a litigation clause and the twenty-seven contracts without a dispute resolution clause.

66. We can observe only correlation, but not causation, between these two factors.

67. The 151 international contracts consist of eighty-eight contracts with only a litigation clause and sixty-three contracts without a dispute resolution clause. The twenty-eight percent refers to the twenty-seven international contracts without a dispute resolution clause.

68. Thirty-three percent equals the twenty-seven international contracts without a dispute resolution clause, divided by the eighty-two international contracts without an arbitration clause, and multiplied by 100.

tions. For example, merger agreements could be particularly conducive to arbitration clauses. If this were true, the number of arbitration clauses would be limited largely by the number of merger contracts in the dataset. Table 4 allows us to identify any correlation between type of transaction and the frequency of arbitration or litigation clauses and thereby detect potentially limiting factors. A comparison of the frequency with which a particular type of transaction appears in the dataset and the frequency with which arbitration or litigation clauses appears for that type of transaction will reveal any such correlation. If the latter is substantially greater than the former, a limiting effect might exist. For example, suppose 30% of the international contracts are mergers, but merger contracts contain 90% of all arbitration clauses. It follows that the presence of merger contracts tends to limit the total number of arbitration clauses. If the dataset had fewer merger contracts, it is likely that the number of arbitration clauses would decrease correspondingly.

Table 4 shows the distribution of arbitration and litigation clauses among the five categories of transactions. With few exceptions, Table 4 reveals similarities between the percentages of arbitration or litigation clauses belonging to a particular type of transaction and the percentage of that type of transaction among the international contracts. For example, acquisition contracts account for 19.8% of all contracts in the dataset, and they contain 18.3% of all arbitration clauses and 21.9% of all litigation clauses. The differences between 18.3% and 19.8%, or 18.3% and 21.9%, are not sufficiently large to conclude that acquisition contracts contain a disproportionately large share of the arbitration or litigation clauses within the dataset. An analogous conclusion holds true for the four other types of transactions.[69] Thus, among contracts comprising the dataset, the scarcity of arbitration clauses is unlikely to result from the characteristics of any particular type of transaction.

69. Because of the exceptionally low observance rate of combination contracts (2), one cannot draw any meaningful conclusions from the percentile figures corresponding to these contracts.

Table 4. Distribution of Arbitration and Litigation Clauses among Types of Transactions in International Contracts

	Type of Transaction (number of clauses in parenthesis)					
Arbitration clause	*Acquisition*	*Combination*	*Exchange*	*Merger*	*Reorganization*	*Total*
No	18.3% (15)	1.2% (1)	19.5% (16)	50.0% (41)	11.0% (9)	100% (82)
Yes	*28.6%* (4)	*7.1%* (1)	*0.0%* (0)	*57.1%* (8)	*7.1%* (1)	100% (14)
Litigation clause						
No	15.6% (5)	3.1% (1)	18.8% (6)	37.5% (12)	25.0% (8)	100.0% (32)
Yes	*21.9%* (14)	*1.6%* (1)	*15.6%* (10)	*57.8%* (37)	*3.1%* (2)	100.0% (64)
Total	*19.8%* (19)	*2.1%* (2)	*16.7%* (16)	*51.0%* (49)	*10.4%* (10)	100.0% (96)

Note: The easiest way to read this table is to compare the italicized percentages in a column.

3. *Status of Foreign Party*

The presence of a foreign party, either as the acquiring or acquired company, could influence the decision of American parties in selecting a particular type of dispute resolution clause. For the purposes of this study, a contract contains a foreign party if either the acquiring or acquired company was incorporated or had a place of business in a country outside of the United States. If contracts involving foreign acquiring parties contain a disproportionately large percentage of all the arbitration or litigation clauses, one might conclude that these clauses are correlated with the presence of foreign acquiring parties. The same analysis holds true for acquired parties. Table 5 shows that arbitration or litigation clauses are not disproportionately associated with either foreign acquiring or acquired parties. Among contracts containing an arbitration clause, 50% had a foreign acquiring party while 43% had a foreign acquired party.[70] Similarly, among contracts with a litigation clause, 48% had a foreign acquiring party while 34% had a foreign acquired party. Because it appears from these figures that we are only slightly more likely to find an arbitration or litigation clause in a contract with a foreign acquiring party than a foreign acquired party, we cannot confidently conclude that arbitration and litigation clauses are significantly more associated with one than the other.[71]

70. Although only 7.1% of contracts with two foreign parties had arbitration clauses, only 14.6% of all contracts had two foreign parties. More importantly, 7.1% represents only one (1) party, an exceedingly low number upon which to base any reasonable conclusions for this study.

71. Indeed, the Fisher's exact test yields a p-value of 0.580.

Table 5. Influence of Foreign Party on Frequency of Arbitration and Litigation Clauses

	Status of Foreign Party			
Arbitration	*Acquiring party*	*Acquired party*	*Both parties foreign*	*Total*
No	34 (41.5%)	35 (42.7%)	13 (15.9%)	82 (100.0%)
Yes	7 (50.0%)	6 (42.9%)	1 (7.1%)	14 (100.0%)
Litigation				
No	10 (31.3%)	19 (59.4%)	3 (9.4%)	32 (100.0%)
Yes	31 (48.4%)	22 (34.4%)	11 (17.2%)	64 (100.0%)
Total	41 (42.7%)	41 (42.7%)	14 (14.6%)	96 (100%)

Note: p = 0.580 (Fisher's exact).

C. Court Selection Clauses

This section presents the jurisdictions in which the parties consented to litigation, and how frequently the parties chose to litigate in the state whose law governed the contract. This section avoids discussing influences on the choice of jurisdiction, because the dataset is not large enough to reveal statistically significant correlations. Nonetheless, Part IV suggests possible areas of future research if a larger dataset becomes available.

1. *Frequency of Court Selection Clauses*

A contract that contains a litigation clause may not always contain a clause stipulating to the jurisdiction of a court. Among the ninety-six contracts studied, however, every litigation clause was accompanied by a court selection clause. This result is not surprising, since a principal purpose of including a litigation clause is to influence the outcome of dispute resolution. As discussed in Part I, often the resolution of a dispute will depend more on who decides it than on the applicable legal standards.[72] Thus, parties often have every incentive to stipulate the particular court that will resolve potential disputes.

2. *Litigation Jurisdiction*

The next inquiry is the frequency with which parties consent to courts of a particular jurisdiction. Table 6 shows the frequency with which parties selected each litigation jurisdiction. The rows, "Any federal court," through, "Washington," represent contracts that explicitly consent to courts in the United States. The next rows indicate that the only foreign courts to which parties consented were in Canada, China, England, and Israel. The final row indicates that thirty-two of the contracts contain no litigation clause.

The most popular courts were in Delaware and New York. This is not surprising, because many of the courts in these states are widely regarded

72. Park, *supra* note 12, at 33; *see also* Park, *supra* note 25, at 137 ("The text of a legal rule is often less important than the context of its interpretation and application.").

as experienced in resolving complex questions of commercial law. For instance, the Delaware Chancery court oversees matters involving Delaware's General Corporate Law and has judges appointed by merit. These courts are also popular because, as the next section reveals, many of the contracts are governed by Delaware or New York law.

Table 6. Frequency of Court Selection Clauses

Litigation Jurisdiction	*Frequency*	*Percentage*
Any federal court	4	4.2
California	5	5.2
Colorado	1	1.0
Delaware	17	17.7
Florida	4	4.2
Georgia	1	1.0
Maryland	1	1.0
New Jersey	1	1.0
Nevada	5	5.2
New York	14	14.6
Texas	2	2.1
Washington	2	2.1
Canada	3	3.1
China	1	1.1
England	2	2.1
Israel	1	1.0
None selected	32	33.3
Total	96	100.0

3. *Overlap between Litigation Jurisdiction and Choice of Law*

Ninety-five of the ninety-six contracts stipulate the law that governs the interpretation of the contract. The selected litigation forum may, but need not, be in the same state whose law governs the contract. Where the former and latter do correspond the outcome of litigation is more predictable because precedent informs parties of the current interpretation of the law.[73] The outcome of litigation is also more reliable because judges are more likely to have experience adjudicating the law governing the dispute.

Table 7 shows that among the ninety-five contracts, many of the parties that consented to courts of a state also chose the law of that state to govern their contract.[74] Specifically, the ratio of (i) contracts containing consents to both the law and court of state *X* to (ii) all contracts containing consents to the court of state *X* are as follows: 2 to 5 for California (40%), 15 to 17 for Delaware (88%), 3 to 4 for Florida (75%), 5 to 5 for Nevada

73. *See* David S. Steuer, *A Litigator's Perspective on the Drafting of Commercial Contracts*, Practising Law Institute: Drafting Corporate Agreements 2004-2005 (2005). Steuer recommends that parties, where practical, select forums in order to align the contract's choice of forum with its choice of law.

74. California is the one exception. Three of the five contracts consenting to jurisdiction in California also consented to Delaware choice of law.

(100%), and 12 to 14 for New York (86%). This yields an aggregate average of 78% among the five states.[75] Among contracts explicitly consenting to courts of a foreign country,[76] every contract was governed by the law of that country. It is important to note, however, that the low sample rate for these contracts (three for Canada, two for England, and one for Israel and the People's Republic of China) limits the usefulness of these observations. Undoubtedly, a larger sample size would have allowed a fuller exploration of the implications of the overlap between the country of the selected court and choice of law. Nonetheless, one expects that a larger dataset would reveal a strong overlap because, on average, the outcome of dispute resolution is more reliable and predictable when judges adjudicate disputes based on laws with which they are very familiar. Finally, I observe that no party consenting to a foreign court chose American law to govern their contract. Surely, one reason is to avoid the precarious situation in which foreign judges apply American laws without the assistance of an expert counsel.[77]

Table 7. Frequencies of Choice of Law and Court Selection Clauses

	Jurisdiction											
Law	*CA*	*DE*	*FL*	*NV*	*NY*	*Other*	*CND*	*ENG*	*ISR*	*PRC*	*None*	*Any*
CA	2	0	0	0	0	0	0	0	0	0	4	0
DE	3	15	0	0	0	0	0	0	0	0	7	2
FL	0	0	3	0	0	0	0	0	0	0	2	0
NV	0	0	1	5	0	0	0	0	0	0	6	2
NY	0	1	0	0	12	0	0	0	0	0	3	0
Other states	0	1	0	0	1	7	0	0	0	0	6	0
Virgin Isle	0	0	0	0	0	1	0	0	0	0	0	0
Canada	0	0	0	0	0	0	3	0	0	0	1	0
England	0	0	0	0	1	0	0	2	0	0	1	0
Israel	0	0	0	0	0	0	0	0	1	0	0	0
P.R. of China	0	0	0	0	0	0	0	0	0	1	0	0
Switzerland	0	0	0	0	0	0	0	0	0	0	1	0
None selected	0	0	0	0	0	0	0	0	0	0	1	0
Total	5	17	4	5	14	8	3	2	1	1	32	4

Note: The abbreviations used for foreign countries are as follows: Canada (CND), ENG (England), Israel (ISR), and the People's Republic of China (PRC). "None" refers to contracts without a choice of law or jurisdiction clause. "Any" refers to contracts explicitly consenting to any court in the United States. "Other" refers to contracts explicitly consenting to states other than CA, DE, FL, NV, or NY.

IV. Limitations and Future Research

The small sample size of the dataset limits the confidence one can repose in certain conclusions drawn in prior sections of the discussion. Among the over 1,000 merger, acquisition, reorganization, exchange, and

75. Table 7 consolidates into the "Other" column the data for all states other than California, Delaware, Florida, Nevada, and New York, because none of the consolidated states were selected as the location for litigation in more than two contracts.

76. Foreign country means country other than the United States.

77. For the same reason that expert counsel assist American judges applying foreign law in order to avoid erroneous outcomes, foreign judges may be no better at applying American law without assistance of expert counsel. *See* Joelson, *supra* note 22, at 173.

combination contracts comprising the dataset, the number of contracts involving foreign parties is fewer than 10%. Of these ninety-six contracts, only fourteen contain arbitration clauses. The limitations of the data are most problematic when attempting to analyze contracts explicitly consenting to courts of foreign countries. Considering that fifteen months of data provided less than three contracts for any foreign country whose courts were chosen as the litigation forum,[78] several years of data would be required to draw any statistically significant conclusions about the frequency with which parties consent to courts in foreign countries. Intangible factors defying strict classification present a final barrier to identifying influences on the frequency of arbitration and litigation clauses. For example, the experiences of a party or its lawyers with a particular court may influence the decision to adjudicate in that court. This type of data, however, cannot readily be collected.

Given the respective advantages and disadvantages of using arbitration and litigation to resove international commerical disputes, the low frequency of arbitration clauses is certainly surprising. The observations of this Note, however, are not entirely surprising considering the fundamentally different objectives for including arbitration or litigation clauses in domestic and international contracts. Lawyers accustomed to drafting domestic contracts may not immediately perceive the benefits of arbitration for resolving international commercial disputes. This could explain the similarity in the rates of arbitration clauses among the ninety-six international contracts and the 187 domestic contracts. On the other hand, lawyers might recognize the different, and often serious, implications of including or excluding arbitration and litigation clauses in international contracts but perceive the drawbacks of arbitration as too troublesome. Although this Note has attempted to account for three factors that might have influenced the presence of arbitration clauses, others undoubtedly remain. Given the growth of the global economy, further empirical analysis might prompt more lawyers to place greater emphasis on drafting contracts that mitigate the possibility of obtaining unpredictable and biased outcomes from international dispute resolution.

The selection of one or more courts to litigate potential disputes also merits further investigation. In particular, a larger dataset would permit more accurate characterization of the factors that influence parties and their lawyers in their selection of courts. Possible factors include choice of law, the acquiring company's place of business and incorporation, the acquired company's place of business and incorporation, the drafting lawyer's place of business, and the reputation of a court.

Due consideration of the advantages and disadvantages of arbitration and litigation reveal that, in general, arbitration is the optimal method of resolving disputes arising from international contracts. As a group, however, the parties to the ninety-six contracts from January 1, 2002 through March 31, 2003 did not rely heavily on arbitration clauses. Indeed, the

78. *See* Table 7.

frequency of arbitration clauses was not higher in these international contracts than in the 187 domestic contracts. In considering the manner in which parties stipulated court selection clauses, this Note observed that the chosen state or country in a choice of law clause often corresponds to the chosen state or country in a court selection clause. However, the paucity of data makes it difficult to identify factors influencing this selection. Nonetheless, the results of this preliminary research strongly indicate the need for further empirical investigation, especially given the importance of contracts in our increasingly global economy.