An Empirical Study of Dispute Resolution Clauses in International Supply Contracts

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ABSTRACT

International transactions present unique legal risks. When a contract touches several different nations, a party may not know where it will be called upon to defend a lawsuit or, alternatively, which nation's law will be applied to resolve that dispute. To mitigate these risks, parties will often write dispute resolution provisions into their contracts. Arbitration clauses and forum selection clauses help to reduce uncertainty relating to the forum. Choice-of-law clauses help to reduce uncertainty as to the governing law. Over the past few decades, such provisions have become commonplace in international contracting. And yet there exist vanishingly few empirical studies exploring the use of these provisions in international commercial agreements.

This Article aspires to fill this gap. Drawing upon a hand-collected dataset of 157 international supply agreements, it describes the ways in which large corporations seek to mitigate their risk in international transactions via dispute resolution clauses. The Article first provides a thorough descriptive account of choice-of-law clauses in these agreements to illustrate the myriad ways these clauses do and do not mitigate legal risk. It then undertakes the same project with respect to arbitration clauses and forum selection clauses, paying careful attention to the ways in which actual practice deviates from the model forms

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promulgated by arbitration groups, to show how these clauses mitigate forum risk.

While the primary objective of the Article is descriptive rather than normative—it seeks to describe the contents of agreements that have heretofore been largely ignored by legal scholars—it also discusses the normative implications of its descriptive account for three groups. First, legal scholars may draw upon this account to better understand how contract boilerplate evolves and changes over time. Second, judges called upon to interpret a contract may utilize this account to determine whether a phrase is typically included in clauses of a given type. Third, and finally, contract drafters may glean useful insights into how to craft dispute resolution provisions that maximize the reduction in uncertainty in international contracting.

TABLE OF CONTENTS

I. INTRODUCTION

One notable gap in the growing empirical literature on the terms and provisions of contracts is studies of the dispute resolution clauses in international commercial contracts.[1] A number of studies have examined the terms and provisions of arbitration clauses in domestic

1. Zev J. Eigen, *Empirical Studies of Contract*, 8 ANN. REV. L. & SOC. SCI. 291, 297 & fig. 2 (2012) (reporting that "[t]he most frequently asked question," comprising 29 percent of the 113 empirical studies of contracts in the sample, was "Which terms are included in contracts?"); *see* Geoffrey P. Miller, *Empirical Analysis of Legal Theory: In Honor of Theodore Eisenberg*, 171 J. INSTITUTIONAL & THEORETICAL ECON. 6, 6 (2015) (summarizing studies by Eisenberg and Miller). *See also generally* Norman D. Bishara, Kenneth J. Martin, & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1 (2015); John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631 (2017) [hereinafter Coyle, *Canons*]; John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. PA. J. INT'L L. 195 (2016) [hereinafter Coyle, *CISG*]; Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309 (2009); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008); Robert Taylor & Florencia Marotta-Wurgler, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240 (2013).

US contracts, including consumer,[2] franchise,[3] CEO employment,[4] and material corporate contracts.[5] But while several studies have examined the use of arbitration clauses and forum selection clauses in international contracts, only rarely have the studies looked beyond the basic choice between arbitration and litigation to the detailed provisions of those clauses.[6] Choice-of-law clauses have attracted even less academic attention.

This Article takes steps toward filling this gap in the empirical literature. It provides a detailed analysis of the terms and provisions of choice-of-law clauses, arbitration clauses, and forum selection clauses in a hand-collected dataset of 157 international supply contracts. Some findings worthy of note include the following:

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2. *See, e.g.*, CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) at § 2 (2015) [hereinafter CFPB FINAL REPORT]; *see also* Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 653–61 (2012). *See generally* James R. Bucilla II, *The Online Crossroads of Website Terms of Service Agreements and Consumer Protection: An Empirical Study of Arbitration Clauses in the Terms of Service Agreements for the Top 100 Websites Viewed in the United States*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 102 (2014); Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536 (2012) (showing how most credit card issuers do not use arbitration clauses in their agreements); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341 (2014); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1 (2013); Elizabeth C. Tippett & Bridget Schaaff, *How* Concepcion *and* Italian Colors *Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS L. REV. 459 (2018).

3. *See generally* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration*, 37 HOFSTRA L. REV. 71 (2008); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001); *see also generally* Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549 (2003) (arguing that deterrence has played a role in the increased presence of arbitration clauses in franchise contracts); Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955 (2014) (finding that the increased presence of arbitration clauses in franchise contracts has not been a dramatic shift).

4. *See generally* Erin O'Hara, Kenneth J. Martin & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133 (2012); Randall S. Thomas, Erin O'Hara & Kenneth J. Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959 (2010).

5. *See generally* John C. Coates, IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295 (2012) (documenting how these arbitration clauses affect M&A litigation); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007) [hereinafter Eisenberg & Miller, *Arbitration*]; David A. Hoffman, *Whither Bespoke Procedure*, 2014 U. ILL. L. REV. 389; W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865 (2015) (documenting the considerations that go into including arbitration procedures in contracts).

6. *See infra* text accompanying notes 82–93.

Prevalence of Dispute Resolution Clauses. Virtually all the international supply agreements in the sample (99 percent) contained a choice-of-law clause. Slightly more than half of the agreements (55 percent) contained an arbitration clause. Just over a third of the agreements (36 percent) contained a forum selection clause.

New York as Neutral Jurisdiction. When the parties to international supply agreements involving at least one US party chose a "neutral" jurisdiction with no connection to either party, they overwhelmingly gravitated to New York in their choice-of-law clauses, their arbitration clauses, and their forum selection clauses.

Gaps in the Choice-of-Law Clauses. Most of the choice-of-law clauses (80 percent) in the agreements did not address the issue of scope (i.e., whether the chosen law applies to tort and statutory claims as well as contract claims). A similar percentage (76 percent) did not address the distinction between substantive and procedural law.

The CISG. The parties expressly opted out of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 39 percent of the international supply agreements. They expressly opted in to the CISG in less than 1 percent of the agreements. Slightly more than 60 percent of the agreements contained no express reference to the CISG.

Departures from Model Arbitration Clauses. Most of the arbitration clauses departed in notable ways from the standard language suggested by international arbitration institutions. For example, the 86 arbitration clauses in the sample included 70 different formulations of the language defining the scope of the clause, and barely one-third (37.2 percent) expressly identified the arbitral seat (most clauses instead identified a location for the arbitral proceeding).

Class Arbitration and Confidentiality. Almost no arbitration clauses in the sample expressly precluded class arbitration, and few imposed any obligation of confidentiality on the parties.

State and Federal Court. Most of the forum selection clauses selecting a US jurisdiction did not evidence a preference for either state or federal court. Among those clauses that expressed a preference, slightly more parties opted to litigate in state court rather than in federal court.

Part II describes the sample and the limitations of the study's findings. Part III examines the choice-of-law provisions in the contracts. Part IV describes the arbitration clauses in detail, while

Part V describes the forum selection clauses in detail. Part VI concludes by discussing some of the normative implications of the Article's findings.

II. SAMPLE AND LIMITATIONS

The sample consists of 157 international supply contracts collected from filings with the U.S. Securities and Exchange Commission (SEC) from January 1, 2011, through December 31, 2015. A team of research assistants were instructed to search for "supply /2 agreement" in the "Material Contracts" section of the SEC's EDGAR database.[7] These searches resulted in 5,549 hits. A research assistant then reviewed each of these agreements to determine whether the contract at issue was an "international" supply agreement involving at least one non-US party. Once this initial review was complete, there remained 248 international supply agreements. Duplicate contracts, amendments to previous contracts, and contracts that were formatted in a manner that made them unreadable were then removed from the sample. Once this process was complete, there were 157 unique agreements remaining, which comprise the sample analyzed in this Article.

Several characteristics of the sample are worth noting. First, as already stated, the sample is limited to international supply contracts. As discussed in Part IV.A, the use of dispute resolution clauses varies substantially across different types of contracts.[8] Accordingly, one must be very cautious in extrapolating these findings to types of contracts other than the type studied.

Second, almost all of the contracts in the sample have at least one US party, meaning (because they are international contracts) they almost always were entered into between a US party and a non-US party.[9] The US party was the buyer in 102 of the contracts and the seller in 52, with the remaining 3 contracts between non-US parties.[10] Because the empirical results here are essentially limited to contracts with a US party, they may not be generalizable to contracts between non-US parties.

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7. The searches were conducted through the LexisNexis portal.

8. *See infra* text accompanying notes 76–81.

9. If there were multiple non-US buyers or sellers, we coded the nationality of the buyer or seller based on the first party listed in the contract. Twelve contracts had multiple parties as buyer or seller of which one was a US party. We coded the nationality of the buyer or seller in those contracts based on the first non-US party listed in the contract, recognizing the possibility that the US party may have played an important role in negotiating and drafting the contract.

10. The most common country of origin of the non-US parties was Canada (22 contracts), followed by three European countries (Germany (13 contracts), the UK (12 contracts), and Switzerland (11 contracts)), China (10 contracts), and Japan (also 10 contracts). For a complete list of the non-US parties, see *infra* Appendix A.

Third, the contracts in the sample were all identified by the filing party as "material" contracts, defined by SEC regulations as contracts "not made in the ordinary course of business."[11] The contracts studied thus do not include routine contracts and may not be representative of such contracts.[12] As stated by Mark Weidemaier, "[b]y definition, material contracts are not representative of all contracts."[13]

Fourth, the contracts in the sample are concentrated in three industries; contracts from other industries may differ.[14] Far and away the most common industry for the contracts in the sample was the pharmaceutical industry,[15] comprising 45.9 percent (72 of 157) of the contracts. Companies producing medical supplies[16] (18 of 157, or 11.5 percent) and electronic components and accessories[17] (12 of 157, or 7.6 percent) were the only other industry groupings with ten or more contracts in the sample.

Fifth, while the contracts in the sample were all filed with the SEC from 2011 through 2015, some were entered into between the parties before those years. As summarized in Table 1, 68.2 percent (107 of 157) of the contracts were entered into from 2011 through 2015. By comparison, 22.9 percent (36 of 157) were entered into between 2007 and 2010, and 5.7 percent (9 of 157) were entered into before 2007. (The date of contracting was missing for 3.2 percent (5 of 157) of the contracts.) To the extent the terms of dispute resolution clauses change over time, the results here might not reflect the current state of such provisions.[18]

Table 1. Year of Contracting for International Supply Contracts in Sample

Year	Number (%) of Clauses
2015	12 (7.6%)
2014	13 (8.3%)
2013	21 (13.4%)
2012	38 (24.2%)

11. 17 C.F.R. § 229.601(b)(10)(i) (2013).

12. *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 463–67 (2010) (showing that arbitration clauses are less common in material contracts than in ordinary course of business contracts and thus it is useful to study material contracts that contain them).

13. Weidemaier, *supra* note 5, at 1906.

14. We categorized the industries based on the SIC Industry Group as identified in the SEC filings.

15. SIC Industry Grouping 283 ("Drugs").

16. SIC Industry Grouping 384 ("Surgical, Medical, and Dental Instruments and Supplies").

17. SIC Industry Grouping 367 ("Electronic Components and Accessories").

18. We do not have enough contracts in the sample to identify changes in contract terms over time reliably.

2011	23 (14.6%)
2010	15 (9.6%)
2009	9 (5.7%)
2008	6 (3.8%)
2007	6 (3.8%)
Pre-2007	9 (5.7%)
Missing	5 (3.2%)
Total	157

III. CHOICE-OF-LAW CLAUSES IN INTERNATIONAL SUPPLY CONTRACTS

This Part provides a detailed look at the provisions included in choice-of-law clauses in the sample of international supply contracts. It first discusses prior studies that have looked at the provisions in international choice-of-law clauses. It then examines these provisions in the sample of international commercial agreements reviewed for this Article.

A. *Background*

The empirical studies relating to choice-of-law clauses may be usefully sorted into two baskets. The first basket contains studies that seek to determine which jurisdictions (e.g., New York) are named as the governing law. The second basket contains studies that are less focused on the choice of jurisdiction than on the other language in the clause. To date, most of the empirical research in this area has focused on the first issue. The results of the most significant studies from the past decade are briefly recounted below.

In 2009, Theodore Eisenberg and Geoffrey Miller reviewed 2,865 contracts filed with the SEC over a seven-month period in 2002.[19] Their goal was to identify the governing law for each agreement. They found that New York occupied a dominant position in this regard—it supplied the governing law in roughly 46 percent of the agreements.[20] Delaware was a distant second at 15 percent, and California came in third at just under 8 percent.[21] They also found that the chosen law varied depending on the type of agreement at issue. Across the board, New

19. *See generally* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009) [hereinafter Eisenberg, *Flight to NY*] (their study did not report data on contracts for the sale of goods as a separate category).

20. *Id.* at 1478.

21. *Id.* at 1490.

York law was chosen significantly more often for all contract types. The exceptions were (1) employment agreements, (2) licensing agreements, (3) settlements, and (4) trusts.[22] The chosen law for these first three types was eclectic and did not cluster in any one state. With respect to trusts, the jurisdiction of choice was Delaware.[23]

In 2014, Sarath Sanga developed a computer program that collected and then analyzed the text of every contract filed with the SEC between 1996 and 2012.[24] Of the 495,999 contracts that contained a choice-of-law clause, Sanga found that 27.3 percent of the contracts chose New York law, 12.4 percent chose Delaware law, and 10.5 percent chose California law.[25] Approximately 21 percent of these agreements were equity plans, 18.6 percent were credit agreements, 15.3 percent were employment agreements, and 9.2 percent were purchase agreements.[26]

In 2014, Gilles Cuniberti reviewed data from 4,427 cases that came before the International Court of Arbitration of the International Chamber of Commerce (ICC) between 2007 and 2012.[27] He found that when the parties to these proceedings chose a "neutral" law—the law of a third state with no connection to either party—to govern their agreement, they tended to gravitate to the law of a relatively small number of jurisdictions.[28] Approximately 11.2 percent of the contracts reviewed chose English law for this purpose, and an additional 9.9 percent chose Swiss law.[29] The laws of various US states (3.6 percent), France (3.1 percent), and Germany (2 percent) rounded out the top five.[30] In reporting these results, Cuniberti noted that European companies typically account for more than half of the parties in ICC arbitrations.[31]

In 2015, Mark Weidemaier reviewed 402 commercial agreements filed with the SEC between 2000 and 2012.[32] Approximately 60 percent of these agreements arose out of domestic transactions between US companies, 34 percent arose out of international transactions involving at least one US party, and 6 percent arose out of international

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22. *Id.* at 1491.

23. *Id.*; *see also* Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009) (stating that Delaware law "exercises an important but secondary influence" to New York in the realm of material contracts).

24. Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 902–03 (2014).

25. *Id.* at 906.

26. *Id.* at 905.

27. Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 459 (2014).

28. *Id.* at 468–69.

29. *Id.* at 459.

30. *Id.* at 473.

31. *Id.* at 464.

32. Weidemaier, *supra* note 5, at 1907.

transactions between non-US parties.[33] In reviewing the international contracts, Weidemaier found that New York law was chosen most frequently (17.9 percent of clauses), followed by California (17 percent), Delaware (9.8 percent), and Massachusetts (6.3 percent).[34] When he looked exclusively to those contracts that chose the law of a "neutral" jurisdiction with no connection to either party, he found that New York law was chosen approximately 73 percent of the time.[35]

In 2016, Gilles Cuniberti reviewed data from cases decided by four leading international arbitration centers with connections to Asia in 2011 and 2012.[36] He found that the contracts in these proceedings generally selected US law, English law, or Singapore law to govern their agreements. Together, these three countries were selected in approximately 85 percent of the contracts submitted to arbitration.[37] Cuniberti also found that the popularity of a given body of law varied by arbitration center. While English law was widely used across all four centers, Singapore law was more frequently chosen by parties coming before the Singapore International Arbitration Center.[38] US law, in turn, was more commonly chosen by parties coming before the International Center for Dispute Resolution (ICDR), which functions as the international division of the American Arbitration Association (AAA).[39]

There exist several international treaties that seek to harmonize the law across jurisdictions. One of these is the CISG. Under certain circumstances, the parties may choose to have their contract governed by the CISG rather than national law. The existence of this treaty raises the question of how frequently parties opt out of national sales law altogether and choose to have a treaty govern their contract.[40] In 2016, John Coyle reviewed over five thousand contracts filed with the

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33. *Id.* at 1907–08.

34. *Id.* at 1915.

35. *Id.* at 1916.

36. Gilles Cuniberti, *The Laws of Asian International Business Transactions*, 25 PAC. RIM L. & POL'Y J. 35, 39 (2016). The four arbitration centers were (1) the International Center for Dispute Resolution (ICDR), (2) the Court of International Arbitration at the International Chamber of Commerce, (3) the Singapore International Arbitration Center (SIAC), and (4) the Hong Kong International Arbitration Centre (HKIAC). *Id.* In each case, Cuniberti excluded arbitrations before these bodies that did not involve any Asian companies. *Id.*

37. *Id.* at 59.

38. *Id.* at 51.

39. *Id.* at 57.

40. *See* Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 538–42 (2005); Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN. ST. L. REV. 1031, 1039 (2009) (presenting empirical data showing that parties rarely choose anything other than national law to govern their international agreements); *see also* John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 376–78 (2011) (questioning whether international treaties are "better" than national law in the context of international sales transactions).

SEC between 1996 and 2012 that referenced the CISG.[41] He found that 99 percent of these contracts referred to the CISG to exclude it as a source of law.[42] Only 1 percent referred to the CISG to select it as the governing law.[43] He also found that approximately 70 percent of the contracts that excluded the CISG did so unnecessarily because the treaty was inapplicable by its terms.[44]

There appears to be only one empirical study to date that examines patterns of practice with respect to the *other* language in choice-of-law clauses (i.e., everything except for the choice of jurisdiction). In 2018, John Coyle reviewed 351 bond indentures filed with the SEC in 2016 that selected New York law.[45] He then sought to ascertain whether the choice-of-law clauses in these agreements (1) excluded conflict-of-laws rules, (2) covered non-contractual claims, (3) addressed the distinction between substantive and procedural law, and (4) utilized the phrase "governed by."[46] While the results varied depending on the issue, Coyle found that the clauses in his sample were riddled with loopholes and frequently lacked the language necessary to ensure that New York law governed all aspects of litigation relating to the indenture.[47] This finding was significant because the contracts were generally high-dollar-value agreements drafted by lawyers at leading law firms. If these contracts contain choice-of-law clauses that routinely omit language necessary to lock in the law of the chosen state, he concluded, then the same is likely true for many other contracts.[48]

B. *Empirical Results: Provisions in Choice-of-Law Clauses*

Virtually all of the international supply contracts in the sample (99 percent) included a choice-of-law clause. This subpart describes the following provisions in those clauses: (1) jurisdiction selected; (2) the choice between "interpret," "construe," and "govern"; (3) conflict-of-laws rules; (4) scope; (5) substance and procedure; (6) miscellaneous issues; (7) federal law; and (8) carve-outs.

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41. Coyle, *CISG*, *supra* note 1, at 211.
42. *Id.* at 220.
43. *Id.*
44. *Id.*
45. *See generally* John F. Coyle, *Choice of Law Clauses in U.S. Bond Indentures*, 13 CAP. MKTS. L.J. 152 (2018) [hereinafter Coyle, *Choice of Law*]. *Cf.* Coyle, *Canons*, *supra* note 1, at 631 (providing background and context on the default interpretive rules that courts use to construe choice-of-law clauses).
46. *See generally* Coyle, *Choice of Law*, *supra* note 45.
47. *Id.* at 159.
48. *Id.* at 15.

1. Jurisdiction Selected

A total of 157 choice-of-law clauses in the sample specified 28 different jurisdictions—12 US jurisdictions and 16 non-US locations. The identity of the chosen jurisdiction was redacted in three clauses. Only one clause did not select a body of law to govern the contract. Far and away the most commonly chosen jurisdiction was New York (named in 59 clauses). The runners-up were California (15 clauses), Delaware (15 clauses), and England (15 clauses).[49] Table 2 summarizes these findings.

Table 2. Jurisdiction Selected in Choice-of-Law Clause

US State	Number of Clauses	Non-US Jurisdiction	Number of Clauses
New York	59	England/United Kingdom	15
California	15	Switzerland	5
Delaware	15	Germany	4
Nevada	4	China	3
Florida	3	Ontario	3
New Jersey	3	Quebec	3
Massachusetts	2	Japan	2
Texas	2	Russia	2
Other US State	4	Other Foreign Jurisdiction	8
USA	2	Redacted	3
		Not Stated	1

In some instances, the law chosen was the same as (a) the principal place of business, or (b) the place of incorporation of one of the contracting parties. In other instances, the law chosen was the law of a "neutral" jurisdiction with no connection to either the buyer or the seller, as reported in Table 3.

Table 3. Chosen Law as Compared to Location of Party

Law Chosen:	Number (%) of Clauses
State of Buyer Place of Incorporation	10 (6.4%)
State of Buyer Headquarters	26 (16.6%)

49. One clause stated that the contract would be governed by Japanese law if the suit were brought in Japan and by California law if the suit were brought in California. This contract was coded as choosing both Japan and California.

Neutral Third State	72 (45.9%)
State of Seller Headquarters	35 (22.3%)
State of Seller Place of Incorporation	2 (1.3%)
Connection to Both Buyer and Seller	3 (1.9%)
Unknown	9 (5.7%)

New York was the most commonly selected neutral jurisdiction (46 clauses), followed by England (10 clauses), Switzerland (5 clauses), and Delaware (3 clauses).

2. Interpret, Construe, Govern

In theory, a choice-of-law clause may be framed in a near-infinite number of ways. In practice, however, most clauses are framed in one of three specific ways. First, a choice-of-law clause may state that the contract will be "interpreted" in accordance with the laws of a particular jurisdiction. Second, a clause may stipulate that the contract will be "construed" in accordance with the laws of that jurisdiction. Third, a clause may provide that the contract will be "governed by" the laws of that jurisdiction.

The question of whether the precise phrase utilized in the clause *matters* has generated a split among US courts.[50] Most courts have held that "interpret," "construe," and "govern" all mean the same thing.[51] A few courts have held, however, that a clause stating that the contract shall be "interpreted" or "construed" in accordance with a state's laws is narrower than a clause stating that the contract shall be "governed" by that state's law.[52] These courts have held that the words "interpret" or "construe" standing alone suggest that the parties merely intended to select the law of the chosen jurisdiction touching on issues of contract interpretation.[53] These courts have refused to apply the full breadth of the chosen jurisdiction's law to the dispute. It follows, therefore, that the precise language used to frame the choice-of-law clause may be deemed legally significant in at least some cases.

50. Coyle, *Canons*, *supra* note 1, at 656–60.

51. *See, e.g.*, C.A. May Marine Supply Co. v. Brunswick Co., 557 F.2d 1163, 1165 (5th Cir. 1977) ("The court is aware that the term 'construe in accordance with' is technically distinguishable from the term 'governed by,' but doubts that such a fine distinction was intended by the parties."); *see also* Coyle, *Canons*, *supra* note 1, at 656–68.

52. *See, e.g.,* Arnone v. Aetna Life Ins. Co., 860 F.3d 97, 107–08 (2d Cir. 2017) ("The Plan's choice of law provision, in stating that the Plan will be 'construed' in accordance with Connecticut law, sets forth only which jurisdiction's law of contract interpretation and contract construction will be applied. In the context presented here, that provision is insufficient to bind this court to apply the full breadth of Connecticut law, to the exclusion of another jurisdiction's law, in fields other than the interpretation of the language in this contract."); *see also* Coyle, *Canons*, *supra* note 1, at 660 n.131.

53. Coyle, *Canons*, *supra* note 1, at 660 n.131.

These varying formulations may be—and frequently are—invoked simultaneously. A clause may, for example, state that it is to be "governed by and construed in accordance with" the laws of a given jurisdiction. Table 4 summarizes the study's findings on this issue.

Table 4. Interpret, Construe, Govern

	Number (%) of Clauses
Interpret Only	4 (2.5%)
Construe Only	5 (3.2%)
Govern Only	13 (8.3%)
Interpret and Construe	1 (0.6%)
Interpret and Govern	20 (12.7%)
Construe and Govern	94 (59.9%)
Interpret, Construe, and Govern	15 (9.6%)
Other	5 (3.2%)

The word "govern" appears in more than 90 percent of the clauses. The remaining clauses either utilize the words "interpret" or "construe" exclusively (6.3 percent) or decline to utilize any of these words (3.2 percent).

3. Conflict-of-Laws Rules

In the field of conflict of laws, it is customary to distinguish between the "internal law" of a particular jurisdiction and its "whole law."[54] The whole law of a jurisdiction includes its conflict-of-laws rules. The internal law of that jurisdiction does not. When a choice-of-law clause selects the "law" of a particular jurisdiction, a threshold question that must be answered is whether that clause is selecting the internal law of that jurisdiction (excluding its conflicts rules) or its whole law (including its conflicts rules).[55]

The basic purpose of a choice-of-law clause is to make it unnecessary for a court to conduct a conflict-of-laws analysis. Accordingly, it should come as little surprise that many of the clauses in the sample contain language directing the courts *not* to apply the

54. *Id.* at 643.

55. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (discussing this distinction in the context of choice-of-law clauses).

whole law of the chosen jurisdiction.[56] This expression of intent, however, manifests in a wide variety of ways, as shown in Table 5.[57]

Table 5. Conflict-of-Laws Rules

	Number (%) of Clauses
Without regard to conflicts principles	88 (56%)
Without regard to rules that would lead court to apply the law of another state	29 (18.4%)
Internal laws	10 (6.4%)
Treat contract as if it were to be performed within the state by state residents	6 (3.8%)
A [state] contract	2 (1.3%)
Did not address issue	36 (22.9%)

Eighty-eight clauses stated that the courts should apply the law of the chosen jurisdiction "without regard to conflict of laws principles." This is the simplest—and most widely used—means of excluding a state's conflicts rule from the ambit of the choice-of-law clause. Ten clauses provided that the courts should apply the "internal" laws of the selected jurisdiction. Six clauses stipulated that the courts should apply the law that they would apply to "agreements entered into and to be performed entirely within the state between state residents." Two clauses stated that the contract was to be "treated in all respects as a [state] contract." These various formulations all seek to attain the same basic goal—directing the courts *not* to apply the conflict-of-laws rules of the chosen jurisdiction, which could bounce the parties to the law of a different jurisdiction—and all seem likely to realize this goal.

There is, however, a wrinkle. Several US states have enacted statutes that direct the courts within the state to enforce certain choice-of-law clauses selecting that state's laws.[58] These statutes are technically conflict-of-laws rules. It follows that a provision directing the courts not to apply the conflicts principles of the state could, perversely, lead the court to ignore a statute specifically intended to

56. The likelihood that a US court would ever interpret a choice-of-law clause to select the whole law of the chosen jurisdiction is very low. There appear to be only two reported cases in the past century where this was done. *See* Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727, 732 (6th Cir. 1948); Carlos v. Phillips Bus. Sys., Inc., 556 F. Supp. 769, 774 n.4 (E.D.N.Y. 1983). In the overwhelming majority of cases, the courts will interpret the word "law" to refer exclusively to the internal law of the chosen jurisdiction. *See* Coyle, *Canons*, *supra* note 1, at 643–47.

57. The percentage totals in the Table do not add up to 100 percent because several clauses contained more than one of these phrases.

58. *See, e.g.*, CAL. CIV. CODE §1646.5; DEL. CODE ANN. Tit. 27, § 2708; N.Y. GEN. OBLIG. LAW § 5-1401.

encourage the use of choice-of-law clause.[59] Several he clauses in the sample sought to address this problem by stipulating that the courts should apply the chosen law "without regard to conflict of law principles that would cause the application of the laws of any other jurisdiction."

4. Scope

A choice-of-law clause must define the set of disputes to which the chosen law will apply. Will that law apply exclusively to claims for breach of contract? Or will it also apply to tort and statutory claims brought by one party against the other? These questions have recently attracted a great deal of attention from courts in the United States. These courts have consistently held that the precise language used in in a given choice-of-law clause will determine whether it will apply only to contract claims (a narrow scope) or whether it will also apply to non-contractual claims (a broad scope). Table 6 below summarizes the language in the sample clauses that address this issue.[60]

Table 6. Scope

	Number (%) of Clauses
Related to	12 (7.6%)
Connected with	10 (6.4%)
Non-contractual claims	6 (3.8%)
Relationship	5 (3.2%)
Related transactions	4 (2.5%)
Arising out of	2 (1.3%)
Indirectly	2 (1.3%)
Did not address issue	125 (80%)

The first—and most important—finding is that 80 percent of the clauses (125) did not address the issue of scope. This is a remarkable finding. One of the most significant legal risks when US companies contract with a foreign counterparty is the risk that any dispute will be governed by the law of a foreign jurisdiction with which the US company is unfamiliar. When a clause does not address the issue of scope, there arises the very real possibility that any tort or statutory claims brought by the foreign counterparty will be governed by the law

59. *See* Coyle, *Canons*, *supra* note 1, at 647 n.75.

60. The percentage totals in the Table do not add up to 100 percent because several clauses contained more than one of these phrases.

of a jurisdiction *other* than the one named in the clause. The overwhelming majority of the clauses did not address this risk.

Among the clauses that did address the issue of scope, the general practice was to stipulate that the clause should be given a broad scope. Twelve clauses stipulated, for example, that the chosen law would apply to claims or disputes "relating to" the agreement. Ten clauses stated that the chosen law would apply to claims or disputes "connected with" the agreement. Six clauses specified that the chosen law would apply to "non-contractual" claims or claims that sounded in "contract or tort or other legal theory." Two clauses stated that the chosen law would apply to claims arising "directly or indirectly" under the contract. Each of these formulations is likely to be read as evidence that the parties wanted their choice-of-law clause to apply to tort and statutory claims that relate to the contract in some way.[61]

Other clauses in the sample staked out an even broader scope. Five clauses provided that the chosen law would apply to any claims relating to the "relationship" between the parties. If one contracting party wished to sue the other about a matter that was completely unrelated to the contract, in other words, the chosen law would govern that claim because it arose out of the parties' relationship. Three additional clauses stipulated that the chosen law would apply to "related" or "subsequent" transactions between the parties. Two clauses included language that was ambiguous with respect to scope. These clauses stipulated that the chosen law would apply to all claims "arising out of" the agreement. US courts are currently split on whether this language connotes a desire to give a clause a narrow scope or a broad scope.[62]

5. Substance and Procedure

Courts in the United States have long distinguished the "procedural law" of a particular jurisdiction from its "substantive law."[63] Substantive law is generally understood to refer to the law relating to the right itself, whereas procedural law is generally understood to refer to the process by which that right is enforced.[64] When a dispute has a connection to more than one jurisdiction, the forum will generally apply its own procedural law but may typically apply the substantive law of another jurisdiction after conducting a conflict-of-laws analysis.[65] A recurring question with respect to contract clauses that select the "law" of a particular place, therefore, is whether the clause is selecting the *substantive* law of the chosen

61. *See* Coyle, *Canons*, *supra* note 1, at 679.
62. *See id.* at 666–82.
63. *See id.* at 648.
64. *Id.*
65. *Id.*

jurisdiction or whether it is selecting the *substantive and procedural* law of that same jurisdiction.

Seventy-six percent of the clauses in the sample (119) did not address this issue. Among those clauses that did address the issue, twenty-two directed the court to apply the procedural law of the chosen jurisdiction as well as its substantive law. These clauses followed different paths to this end. Most stipulated that the contract was to be "enforced" in accordance with the law of the chosen jurisdiction, a formulation that is likely to be effective because the general view among US courts is that the use of the word "enforced" in a choice-of-law clause connotes an intent to select the procedural law of the chosen jurisdiction.[66] A few stated that the law of that jurisdiction would apply to all matters relating to "remedies" or that the agreement was to be governed by the "substantive and procedural law" of that jurisdiction. One clause directed the courts to apply the statutes of limitation—a matter that approximately half of US states classify as procedural—of the chosen jurisdiction. These findings are reported in Table 7.[67]

Table 7. Substance and Procedure

	Number (%) of Clauses
Enforced	22 (14%)
Remedies	4 (2.5%)
Procedure	2 (1.3%)
Statutes of limitation	1 (0.6%)
Substantive law	16 (10.2%)
Did not address issue	119 (76%)

Conversely, sixteen clauses specifically provided that the contract was to be governed by the "substantive" laws of the chosen jurisdiction. These clauses, by negative implication, directed the courts *not* to apply the procedural law of that jurisdiction.

6. Miscellaneous Issues

Some of the choice-of-law clauses in the sample stipulated that the law of the chosen jurisdiction would apply to specific issues that are not captured in the foregoing discussion. Seventeen clauses, for example, stated that chosen law would apply to issues relating to

66. *See, e.g.,* Czewski v. KVH Indus., 607 F. App'x. 478, 481 (6th Cir. 2015); 2138747 Ontario Inc. v. Samsung C&T Corp., 39 N.Y.S.3d 10, 1213 (N.Y. App. Div. 2016); *see also* Coyle, *supra* note 1, at 655 n.113.

67. The percentage totals in the Table do not add up to 100 percent because several clauses contained more than one of these phrases.

"validity." Another seventeen clauses provided that this law would apply to issues relating to "performance" under the contract. Nine clauses stated that this law would apply to any "breach" of the contract. Table 8 provides further details on these and other specific issues referenced by clauses in the sample.[68]

Table 8. Miscellaneous Issues

	Number (%) of Clauses
Validity	17 (10.8%)
Performance	17 (10.8%)
Breach	9 (5.7%)
Effect	6 (3.8%)
Negotiation	3 (1.9%)
Execution	2 (1.3%)
Did not address issue	127 (80.9%)

As the Table illustrates, most of the clauses in the sample did not address any of these issues. Moreover, it is unclear whether the parties may choose the law that will determine questions of a contract's validity—most courts have held that this question will always be determined by forum law.[69] Nevertheless, a few clauses went out of their way to stipulate that the law of the chosen jurisdiction would apply to disputes arising out of the negotiation, execution, validity, effect, performance, or breach of the contract.

7. Federal Law

In purely domestic transactions, contracts for the sale of goods will typically be governed by Article 2 of the Uniform Commercial Code (UCC). In international transactions, by contrast, there is a chance that contracts for the sale of goods will instead by governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG is a multilateral treaty that serves as an "international" version of UCC Article 2. Where there is a contract for the sale of goods, the buyer and seller are based in different countries,

68. The percentage totals in the Table do not add up to 100 percent because several clauses contained more than one of these phrases.

69. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2001*, 50 AM. J. COMP. L. 1, 21 (2002) (identifying "existence, validity, scope, and enforceability" as "the four sequential logical steps that a court takes before applying the law chosen by the clause"); *see also* Michael Gruson, *Governing-Law Clause in International and Interstate Loan Agreements—New York's Approach*, 1982 U. ILL. L. REV. 207, 223 (1982) ("The parties to a contract cannot change this conflict-of-laws rule relating to the validity of governing-law clauses.").

and each of these countries is a party to the CISG, then the CISG will displace national sales law and provide the governing law. However, Article 6 of the CISG provides that the parties may opt out of the CISG by including a statement to that effect in their contract.

International supply agreements—as international contracts for the sale of goods—will frequently be governed by the CISG unless the choice-of-law clauses in those agreements specifically opt out. Table 9 reports on the number of clauses in the sample that address the potential applicability of the CISG.

Table 9. Applicability of the CISG

	Number of Clauses
Opted out of the CISG	61 (38.9%)
Opted into the CISG	1 (0.3%)
Did not address issue	95 (60.5%)

The mere fact that a choice-of-law clause does not specifically address the CISG does not, of course, mean that the CISG will not apply. If a choice-of-law clause selects the law of a nation that has ratified the CISG, and if the other criteria discussed above are satisfied, then that treaty will supply the governing law even if the parties do not mention it in their agreement. It is nevertheless noteworthy that 60 percent of the agreements in the sample made no mention of the CISG one way or the other.

8. Carve-Outs for Intellectual Property

A small number of choice-of-law clauses in the sample—four—expressly stated that the chosen law would not apply to intellectual property matters. One such clause stated that the contract would be governed by the law of North Carolina but went on to state that "matters of intellectual property law shall be determined in accordance with the national intellectual property laws relevant to the intellectual property in question."[70]

IV. ARBITRATION CLAUSES IN INTERNATIONAL SUPPLY CONTRACTS

This Part provides a detailed look at the arbitration clauses in the sample of international supply contracts studied here. It first discusses prior empirical studies on the use of international arbitration clauses

70. Oxygen Biotherapeutics, Inc., License and Supply Agreement § 14.12 (June 26, 2013), https://www.sec.gov/Archives/edgar/data/34956/000135448813003629/oxbt_ex1069.htm [https://perma.cc/8NW9-7PGU] (archived Feb. 5, 2019).

and the provisions those clauses contain. It then presents findings on the choice between arbitration and litigation in the contracts in the sample. Finally, it briefly describes the length and complexity of the arbitration clauses in the sample before examining in detail the provisions they contain.

A. *Background*

Arbitration has been described as the "predominant" if not the "only" means of resolving disputes arising out of international commercial contracts.[71] According to surveys of international arbitration practitioners, the main reasons parties use arbitration clauses in their transnational contracts are (1) to avoid having disputes resolved in the other party's home court; and (2) because the New York Convention makes foreign arbitral awards more enforceable than foreign court judgments.[72] Those reasons would seem to apply across the board to all international commercial contracts, suggesting that all such contracts should include an arbitration clause. Indeed, survey results support the conclusion that the use of arbitration clauses is widespread in international contracts.[73]

But other empirical evidence is inconsistent with such a broad assertion. An often-cited study by Theodore Eisenberg and Geoffrey Miller found a "surprisingly . . . low absolute rate of arbitration

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71. *See, e.g.*, W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 243, 251 (2010) ("Whatever the benefits on the domestic scene of comparing the merits of arbitration with those of litigation, the comparison is neither interesting nor realistic on the international scene where arbitration is not only the *accepted* but realistically the *only* method of dispute resolution . . . ."); Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 108 AM. SOC'Y INT'L L. PROC. 219, 234 (2014) ("[A]rbitration is likely to remain the predominant method for the resolution of transnational commercial disputes.").

72. CHRISTIAN BÜHRING-UHLE, ARBITRATION & MEDIATION IN INTERNATIONAL BUSINESS 136 (1996) ("Clearly the two most significant advantages and presumably the two most important reasons for choosing arbitration as a means of international commercial dispute resolution seem to be the *neutrality of the forum*, i.e. the possibility to avoid being subjected to the jurisdiction of the home court of one of the parties, and the superiority of its legal framework, with treaties like the New York Convention guaranteeing the *international enforcement* of awards."); QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARB. & WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 6 (2015) [hereinafter 2015 SURVEY] (survey respondents cited "enforceability of awards" (65 percent) and "avoiding specific legal systems/national courts" (64 percent) as the "most valuable characteristics of international arbitration").

73. *See, e.g.*, 2015 SURVEY, *supra* note 72, at 5 (reporting that "90% of respondents said that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other ADR (34%)"); QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARB. & PWC, CORPORATE CHOICES IN INTERNATIONAL ARBITRATION: INDUSTRY PERSPECTIVES 6 (2013) [hereinafter 2013 SURVEY] (52 percent of respondents favored arbitration, while 28 percent favored court litigation).

clauses: only about 20% of international contracts contain them."[74] (Table 10 summarizes their results by type of contract.) Indeed, based on the Eisenberg and Miller results, some commentators have gone to the opposite extreme, concluding that businesses, including international businesses, prefer to have their disputes resolved in court rather than in arbitration.[75]

Table 10. Use of Arbitration Clauses in Material Contracts with at Least One Non-US Party[76]

Type of Contract	% with Arbitration Clause	N
Mergers	18.6%	43
Bond indentures	0.0%	4
Settlements	25.0%	12
Securities purchase	18.2%	77
Employment contracts	20.0%	5
Licensing	63.6%	11
Asset sale purchase	30.4%	46
Credit commitments	5.0%	20
Underwriting	7.1%	14
Pooling and servicing	0.0%	3
Security agreements	0.0%	1
Other	16.7%	36
Total	20.2%	272

The arbitration literature, however, provides a more nuanced view, suggesting that arbitration makes more sense for some parties

74. *See* Eisenberg & Miller, *Arbitration*, *supra* note 5, at 350–52; *see also* Ya-Wei Li, *Dispute Resolution Clauses in International Contracts: An Empirical Study*, 39 CORNELL INT'L L.J. 789, 799–800 (2006) (finding that 14.6 percent of international merger agreements filed with the SEC between January 1, 2002, and March 31, 2003, included an arbitration clause); Julian Nyarko, Forum Shopping on the Market for Contracts: When Corporations Arbitrate 9, 19 (Aug. 10, 2017) (unpublished manuscript), https://eale.org/content/uploads/2017/08/nyarkoforumshoppingeale.pdf [https://perma.cc/FUF3-4JEM] (archived Jan. 20, 2019) (based on sample of "all filings of 'material contracts' with the SEC through its electronic filing system EDGAR between 2000 and 2016") ("Not only are arbitration clauses absent in a majority of contracts between two business entities. There is also only a minor substantive increase in the rate at which arbitration clauses are used in international contracts, as compared to domestic contracts.").

75. *See* Jens C. Dammann & Henry B. Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 31 (2008) ("In practice, arbitration does not seem to compete strongly with well-functioning public courts."); William J. Woodward Jr., *Saving the Hague Choice of Court Convention*, 29 U. PA. J. INT'L L. 657, 669 (2008) (arguing that "given their choice, most businesses that negotiate contracts would prefer a judicial dispute resolution system over arbitration").

76. Eisenberg & Miller, *Arbitration*, *supra* note 5, at 353.

and some types of contracts than others.[77] First, it has long been clear that financial institutions often prefer litigation to arbitration as a means of resolving commercial disputes, due to the straightforward nature of the claims and the specialized foreclosure procedures available in court.[78] Second, parties are less likely to use arbitration clauses in contracts that may give rise to high-stakes ("bet-the-company") disputes and disputes that may require emergency relief[79]—such as the corporate transactional contracts that make up a large part of the Eisenberg and Miller sample.[80] Conversely, and third, parties are more likely to use arbitration clauses in contracts that may give rise to more routine, lower-stakes disputes, or that require particular, specialized expertise, such as construction, reinsurance, maritime, and commodities disputes—types of contracts that generally are not included in the Eisenberg and Miller sample.[81]

Meanwhile, although much has been written about drafting international arbitration agreements,[82] little empirical work has been done on the terms and provisions actually included in international arbitration agreements.

Stephen R. Bond examined 237 arbitration clauses giving rise to ICC arbitrations in 1987 and 215 clauses giving rise to ICC

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77. *See, e.g.*, 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 97 (2d ed. 2014) [hereinafter BORN, COMMERCIAL ARBITRATION] ("It is probably true that, in negotiated commercial (not financial) transactions, where parties devote attention to the issue of dispute resolution, and where the parties possess comparable bargaining power, arbitration clauses are more likely than not to be encountered . . . [B]ut more ambitious statistical claims are unproven.").

78. William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 215 (1998) ("In contrast to the commercial and insurance communities, bankers have traditionally preferred judges over arbitrators."); *see* 2013 SURVEY, *supra* note 73, at 7 (finding that 82 percent of respondents in financial services industry preferred court litigation to arbitration).

79. Drahozal & Ware, *supra* note 12, at 455–63 ("The limited court review of arbitration awards . . . is an important reason why parties tend to prefer litigation in 'bet-the-company' cases.").

80. As noted above, SEC regulations require filing only of "material" contracts, meaning contracts "not made in the ordinary course of business." 17 C.F.R. § 229.601(b)(10)(i) (2013). The regulations explain that "[i]f the contract is such as ordinarily accompanies the kind of business conducted by the registrant and its subsidiaries, it will be deemed to have been made in the ordinary course of business and need not be filed unless it falls within" a specified exception. § 229.601(b)(10)(ii). Another possible reason for the low use of arbitration clauses in the corporate transactional contracts studied by Eisenberg and Miller is that the SEC has an informal but longstanding policy that discourages the use of arbitration clauses in some such contracts. *See, e.g.*, Hal S. Scott & Leslie Silverman, *SEC's Silent Opposition to Arbitration Bylaws Is Speaking Volumes*, NAT'L L.J. (Aug. 12, 2013).

81. Drahozal & Ware, *supra* note 12, at 463–66.

82. *See, e.g.*, GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 29–108 (5th ed. 2016) [hereinafter BORN, FORUM SELECTION AGREEMENTS]. *See generally* PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS (2d ed. 2007).

arbitrations in 1989.[83] He found, for example, that the most common provision added to an ICC arbitration clause was the place of arbitration, with 57 percent of clauses in 1987 and 68 percent of clauses in 1989 "specif[ying] the city or country in which any arbitration held pursuant to the clause would take place";[84] relatively few clauses specified the number of arbitrators (24 percent in 1987 and 29 percent in 1989, with a sizeable majority preferring three arbitrators);[85] and that fewer still clauses addressed the language of the arbitration and post-award proceedings.[86] Bond's study remains the leading study of its kind, but at this point is quite dated. Moreover, it is limited to arbitration clauses giving rise to ICC arbitrations. Thus, it necessarily provides no information on arbitration clauses that do not provide for ICC arbitration, much less on party choice between institutional and *ad hoc* arbitration and among arbitration institutions.

Christopher R. Drahozal and Richard W. Naimark examined a small sample of international joint venture agreements (17 contracts) attached to SEC filings from 1993 through 1996.[87] Of those seventeen contracts, fifteen (or 88.2 percent) included an arbitration clause.[88] In addition, the study reported data on: the use of step or escalation clauses (93.3 percent provided for some sort of negotiation before arbitration), the administering institution (one-third chose the ICC), the number of arbitrators (69.2 percent specified three), the language of the arbitration (53.3 percent provided English), the scope of discovery permitted (26.7 percent addressed), how the clause dealt with multi-party issues (one clause (6.7 percent) permitted joinder), damages limitations (13.3 percent precluded the award of punitive damages) and awards of costs (6.7 percent provided for the loser to pay arbitration costs and 13.3 percent for the loser to pay attorneys' fees), time limits on the arbitration (13.3 percent included), and waiver of the right to appeal (20 percent so provided).[89]

More recently, Mark Weidemaier examined the dispute resolution clauses in a sample of 402 material commercial contracts attached to SEC filings from 2000 through 2012.[90] The sample "emphasizes commercial agreements, including manufacturing and supply agreements, distribution agreements, licensing and development

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83. Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT'L CT. ARB. BULL. 14 (1990), *reprinted in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 66 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter Drahozal & Naimark].

84. *Id.* at 72.

85. *Id.* at 75.

86. *Id.* at 76–77.

87. *Id.* at 59–63.

88. For updated results, *see* Drahozal & Ware, *supra* note 12, at 466 (finding that 71 percent of a sample of 31 international joint venture agreements from SEC filings in 2008 included arbitration clauses).

89. Drahozal & Naimark, *supra* note 83, at 59–63.

90. Weidemaier, *supra* note 5, at 1906–07.

agreements, and marketing and other services agreements."[91] The contracts were a mix of domestic (60 percent) and international (40 percent), and most of his results as reported did not separate out international contracts.[92] Exceptions included data on the use of arbitration clauses, the governing law, and the administering institution, for which the results were reported separately for domestic and cross-border transactions.[93]

B. *Empirical Results: Choice between Arbitration and Litigation*

The international supply contracts studied here also come from SEC filings, and thus are subject to some of the same limitations as the Eisenberg and Miller sample.[94] But the nature of the disputes that may arise from international supply contracts at least plausibly may involve lower stakes or not require emergency relief. If so, then one would expect a greater use of arbitration clauses in international supply contracts than in other types of material contracts.

As expected, the use of arbitration clauses is higher in the sample of international supply contracts studied here than in the broader Eisenberg and Miller sample. As shown in Table 11, over half (55.4 percent) of the contracts in this study's sample included arbitration clauses, as compared to 20.2 percent of the Eisenberg and Miller sample.[95] These findings provide further evidence that the Eisenberg and Miller findings are not representative of all types of international contracts.

Table 11. Dispute Resolution Clauses in International Supply Contracts

	Number (%) of Clauses
Arbitration	87 (55.4%)
Exclusive Forum Selection	41 (26.1%)
Nonexclusive Forum Selection	15 (9.6%)
None	14 (8.9%)
Total	157

91. *Id.* at 1906 n.224.
92. *Id.* at 1907, 1923 n.288.
93. *Id.* at 1915, 1920–21.
94. *See* Eisenberg & Miller, *Arbitration*, *supra* note 5.
95. *See id.* at 351.

C. *Empirical Results: Length and Complexity*

Commentators have criticized consumer contract terms, including arbitration clauses, for their complexity.[96] The Consumer Financial Protection Bureau (CFPB) found that arbitration clauses in consumer credit card agreements averaged 1108.8 words in length, ranging from 78 to 2514 words. The average Flesch-Kincaid grade level (a common measure of complexity, with higher scores showing greater complexity[97]) for the clauses was 15.6.[98]

Of course, the international supply contracts studied here, entered into by sophisticated parties, do not present the same policy issues as the consumer contracts studied by the CFPB. Nonetheless, they may provide a baseline for comparison of the length and complexity of the arbitration clauses used in consumer contracts.[99] As compared to the consumer credit card agreements studied by the CFPB, the arbitration clauses in the international supply contracts studied here were shorter but more complex. The average number of words in the arbitration clauses in the sample was 474.2, ranging from 23 to 1975 words in length, while the average Flesch-Kincaid grade level for the clauses was 19.1.[100]

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96. Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 807 (2015) ("The length and complexity of arbitration clauses makes consumers less likely to understand (or even to read) them."); Jeff Sovern et. al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 24 (2015) ("Length and density deter consumers from attempting to read contract terms at all, and the terms are unintelligible for most people who attempt to read them.").

97. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: PRELIMINARY RESULTS 29 n.69 (2013) ("The Flesch-Kincaid Grade level translates readability to the level of education required to understand the text. A lower grade level indicates greater readability.").

98. CFPB FINAL REPORT, *supra* note 2, at 28. The CFPB's findings for arbitration clauses in general purpose reloadable (GPR) prepaid card agreements and storefront payday loan agreements were similar. *Id.* at 28–29 (reporting arbitration clauses in GPR prepaid card agreements to average 1082.6 words in length, ranging from 24 to 2970 words, and to have a Flesch-Kincaid grade level of 15.0; and arbitration clauses in storefront payday loan agreements to average 1421.3 words in length, ranging from 167 to 2860 words, and to have a Flesch-Kincaid grade level of 15.4).

99. *See also* John C. Coates IV, *Why Have M&A Contracts Grown? Evidence from Twenty Years of Deals* 14 (Eur. Corp. Governance Inst., Working Paper No. 333, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862019 [https://perma.cc/WN75-ECEK] (archived Jan. 15, 2019) [hereinafter Coates, *Why Have M&A Contracts Grown?*] ("In linguistic complexity, as measured by the Flesch-Kincaid grade level measure, the same [M&A] contracts increased from an average of ~20 in 1994 to ~30+ in the 2010s.").

100. Because of redactions in the contracts we are unable to calculate accurately the percentage of the contract made up by the dispute resolution clause or otherwise compare the dispute resolution clause to the rest of the contract.

D. *Empirical Results: Provisions in Arbitration Clauses*

This subpart describes the following provisions in the arbitration clauses in the sample of international supply contracts: (1) step/escalation clauses; (2) scope of the arbitration clause; (3) carve-outs from arbitration; (4) delegation clauses; (5) *ad hoc* arbitration/choice of institution; (6) hearing location or arbitral seat; (7) language of the arbitration; (8) arbitral tribunal; (9) arbitral procedures; (10) confidentiality; (11) remedies; (12) awards and costs; and (13) post-award proceedings.

Three general notes:

First, the results reported in this subpart are generally based on eighty-six international supply contracts with arbitration clauses. One additional contract included an arbitration clause (making the total number of contracts with arbitration clauses eighty-seven), but it incorporated by reference terms from another agreement that was unavailable, so in most cases it is not included in the analysis here.[101]

Second, the provisions examined here can only be understood in context of the rules that otherwise would govern the arbitration process. Those rules can come from either the governing arbitration law or from the institutional rules to which the parties have agreed. As a result, the fact that the arbitration clauses do not commonly include a particular provision, for example, may not be significant if the rules that otherwise govern do.

Third, one overall question this subpart also considers is the extent to which arbitration clauses vary from the model clauses proposed by arbitration institutions. Gary Born has made what seems to be an empirical assertion that "[i]n the overwhelming majority of cases . . . international arbitration agreements are straightforward exercises, adopting either entirely or principally the model, time-tested clauses of a leading arbitral institution."[102] This subpart will test that assertion in this sample of contracts by examining, among other provisions, the language in the arbitration clauses defining the scope of the obligation to arbitrate and identifying the arbitral seat.

1. Step/Escalation Clauses

Multi-tiered dispute resolution clauses provide for various steps, such as negotiation among executive officers or mediation, that must occur before a dispute can go to arbitration. Commentators have noted significant use of such provisions (also known as "step" or "escalation"

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101. *See supra* text accompanying note 95. The clause did include a step/escalation clause, and so the number of observations for that type of provision in the sample is also 87.

102. BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 210.

clauses) in international contracts.[103] The data are consistent with this observation.[104] Over 75 percent of the clauses in the sample (67 of 87) included some sort of requirement of negotiation or mediation before the parties could go to arbitration, as shown in Table 12.[105] Clauses including mediation were relatively unusual, with only six clauses (of 87, or 6.9 percent) requiring mediation before the dispute could be arbitrated.

Table 12. Step/Escalation Clauses

	Number (%) of Clauses
Negotiation by senior executives	24 (27.6%)
Negotiation by senior executives with mediation	3 (3.4%)
Some lesser negotiation requirement	25 (28.7%)
Multi-tiered without mediation	12 (13.8%)
Multi-tiered with mediation	3 (3.4%)
None	20 (23.0%)

2. Scope of the Arbitration Clause

An arbitration clause must define the set of disputes that the parties are agreeing to submit to arbitration (i.e., its scope).[106] Almost all of the arbitration clauses in the sample had broad, general scope provisions (all but one, which was limited to certain specified types of

103. IBA GUIDELINES FOR DRAFTING INT'L ARBITRATION CLAUSES ¶ 86 (2010) [hereinafter IBA GUIDELINES] ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration."); Klaus Peter Berger, *Law and Practice of Escalation Clauses*, 22 ARB. INT'L 1, 1 (2006) ("Escalation clauses . . . are being increasingly used in international construction and engineering contracts.").

104. *See also* Weidemaier, *supra* note 5, at 1911 (finding, in sample of domestic and international material contracts, clauses providing for negotiation only (36.1 percent), mediation only (3.0 percent), some multi-tiered process (5.2 percent), and no requirement (55.7 percent)).

105. Table 4 distinguishes between clauses providing for negotiation and clauses providing for multiple tiers of negotiation, based on the language of the clause. This distinction may not be meaningful in practice to the extent parties without multi-tiered clauses nonetheless have representatives negotiate before a dispute is referred to senior executives.

106. FRIEDLAND, *supra* note 82, at 61 ("It is essential that an arbitration clause cover precisely the subject matter that the parties intend be submitted to arbitration."); Daniel M. Kolkey & Richard Chernick, *Drafting an Enforceable Arbitration Clause*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION § 2.02[1], at 15 (Daniel M. Kolkey et al. eds., 3d ed. 2012) ("The first step in drafting an arbitration clause is to determine the scope of the disputes that are to be arbitrated.").

disputes). But the variation in phrasing of the scope provisions is striking. Arbitration institutions commonly offer model arbitration clauses for parties to incorporate into their contracts, although those model clauses vary in how they define the scope of the obligation to arbitrate.[107] In the sample of international supply contracts, however, the parties rarely followed the scope provisions in the model clauses: only nine of the clauses (of 86, or 10.5 percent) included language matching one of the leading model clauses.[108] The Bond study of ICC arbitration clauses had a similar finding.[109]

Even more notable is the large degree of variation in each of the central elements of the scope provisions in the arbitration clauses in the sample.[110] The eighty-six clauses used twenty different formulations of the disputes subject to the arbitration clause, with "dispute" or "disputes" the most common (29 clauses), "dispute, controversy, or claim" the second most common (23 clauses), and "controversy or claim" the third most common (11 clauses). They used

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107. *See* AM. ARBITRATION ASSOC., COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 8 (2013) ("Any controversy or claim arising out of or relating to this contract, or the breach thereof . . . ."); INT'L CTR. FOR DISPUTE RESOLUTION, GUIDE TO DRAFTING INTERNATIONAL DISPUTE RESOLUTION CLAUSES 2, https://www.adr.org/sites/default/files/document_repository/ICDR%20Guide%20to%20Drafting%20International%20Dispute%20Resolution%20Clauses%20-%20English.pdf (last visited Jan. 17, 2019) [https://perma.cc/376N-9QPM] (archived Jan. 17, 2019) [hereinafter ICDR DRAFTING] (using the same language as the AAA); JAMS CLAUSE WORKBOOK: A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS 2 (2018), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf [https://perma.cc/F5W5-X9CB] (archived Jan. 19, 2019) ("Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable . . . ."); *Arbitration Clause,* INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/ (last visited Jan. 17, 2019) [https://perma.cc/9JFH-UVBJ] (archived Jan. 17, 2019) [hereinafter ICC Standard Arbitration Clauses] ("All disputes arising out of or in connection with the present contract . . . ."); UNCITRAL ARBITRATION RULES, Annex (2010), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf [https://perma.cc/F4DD-Q236] (archived Feb. 23, 2019) ("Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof . . . .").

108. Four largely tracked the language of the AAA model clause; three largely tracked the language of the ICC model clause; none used the JAMS model clause; and two used a clause very similar to the UNCITRAL model clause. *See generally* sources cited *supra* note 107.

109. *See* Bond, *supra* note 83, at 69–70. "Of 1987's 237 arbitration clauses [giving rise to ICC arbitrations], the standard clause, word-for-word, was used exactly once. Of 1989's 215 clauses, it was used thrice." Overall, "the standard ICC clause, with perhaps minor variations in wording, was used in 47 arbitration clauses (20%) in 1987 and in 21 arbitration clauses (10%) in 1989, generally with the addition of the place of arbitration." *Id.*

110. The counts of differences that follow do not treat terms as different because one is singular and the other is plural, because they use a different form of the word (i.e., "arise under" and "arising under" are coded as a single variation), or because the key words are in a different order. Similarly, it ignores the use of "any" versus "all" as a modifier in the provision.

thirty-five different formulations to describe the source of the dispute, with "contract" or "agreement" the most common (31 clauses) and "contract, or breach thereof" (10 clauses) the second most common. And they used twenty-one variations of the language describing the relationship between the two, with "arising out of or relating to" the most common (31 clauses) and "arising out of or in connection with" the second most common (11 clauses).[111]

Overall, combining the three elements, the eighty-six clauses in the sample contained seventy different formulations of scope language with no formulation being included in more than four contracts. The four most common formulations were: controversy or claim arising out of or relating to the agreement or breach thereof (4 clauses); dispute arising out of or in connection with the agreement (3 clauses); dispute arising out of or relating to the agreement (3 clauses); and dispute arising under the agreement (3 clauses).

Ultimately, however, the variations in language—clear examples of encrusted contract boilerplate[112]—likely have little legal significance. Almost all American courts would treat most if not all of these scope provisions as broad clauses (rather than narrow ones),[113] applying a "pro-arbitration" policy in interpreting the clause and finding the clause to apply to a range of disputes collateral to the contract.[114]

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111. *Compare* BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 205 ("[T]here are a handful of formulae that are frequently used to define the scope of arbitration clauses. These formulae include 'any' or 'all' disputes: (i) 'arising under this Agreement'; (ii) 'arising out of this Agreement'; (iii) 'in connection with this Agreement'; and (iv) 'relating to this Agreement.' Alternative formulations are also used, including: (v) 'all disputes relating to this Agreement, including any question regarding its existence, validity, breach, or termination'; or (vi) 'all disputes relating to this Agreement or the subject matter hereof.'").

112. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 289 (1985) ("Formulations [of boilerplate terms] are . . . subject to what we term encrustation, an overlaying of legal jargon to the point that the intelligibility of the language deteriorates significantly.").

113. RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INV'R-STATE ARBITRATION § 2-15, reporters' note (ii) to cmt. a (AM. LAW INST. Tentative Draft No. 7, 2019) ("Courts regularly assess the breadth in which an arbitration agreement is couched, characterizing certain clauses as 'broad' or 'narrow.' Some courts have held that this characterization must be made as the first step in the analysis, while others, without so holding, ascribe significance to the characterization when interpreting particular phrases in arbitration agreements.") (citations omitted); BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 1201 ("Historically, a number of U.S. judicial decisions distinguished between 'broad' and 'narrow' arbitration clauses.").

114. BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 1326. *But see* Cape Flattery Ltd. v. Titan Maritime, LLC, 647 F.3d 914, 922–24 (9th Cir. 2011) ("[U]nder an arbitration agreement covering disputes 'arising under' the agreement, only those disputes 'relating to the interpretation and performance of the contract itself' are arbitrable.") (quoting Mediterranean Enterprises, Inc. v. Ssangyong Construction Co., 708 F.2d 1458, 1464 (9th Cir. 1983)); Tracer Research Corp. v.

3. Carve-Outs from Arbitration

Parties to arbitration clauses with broad scope provisions may limit the scope by carving out certain claims from arbitration. Commentators counsel against the use of carve-outs,[115] but they are common in domestic US arbitration clauses.[116]

The international supply contracts studied here commonly used carve-outs. As can be seen in Table 13, almost 60 percent of arbitration clauses in the sample used some form of carve-out: 37.2 percent carved out claims for provisional relief, 18.6 percent carved out intellectual property or patent claims, and 17.4 percent carved out equitable claims or claims for injunctive relief.[117] These findings are consistent with O'Hara O'Connor and Drahozal's view that "the vast majority of these contractual provisions preserve rights to proceed in court in order to protect information and innovation."[118]

Table 13. Carve-Outs from Arbitration

	Number (%) of Clauses
Provisional Relief	32 (37.2%)
Intellectual Property/Patent	16 (18.6%)
Equitable Claims/Injunctive Relief	15 (17.4%)
Breach of Confidentiality Obligation	6 (7.0%)
Other	6 (7.0%)
None	35 (40.7%)

National Environmental Services Co., 42 F.3d 1292, 1295 (9th Cir. 1994), *cert. dismissed*, 515 U.S. 1187 (1995) (construing "arising under" narrowly).

115. BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 205 ("Although these types of provisions can serve legitimate objectives, it is usually better to avoid efforts to exclude particular types of disputes from arbitration, except in unusual circumstances. Such exclusions often lead (undesirably) to parallel proceedings in both the arbitral forum and national courts, and to jurisdictional disputes over the application of a clause to particular claims."); BORN, FORUM SELECTION AGREEMENTS, *supra* note 82, at 33–34 ("Ordinarily, exclusions from the scope of the agreements to arbitrate should be avoided except in unusual circumstances," identifying "injunctive relief for intellectual property rights" and "validity of intellectual property rights" as possible examples).

116. Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1966–67 (2015) (finding carve outs common in domestic US arbitration clauses, but reporting that, except for technology agreements, "carve-outs are included in relatively few international and foreign agreements"); Erin O'Hara O'Connor & Christopher R. Drahozal, *Steps Toward Evidence-Based IP: The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177, 2189 (2014) ("Carve-outs were common in all of the types of contracts we studied") [hereinafter O'Hara O'Connor & Drahozal, *Steps*].

117. Many clauses included only one carve-out, but some included more than one.

118. O'Hara O'Connor & Drahozal, *Steps*, *supra* note 116, at 2180–81.

4. Delegation Clauses

The default rule under US law is that courts have the final authority to rule on challenges to the validity of the arbitration agreement, while arbitrators have final authority over challenges to the validity of the contract that includes the arbitration agreement.[119] Courts always have final authority to rule on issues of assent to either the arbitration agreement or the underlying contract (unless the parties agree post-dispute to have the arbitrator decide).[120]

In *Rent-A-Center, West, Inc. v. Jackson*, however, the U.S. Supreme Court held that parties could by contract delegate authority to the arbitrator to decide challenges to the validity of the arbitration agreement, reversing the default rule in the Federal Arbitration Act (FAA) that courts have the final authority to resolve such issues.[121] (The Court had previously suggested the possibility in *First Options of Chicago, Inc. v. Kaplan*.[122]) Delegation clauses are common in consumer financial services contracts.[123]

But delegation clauses are much less common in the international supply contracts studied here. Only 4.7 percent (4 of 86) of the arbitration clauses in the sample included language that might be construed as a delegation clause. That said, US courts, with only rare exceptions, have held that the most common international arbitration rules contain language that operates as a delegation clause.[124] Because

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119. *See, e.g.*, RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INV'R-STATE ARBITRATION § 2-14 & cmt. b (AM. LAW INST. Tentative Draft No. 7, 2019).

120. *Id.* § 2-12(a).

121. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

122. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 946 (1995) (holding that "First Options cannot show that the Kaplans clearly agreed to have the arbitrators decided (*i.e.*, to arbitrate) the question of arbitrability").

123. CFPB FINAL REPORT, *supra* note 2, at 41 ("Although none of the arbitration clauses in the samples directly tracked the language used in *Rent-A-Center*, many of the arbitration clauses included language delegating to the arbitrator the authority to rule on the enforceability of the arbitration clause. The share ranged from 39.3% of arbitration clauses in our sample of checking account contracts (covering 51.6% of arbitration-subject insured deposits) to 63.4% of arbitration clauses in our sample of storefront payday loan contracts (covering 39.3% of the market), although none of the mobile wireless arbitration clauses studied included a delegation provision.").

Interestingly, some of the consumer financial services contracts contained what might be called "anti-delegation clauses," reserving to the courts issues that otherwise might be decided by the arbitrators. *Id.* ("From 7.0% of arbitration clauses in the storefront payday loan contracts (covering 28.4% of arbitration-subject storefronts) to 13.6% of arbitration clauses in credit card contracts (covering 42.6% of arbitration-subject credit card loans outstanding) to 26.2% of arbitration clauses in checking account contracts (covering 22.4% of arbitration-subject insured deposits) included such a provision."). Our sample did not include any such provisions.

124. *See, e.g.*, Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074–75 (9th Cir. 2013) (citing "prevailing view" that incorporation of the UNCITRAL arbitration

most arbitration clauses in the sample provided that the arbitration would be governed by some such set of rules,[125] the absence of delegation clauses may have little practical effect.

5. *Ad Hoc* Arbitration/Choice of Institution

A central choice faced by drafters of arbitration clauses is between institutional arbitration—with an arbitration institution providing administrative services for the arbitration—and *ad hoc* arbitration—with the arbitral tribunal itself handling administration of the case. Most of the arbitration clauses in the sample (77 of 86, or 89.5 percent) chose a particular arbitration institution to administer the arbitration. Only nine (of 86, or 10.5 percent) of the arbitration clauses provided for *ad hoc* arbitration. Six of the nine *ad hoc* clauses specified an appointing authority or a set of arbitration rules or both; the other three did not.[126]

The remaining clauses provided for arbitration to be administered by an arbitration institution. Not surprisingly, given that most contracts in the sample had at least one American party, the most frequently chosen institution (30 of 86, or 34.9 percent) was the AAA, or its international branch, the ICDR. The ICC was a close second (29 of 86, or 33.7 percent), with the LCIA (4 of 86, or 4.7 percent) and JAMS (3 of 86, or 3.5 percent) third and fourth, respectively. For the other administering institutions agreed to in clauses in the sample, see Table 14.

Table 14. Choice of Ad Hoc *or Institutional Arbitration*

	Number (%) of Clauses
Ad Hoc—Rules or appointing authority specified	6 (7.0%)
Ad Hoc—No rules or appointing authority specified	3 (3.5%)

rules "is clear and unmistakable evidence that the parties agreed that the arbitrator would decide" issues of arbitral jurisdiction); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009) (same for AAA arbitration rules); Shaw Grp. Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 121–22 (2d Cir. 2003) (same for ICC arbitration rules); *but see* RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INV'R-STATE ARBITRATION § 2-8, reporters' note (iii) to cmt. b (AM. LAW INST. Tentative Draft No. 7, 2019) (rejecting the view that current institutional rules should be treated as delegation clauses).

125. *See infra* text accompanying note 126.

126. Of the six ad hoc arbitration clauses that specified either an appointing authority or arbitration rules (or both), one named CPR as the appointing authority; two chose the CPR Non-Administered Arbitration Rules; one selected the UNCITRAL Arbitration Rules and named the Atlanta International Arbitration Society as the appointing authority; one selected the 1996 UK Arbitration Act (for an arbitration seated in London); and one specified the 1996 India Arbitration and Conciliation Act (for an arbitration seated in New Delhi).

AAA/ICDR (American Arbitration Association/International Centre for Dispute Resolution)	30 (34.9%)
CIETAC (China International Economic and Trade Arbitration Commission)	1 (1.2%)
Court of Arbitration of the Saint-Petersburg and Leningrad Region	2 (2.3%)
CPR (International Institute for Conflict Prevention and Resolution)	2 (2.3%)
HKIAC (Hong Kong International Arbitration Centre)	1 (1.2%)
ICC (International Chamber of Commerce Court of International Arbitration)	29 (33.7%)
JAMS (formerly Judicial Arbitration and Mediation Services, Inc.)	3 (3.5%)
LCIA (formerly London Court of International Arbitration)	4 (4.7%)
RFCCI (International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation)	1 (1.2%)
SIAC (Singapore International Arbitration Centre)	1 (1.2%)
SCC (Arbitration Institute of the Stockholm Chamber of Commerce)	2 (2.3%)
AAA if in US; ICC if not	1 (1.2%)
Total	86

6. Hearing Location or Arbitral Seat

All but eight arbitration clauses in the sample specified some location for the arbitration. A total of seventy arbitration clauses in the sample specified twenty-two different locations, ten US locations and twelve non-US locations. Another four specified the respondents' place of business (most commonly by name of the city), in one the place of arbitration was to be agreed on by the party (but could not be either party's principal place of business), and in three the arbitral seat was redacted. Far and away the most commonly specified locations were New York (named in 29 arbitration clauses) and London (named in 13 clauses). Table 15 summarizes the specified locations.

Table 15. Location Specified in Arbitration Clause

US City/State	Number of Clauses	Non-US City	Number of Clauses
New York	29	London	13
San Francisco	3	Hong Kong	2
Chicago	2	Paris	2
Atlanta	1	Singapore	2
Delaware	1	Stockholm	2

Los Angeles	1	Toronto	2
Miami	1	Beijing	1
Raleigh	1	Geneva	1
San Diego	1	Montreal	1
Washington D.C.	1	Moscow	1
		New Delhi	1
		Zurich	1
Others:			
None	8	Respondent's city	1
Redacted	3	New York or London	2
Party agreement	1	San Diego or Tokyo	1

Of the seventy-eight clauses that specified a location for the arbitration (including the three in which the location was redacted), barely a third (29 of 78, or 37.2 percent) expressly labeled the location as the "place" or "seat" of the arbitration, or identified it as the place the award would be issued.[127] The place or seat of an international arbitration is of critical importance because it determines the applicability of the New York Convention, the governing arbitration law, and the country in which actions to vacate the award must be filed.[128] If the arbitration clause does not specify the place of arbitration, international arbitration rules typically provide for the arbitrators to determine it.[129]

As shown in Table 8, the remaining clauses that named a location for the arbitration did not identify it as the place or seat. Instead, they used language that expressly identified the location as where the arbitral hearing would take place (1 clause, or 1.3 percent) or used language that was ambiguous as to whether it was specifying the place of arbitration or the location of the hearing. The clauses referred to the "venue" or "location" of the arbitration (4 of 78, or 5.1 percent); stated that disputes would be "referred," "submitted," or "subject to" arbitration (4 of 78, or 5.1 percent); stated that disputes would be "settled," "resolved," or "determined by" arbitration in the specified location (7 of 78, or 9.0 percent); or provided that the arbitration would

127. Two of the clauses provided that the specified location was both the arbitral seat (or the place the award is issued) and the location of any arbitral hearings. *See supra* Table 8.

128. BORN, FORUM SELECTION AGREEMENTS, *supra* note 82, at 56–59.

129. *Id.* at 58; *see, e.g.*, IN'TL CTR. FOR DISPUTE RESOLUTION, INTERNATIONAL ARBITRATION RULES, art. 17(1) (2014) [hereinafter ICDR INTERNATIONAL ARBITRATION RULES]; UNCITRAL ARBITRATION RULES, *supra* note 107, art. 18(1); ICC Standard Arbitration Clauses, *supra* note 107. The place of arbitration can be, but is not necessarily, where the arbitration hearing takes place. BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 1596–97.

be "conducted," "held," or would "occur" or "take place" in (or at) the specified location (33 of 78, or 42.3 percent).[130]

As a practical matter, the ambiguity in the clauses may not matter because courts and arbitration institutions may nonetheless construe the provision as naming the arbitral seat.[131] But at a minimum, the language provides further evidence that international arbitration clauses, at least those studied here, do not track the sample clauses of arbitration institutions. Leading arbitral institutions,[132] as well as leading commentators,[133] recommend that arbitration clauses specifically identify the "place" or "seat" of arbitration to avoid this possible ambiguity. Most of the clauses in the sample do not follow that advice, as shown in Table 16. A possible explanation is that the drafters were influenced by drafting practices in US domestic arbitration, in which the arbitral seat is not a particularly relevant concept. At least some commentators recommend that parties to US domestic arbitration clauses use language like that found to be used in the clauses studied here (that is, not referring to the place or seat of the arbitration).[134] The extent to which drafting of domestic arbitration

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130. *See supra* Table 10. The other possibility is that the parties wanted only to identify the place where any arbitral hearings would be held and did not intend to identify the place or seat of the arbitration. Given how such language often is interpreted, such a drafting choice would be even more problematic. *See infra* note 131 and accompanying text.

131. BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 2074 ("[P]arties sometimes refer merely to a geographic location, without specifying for what purpose (*e.g.*, as the arbitral seat, location for hearings, location of an arbitral institution, or something else). In general, courts and arbitral institutions interpret such references as specifying the arbitral seat.").

132. ICDR DRAFTING, *supra* note 107, at 2 ("The place of arbitration shall be [city, (province or state), country][.]"); UNCITRAL ARBITRATION RULES, *supra* note 107 ("The place of arbitration shall be . . . [town and country.]").

133. *See, e.g.*, IBA GUIDELINES, *supra* note 103, at §2 ¶ 13 ("The place of arbitration shall be [city, country]"); *see also* BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 2070–71 ("It is desirable to avoid references to the 'situs,' 'venue' or 'forum' of the arbitration. In principle, these terms should have the same meaning as either 'place' or 'seat.' Nonetheless, they also connote either a requirement that the arbitral hearings and meetings be conducted in the designated 'venue' or 'forum' . . . or that the designated location is not intended as the arbitral 'seat,' but merely as a geographic location for hearings. Similar confusion may arise where the arbitration agreement designates where the arbitral tribunal shall 'meet' . . . [T]he foregoing usages (referring to the venue, situs, or forum) produce unnecessary certainty and should be avoided as a drafting matter.").

134. *See, e.g.*, DAVID ALLGEYER, ASS'N OF CORP. COUNSEL, SAMPLE ARBITRATION CLAUSES WITH COMMENTS, http://www.acc.com/_cs_upload/vl/membersonly/SampleFormPolicy/409703_1.pdf [https://perma.cc/NU4P-9VJJ] (last visited Jan. 17, 2019) ("The arbitration shall be held in _____, ____ or any other place agreed upon at the time by the parties."); *ADR Clauses*, NAT'L ARBITRATION & MEDIATION, http://www.namadr.com/resources/adr-clauses/ (last visited Feb. 23, 2019) [https://perma.cc/LZ78-RZHV] (archived Jan. 17, 2019) ("The Employee and Employer agree that the Arbitration shall be held in the county and state where Employee currently works for Employer or most recently worked for Employer.").

clauses influences the drafting of international arbitration clauses (and vice versa) is worth further research.

Table 16. Arbitral Seat or Location of Hearing

	Number (%) of Clauses
Place or Seat of the Arbitration	27 (34.6%)
Seat and Where Hearings Held	1 (1.3%)
Where Hearings Held and Award Issued	1 (1.3%)
Hearing Shall Be Held In	1 (1.3%)
Venue or Location of Arbitration	4 (5.1%)
Refer, Submit, or Subject to Arbitration In	4 (5.1%)
Settled, Resolved, Determined by Arbitration In	7 (9.0%)
Conducted, Held, Venued, or Occur, Take Place, Brought In	33 (42.3%)

Table 17 compares the location of the arbitration to the parties' principal places of business, as identified in the contract.[135] In eleven (of 75, or 14.7 percent)[136] of the arbitration clauses the location was the buyer's principal place of business or state of incorporation. In ten (of 75, or 13.3 percent) of the arbitration clauses the location was the seller's principal place of business or state of incorporation. In four (of 75, or 5.3 percent) of the clauses, the respondent's location (or a location convenient for the respondent) was specified. In twenty (of 75, or 26.7 percent) of the arbitration clauses, a neutral jurisdiction was chosen (and in one case the clause, while not specifying a location, provided that the location could not be either party's principal place of business). This study classified the location of an arbitration as neutral when it was not in the same country as either the buyer or the seller. Because almost every contract had at least one American party, this definition of neutrality means that none of the contracts with a US location for the arbitration was labeled "neutral." Of the contracts with a US location for the arbitration other than a party's principal place of business or place of incorporation (29 of 75, or 38.7 percent), sixteen had a US buyer and thirteen had a US seller.

135. We treated the seat as matching the principal place of business when it was in the same country for non-US parties and the same state for US parties (with the exception of one clause for a company located in the New Jersey suburbs of New York City, which we treated as being in New York).

136. As noted above, eight clauses did not specify a location and in three clauses the location was redacted.

Table 17. Location of Arbitration Compared to Location of Party

Arbitration Located In:	Number (%) of Clauses
State of Buyer Headquarters	9 (12.0%)
State of Buyer Place of Incorporation	2 (2.7%)
US with US Buyer	16 (21.3%)
Neutral Site	20 (26.7%)
Not at Parties' Principal Place of Business	1 (1.3%)
State of Respondent's Headquarters	2 (2.7%)
State Convenient for Respondent	2 (2.7%)
US with US Seller	13 (17.3%)
State of Seller Headquarters	10 (13.3%)
State of Seller Place of Incorporation	0 (0.0%)

Finally, Table 18 compares the location of the arbitration to the applicable substantive law specified in the contract. Overall, the majority of arbitration clauses (43 of 70, or 61.4 percent) selected as the applicable substantive law the law of the jurisdiction in which the arbitration was located (or vice versa).

Table 18. Arbitration Clauses in which Applicable Substantive Law Was the Same as the Location of the Arbitration

US City/State	Number (%) of Clauses	Non-US City	Number (%) of Clauses
New York	21/29 (72.4%)	London	8/13 (61.5%)
San Francisco	1/3 (33.3%)	Hong Kong	1/2 (50.0%)
Chicago	1/2 (50.0%)	Paris	0/2 (0.0%)
Atlanta	0/1 (0.0%)	Singapore	0/2 (0.0%)
Delaware	1/1 (100.0%)	Stockholm	1/2 (50.0%)
Los Angeles	1/1 (100.0%)	Toronto	1/2 (50.0%)
Miami	1/1 (100.0%)	Beijing	1/1 (100.0%)
Raleigh	1/1 (100.0%)	Geneva	0/1 (0.0%)
San Diego	1/1 (100.0%)	Montreal	1/1 (100.0%)

Washington D.C.	0/1 (0.0%)	Moscow	0/1 (0.0%)
		New Delhi	1/1 (100.0%)
		Zurich	1/1 (100.0%)

7. Language of the Arbitration

The majority of arbitration clauses in the sample (49 of 86, or 57.0 percent) specified English as the language of the arbitration. Only three contracts in the sample specified some language other than English—two (2.3 percent) provided for Russian and one (1.2 percent) provided for both English and Chinese. Almost all of the remainder (33 of 86, or 38.4 percent) specified no language, leaving the language of the arbitration to be governed by any applicable arbitration rules.[137]

Interestingly, the two sets of arbitration rules for the institutions specified most commonly in the sample address the language of the arbitration differently. Article 18 of the AAA/ICDR Rules provides that "[i]f the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise."[138] The ICC Rules have a different emphasis, providing that the arbitral tribunal "shall determine the language or languages of the arbitration" and making "the language of the contract" only one of the "relevant circumstances" to be given "due regard" by the tribunal.[139] Because all of the contracts in the sample are in English, English would be the language of the arbitration under the AAA/ICDR Rules unless the tribunal rules otherwise. Under the ICC Rules, by comparison, the tribunal would decide the language of the arbitration, with the fact that the contract was in English being a relevant consideration.

Accordingly, one might expect parties that choose the ICC Rules to be more likely to specify the language of the arbitration in their arbitration clause than parties that choose the AAA/ICDR Rules. That is what these data show, albeit based on a small sample. Half of the parties (15 of 30) that chose the AAA/ICDR Rules specified English as the language of the arbitration in their arbitration clause. By comparison, 75 percent of the parties (21 of 28, with one clause redacted) that chose the ICC Rules specified English in their arbitration clause.

137. The language specified in the remaining arbitration clause was redacted.
138. ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 18.
139. ICC Standard Arbitration Clauses, *supra* note 107, art. 20.

8. Arbitral Tribunal

The default number of arbitrators specified in international arbitration rules varies, between one and three.[140] Data show that roughly 40 percent of ICC arbitrations are decided by sole arbitrators while 60 percent are decided by three-arbitrator tribunals.[141]

In the arbitration clauses in the sample, 20.9 percent (18 of 86) provided for a sole arbitrator to resolve the parties' dispute, 45.3 percent (39 of 86) provided for a three-arbitrator tribunal, 16.3 percent (14 of 86) provided for one or three arbitrators, 4.7 percent (4 of 86) contained some other provision, and 12.8 percent (11 of 86) did not address the issue, as shown in Table 19. Of the clauses specifying one or three arbitrators, five based the number of arbitrators on the amount at stake,[142] and nine provided for one arbitrator unless the parties could not agree on the sole arbitrator, in which case three would be used.

Table 19. Number of Arbitrators

	Number (%) of Clauses
One arbitrator	18 (20.9%)
Three arbitrators	39 (45.3%)
One or three arbitrators	14 (16.3%)
One or more arbitrators	3 (3.5%)
Three or five arbitrators	1 (1.2%)
No provision	11 (12.8%)

140. *Compare* ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 11 ("If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines in its discretion that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case."), *with* UNCITRAL ARBITRATION RULES, *supra* note 107, art. 7(1) ("If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."), *and* ICC Standard Arbitration Clauses, *supra* note 107, art. 12(2) ("Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.").

141. *See* Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, *in* THE OXFORD HANDBOOK ON INTERNATIONAL ARBITRATION 14 (Thomas Schultz & Frederico Ortino eds.) (forthcoming 2019).

142. Two clauses had a $5 million threshold for a three-arbitral tribunal, one clause had a $1 million threshold, and in two clauses the amount of the threshold was redacted.

All of the clauses that selected a governing set of arbitration rules thereby also specified a method of selecting the arbitrators.[143] In addition, 62.8 percent (54 of 86) addressed arbitrator selection directly in some way, as summarized in Table 20. A number of clauses (11 of 86, or 12.8 percent) simply directed that arbitrators be selected in accordance with the rules, while more (17 of 86, or 19.8 percent) provided that three arbitrators would be selected with each party choosing one, and the party-appointed arbitrators then selecting the chair (i.e., following the standard process specified in arbitral rules).[144] Another 18.6 percent (16 of 86) of the clauses provided that the arbitrators would be selected by agreement of the parties, with most (13 of 86, or 15.1 percent) providing a back-up mechanism if the parties could not agree. Two clauses (of 86, or 2.3 percent) selected the International Institute for Conflict Prevention and Resolution (CPR) ranking or "list" process, whereby each party ranks prospective arbitrators in order of preference and CPR chooses the candidate "for whom the parties have collectively indicated the highest preference."[145] One clause (of 86, or 1.2 percent) specified the CPR screened selection process, under which the party-appointed arbitrators are not informed which party selected them.[146]

Table 20. Method of Arbitrator Selection

	Number (%) of Clauses
As specified in rules	11 (12.8%)
By agreement	3 (3.5%)
By agreement; if none:	
per arbitration statute	1 (1.2%)
per rules	2 (2.3%)
by institution	2 (2.3%)
by CPR ranking procedure	1 (1.2%)
three arbitrators	6 (7.0%)
three arbitrators selected per rules	1 (1.2%)
Each party appoints one; arbitrators select chair	17 (19.8%)

143. *See, e.g.*, ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 12; UNCITRAL ARBITRATION RULES, *supra* note 107, arts. 8–10; ICC Standard Arbitration Clauses, *supra* note 107, arts. 12–13.

144. An additional three clauses (3.5 percent) provided that the chair would be appointed by the arbitral institution, while one (1.2 percent) provided that the chair would be appointed either by the party-appointed arbitrators or the institution.

145. INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, 2018 RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES, Rule 6.4(b), https://www.cpradr.org/resource-center/rules/arbitration/non-administered/2018-International-Non-Administered-Arbitration-Rules [https://perma.cc/YUC5-TY8J] (archived Mar. 14, 2019).

146. *Id.* at Rule 5.4(d).

Each party appoints one; institution selects chair	3 (3.5%)
Each party appoints one; chair selected by agreement or by institution	1 (1.2%)
If one arbitrator, by agreement; if three arbitrators, each party appoints one and arbitrators select chair	1 (1.2%)
If one arbitrator, by agreement; if no agreement, by institution; if three arbitrators, each party appoints one and arbitrators select chair	2 (2.3%)
CPR ranking procedure	2 (2.3%)
CPR screened selection procedure	1 (1.2%)
No provision	32 (37.2%)

More than two-thirds (61 of 86, or 70.9 percent) of clauses required no special qualifications for arbitrators.[147] Of those that did, the most common requirement (9 of 86, or 10.5 percent) was that the arbitrators have some specified experience in the relevant industry.[148] A smaller number (5 of 86, or 5.8 percent) required some particular legal experience, such as that the arbitrator be a retired judge or a practicing attorney. A handful of clauses specified qualifications only for the chair of the arbitral tribunal or for an arbitrator appointed by an institution rather than by the parties. Finally, one clause (1.2 percent) required the arbitrators to abide by the "CPR-Georgetown Commission Proposed Model Rule for the Lawyer as Neutral"[149] and one clause (of 86, or 1.2 percent) required the arbitrators to abide by the AAA's "Code of Ethics for Arbitrators in Commercial Disputes."[150]

147. FRIEDLAND, *supra* note 82, at 71 ("It is usually unwise to specify any qualifications for arbitrators in advance.").

148. Another clause required that the party-appointed arbitrators have industry experience, while the chair of the tribunal be a partner at an international law firm.

149. CPR-GEORGETOWN COMM'N ON ETHICS & STANDARDS IN ADR, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002), https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/model-rule-for-the-lawyer-as-third-party-neutral/_res/id=Attachments/index=0/Third-Party-netural-create-new-cover-page-2012.pdf [https://perma.cc/6GSB-EFSL] (archived Jan. 31, 2019).

150. AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/4979-PH9T] (archived Feb. 23, 2019).

Table 21. Required Qualifications for Arbitrators

	Number (%) of Clauses
General experience	4 (4.7%)
Industry experience	9 (10.5%)
Specific legal experience	5 (5.8%)
Dispute resolution and industry experience	1 (1.2%)
For institutional appointees only	2 (2.3%)
For chair only	2 (2.3%)
For chair and institutional appointees	1 (1.2%)
For chair; industry experience for all arbitrators	1 (1.2%)
None	61 (70.9%)

9. Arbitral Procedures

As noted above, most clauses in the sample, by their choice of arbitration institution or rules, adopted some set of baseline arbitral procedures.[151] But standard international arbitration rules have been criticized for giving too much discretion to the arbitrators.[152] Perhaps in response to such concerns, a number of the clauses adopted more specific provisions addressing various aspects of arbitral procedure.

Three clauses (of 86, or 3.5 percent) contained lengthy and detailed provisions addressing arbitral procedure in depth. Two clauses (of 86, or 2.3 percent) provided for court rules of evidence (one US, one UK) to apply in the arbitration hearing, and one (of 86, or 1.2 percent) adopted the IBA Rules on the Taking of Evidence in International Arbitration.[153]

Few clauses (6 of 86, or 7.0 percent) contained provisions dealing with multi-party disputes, although international arbitration rules increasingly are addressing multi-party issues.[154] As seen in Table 22, two clauses permitted consolidation, one addressed joinder, and three

151. *See supra* text accompanying note 126.

152. *See* William W. Park, *The 2002 Freshfields Lecture—Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L 279, 300 (2003) ("In cross-cultural business arbitration, the widespread assumptions about the benefits of arbitrator discretion may well turn out to be incorrect . . . .").

153. *See* IBA RULES ON THE TAKING OF EVIDENCE IN INT'L ARBITRATION (INTERNATIONAL BAR ASS'N 2010).

154. *See, e.g.*, ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 107, arts. 7–8 (addressing joinder and consolidation respectively); ICC Standard Arbitration Clauses, *supra* note 107, arts. 7–10 (addressing joinder, claims between multiple parties, multiple contracts, and consolidation respectively).

provided that the arbitration could resolve individual claims only—language that should preclude class arbitration.[155]

Table 22. Multiparty Proceedings

	Number (%) of Clauses
Consolidation	2 (2.3%)
Consolidation & joinder	1 (1.2%)
Individual claims only	3 (3.5%)
None	80 (93.0%)

Roughly a quarter (21 of 86, or 24.4 percent) of the clauses addressed the availability of discovery in arbitration in some respect, as shown in Table 23. Indeed, sixteen of the twenty-one clauses actually used the word "discovery" (rather than document production or some more neutral term).[156] Notably, three of the clauses provided for discovery to be governed by court rules of procedure, although one clause then limited the amount of discovery available under those rules. Five clauses (of 86, or 5.8 percent) provided for what might be classified as "reasonable" discovery, six clauses (of 86, or 7.0 percent) sought to limit the amount of discovery beyond what otherwise might be available in arbitration, and one clause (of 86, or 1.2 percent) waived discovery altogether.

155. Provisions precluding class arbitration are much more common in domestic consumer arbitration agreements. *See* CFPB FINAL REPORT, *supra* note 2, § 2.5.5.

156. *See, e.g.*, Robert H. Smit & Tyler B. Robinson, *E-Disclosure in International Arbitration*, 24 ARB. INT'L 105, 105 (2008) ("If 'discovery' is a dirty word in international arbitration, 'e-discovery' promises to be downright obscene."); Robert H. Smit, *Towards Greater Efficiency in Document Production Before Arbitral Tribunals—A North American Viewpoint*, ICC CT. ARB. BULL. 93, 93 (2006) ("'Discovery,' in the US sense, is a dirty word in international arbitration."); *see also* BORN, COMMERCIAL ARBITRATION, *supra* note 77, at 2382 ("There are usually substantial differences between the disclosure processes in litigation and arbitration. These differences can be sufficiently marked that some commentators suggest that the term 'discovery,' which is used to refer to the compelled production of evidentiary materials in some national legal systems, is a misnomer when used in connection with international arbitration, preferring formulae such as 'disclosure' or 'evidence-taking.'"). *See generally* JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 567 (2003) ("In principle, discovery as understood in the common systems does not have a place in international commercial arbitration.").

Table 23. Discovery

	Number (%) of Clauses
Discovery per court rules	2 (2.3%)
Discovery per court rules but limited	1 (1.2%)
Reasonable discovery	5 (5.8%)
Pre-hearing depositions	1 (1.2%)
Discovery under ICC Rules	1 (1.2%)
Arbitrator may order discovery	3 (3.5%)
Information requested by arbitrators	1 (1.2%)
Limited discovery	6 (7.0%)
Waives discovery	1 (1.2%)
None	65 (75.6%)

Finally, 20.9 percent (18 of 86) of the arbitration clauses in the sample established some sort of time limit for the arbitral tribunal to issue its award.[157] The time permitted ranged from thirty days from selection of the arbitrators at the low end to one year from the selection of the arbitrators at the high end. The most common time limit was ninety days (from some starting point—either the selection of the arbitrators or the close of the hearing). The number of days was redacted in three of the clauses (of 86, or 3.5 percent).[158]

10. Confidentiality

The default rule in American arbitration law is that arbitration agreements do not impose an obligation of confidentiality on the parties (as opposed to the arbitrators or the arbitration institution).[159]

157. Commentators often discourage use of such time limits in arbitration clauses because of the risk that the arbitrators will lose their authority to act once the time limit has passed. *See* FRIEDLAND, *supra* note 82, at 88 ("In most instances, . . . the temptation to set deadlines in advance should be avoided or tempered, because an unmet deadline may result in an invalid award, or at least extra expense and delay if the award were challenged due to tardiness."). One of the clauses (of 86, or 1.2 percent) in the sample expressly stated that the arbitrators would not lose authority to act if the time limit passed and another provided that failure to comply with the time limit was not a basis for challenging the award.

158. A handful of clauses addressed scattered other procedural issues, including limiting the hearing to five consecutive days or three days total (one clause each), providing for the right to cross examine witnesses and to counsel of choice (one clause each), and permitting telephonic hearings with arbitrator and/or party consent (two clauses).

159. *See* Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 30–31 (2015); RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL AND INV'R-STATE ARBITRATION § 3–11 (AM. LAW INST., Tentative Draft No. 7, 2019). *But see* 2018 RULES FOR NON-ADMINISTERED ARBITRATION OF

Only a minority of the arbitration clauses in the sample changed that default rule: as shown in Table 24, just under 30 percent of the clauses required some degree of confidentiality in the arbitration proceeding, meaning that, conversely, just over 70 percent of the clauses did not address the issue. Most of the confidentiality provisions (18 of 86, or 20.9 percent) specified that all aspects of the arbitration process be kept confidential, while a handful (6 of 86, or 7.0 percent) provided that materials in the arbitration proceeding be kept confidential. (The remaining clause contained only a general reference to "confidential private arbitration.")

Table 24. Confidentiality of the Arbitral Proceeding

	Number (%) of Clauses
All aspects confidential	18 (20.9%)
Materials disclosed confidential	6 (7.0%)
Other	1 (1.2%)
None	61 (70.9%)

11. Remedies

The substantial majority of the contracts in the sample with arbitration clauses (75 of 87, or 86.2 percent) included some limitation on the award of consequential damages or punitive damages or both.[160] Some contracts had remedy limitations both in the arbitration clause and elsewhere in the contract (21 of 86, or 24.4 percent), with the provision in the arbitration clause typically providing that the arbitrator was not authorized or permitted to award consequential and/or punitive damages. These data are shown in Table 25.[161] But in most contracts (65 of 86, or 75.6 percent), the remedy limitation was not in the arbitration clause but only elsewhere in the contract and did not mention arbitration or the arbitrator, as shown in Table 26.[162]

INTERNATIONAL DISPUTES, *supra* note 145, Rule 18 ("Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration . . . and unless otherwise required by law or to protect a legal right of a party.").

160. *See* FRIEDLAND, *supra* note 82, at 100 ("[Punitive damages are] a U.S. issue. Punitive damages in commercial cases are virtually non-existent outside the United States.").

161. For a discussion of the possible legal significance of this distinction, see RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL & INV'R-STATE ARBITRATION, § 4-12, cmt. c (AM. LAW INST., Tentative Draft No. 7, 2019).

162. The ICDR Arbitration Rules provide that "[u]nless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner." ICDR INTERNATIONAL ARBITRATION RULES, *supra* note

None of the twelve clauses without a remedy limitation in the body of the contract instead included a remedy limitation in the arbitration clause.

Table 25. Damages Limitation Not in Arbitration Clause

	Number (%) of Clauses
No consequential damages	21 (24.1%)
No consequential or punitive damages	45 (51.7%)
Liability cap (amount redacted)	1 (1.1%)
Buyer only: No consequential damages	1 (1.1%)
Seller only: No consequential damages	4 (4.6%)
Seller only: No consequential or punitive damages	1 (1.1%)
Redacted	2 (2.3%)
None	12 (13.8%)

Table 26. Damages Limitation in Arbitration Clause

	Number (%) of Clauses
Arbitrator will not award consequential or punitive damages	9 (10.5%)
Arbitrator will not award consequential damages	2 (2.3%)
Arbitrator will not award punitive damages	10 (11.6%)
None	65 (75.6%)

Four clauses (of 86, or 4.7 percent) made clear that statutes of limitations applicable to court actions also applied to arbitration.[163] Only two clauses (of 86, or 2.3 percent) addressed whether arbitrators could decide *ex aequo et bono* (on the basis of equity), and both rejected that possibility.[164] None of the clauses even mentioned the *lex*

107, art. 31(5); *see* FRIEDLAND, *supra* note 82, at 101 ("No other set of arbitral rules [than the ICDR Arbitration Rules] addresses this subject, as it is specific to the United States."). One of the twelve clauses without a remedy limitation provided that arbitration would be pursuant to the AAA rules, which might be construed to mean the ICDR Arbitration Rules. Two others specifically selected the AAA's Commercial Arbitration Rules, which do not contain a comparable provision.

163. The provisions are important because of uncertainty in US law over whether statutes of limitations applicable to court actions also apply in arbitration. *See* Gary B. Born & Adam Raviv, *Arbitration and the Rule of Law: Lessons from Limitations Periods*, 27 AM. REV. INT'L ARB. 373, 375 (2016) ("The majority position in U.S. courts is that statutes of limitations do not apply in arbitration.").

164. International arbitration rules typically preclude arbitrators from deciding *ex aequo* unless the parties have expressly agreed that the arbitrators may do so. *See, e.g.*, ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 31(3); ICC ARBITRATION

mercatoria (law merchant), although a number opted out of the Convention on Contracts for the International Sale of Goods.[165]

12. Awards and Costs

All leading international arbitration rules require the arbitrators' award to be in writing and to give reasons.[166] Several clauses (11 of 86, or 12.8 percent) in the sample reiterated those requirements, while another six (of 86, or 7.0 percent) required the award to be in writing without mentioning reasons. Two arbitration clauses (of 86, or 2.3 percent) authorized the award to be made by a majority of the arbitrators (consistent with the typical approach of international arbitration rules[167]), and another two provided for some form of "baseball" or final offer arbitration.[168]

Table 27. Award

	Number (%) of Clauses
By majority	2 (2.3%)
Final offer by issue; not reasoned	1 (1.2%)
Final offer for price	1 (1.2%)
In writing	6 (7.0%)
Reasoned and in writing	11 (12.8%)
Reasoned and in writing on request of either party	1 (1.2%)
None	64 (74.4%)

A majority of the clauses in the sample (49 of 86, or 57.0 percent) addressed the award of arbitration costs, while slightly fewer (41 of 86, or 47.7 percent) addressed the award of attorneys' fees. International arbitration rules typically authorize the arbitrators to allocate costs

RULES, *supra* note 107, art. 21(3); UNCITRAL ARBITRATION RULES, *supra* note 128 art. 35(2).

165. *See* Coyle, *Canons*, *supra* note 1, at 644.

166. *See, e.g.*, ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 30(1); UNCITRAL ARBITRATION RULES, *supra* note 107, art. 34(2) & (3); ICC Standard Arbitration Clauses, *supra* note 107, art. 32(2), 34 (reasoned award and requirement that draft award be scrutinized respectively).

167. *See, e.g.*, ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 29(2); UNCITRAL ARBITRATION RULES, *supra* note 107, art. 33(1); ICC Standard Arbitration Clauses, *supra* note 107, arts. 32(1).

168. In final offer arbitration, "each party shall submit its 'last best offer,' and . . . the arbitrators must select the 'last best offer' of one party or the other (with no power to grant any award of damages between, above, or below the 'last best offers' of the parties)." BORN, FORUM SELECTION CLAUSES, *supra* note 82, at 99.

and fees in the award.[169] With a few exceptions, the arbitration clauses that addressed the issue were divided between those providing for costs to be borne as they were incurred and those that adopted a "loser pays" rule, with the loser-pays approach in the minority. Thus, as Table 28 indicates, fifteen clauses (of 86, or 17.4 percent) required the loser to pay the arbitration costs (sometimes unless the arbitrator determines otherwise), while twenty-six clauses (of 86, or 30.2 percent) provided for arbitration costs to be split equally (again, sometimes unless the arbitrator determines otherwise or finds a claim or defense to be unreasonable). Similarly, twelve clauses (of 86, or 14.0 percent) required the loser to pay the other party's attorneys' fees (sometimes unless the arbitrator determines otherwise), while twenty-five clauses (of 86, or 29.1 percent) provided for each party to bear its own attorneys' fees (again, sometimes unless the arbitrator determines otherwise or finds a claim or defense to be unreasonable).[170]

Table 28. Award of Arbitration Costs

	Number (%) of Clauses
Determined by arbitrator	7 (8.1%)
Loser pays	9 (10.5%)
Loser pays unless arbitrator determines otherwise	6 (7.0%)
Split equally	12 (14.0%)
Split equally unless arbitrator determines otherwise	11 (12.8%)
Split equally unless claim or defense unreasonable	2 (2.3%)

169. *See, e.g.*, ICDR INTERNATIONAL ARBITRATION RULES, *supra* note 129, art. 34 ("The tribunal may allocate such costs [of arbitration, defined to include 'the reasonable legal and other costs incurred by the parties,'] among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case."); UNCITRAL ARBITRATION RULES, *supra* note 107, arts. 40, 42 ("The costs of the arbitration [defined to include the 'legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable,"] shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."); ICC Standard Arbitration Clauses, *supra* note 107, art. 38(4) ("The final award shall fix the costs of the arbitration[, defined to include "the reasonable legal and other costs incurred by the parties for the arbitration,'] and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.").

170. Gary Born recommends that arbitration clauses use the term "'legal representation' rather than domestic phrases such as 'costs,' 'attorneys' fees,' and the like, which may be subject to misinterpretation." BORN, FORUM SELECTION AGREEMENTS, *supra* note 82, at 79. Only one clause (of 86, or 1.2 percent) in our sample followed that recommendation.

Each party pays own arbitrator and other costs split equally	1 (1.2%)
Any claim waived	1 (1.2%)
None	37 (43.0%)

Table 29. Award of Attorneys' Fees

	Number (%) of Clauses
Determined by arbitrator	3 (3.5%)
Loser pays	6 (7.0%)
Loser pays unless arbitrator determines otherwise	6 (7.0%)
Parties bear own	14 (16.3%)
Parties bear own unless arbitrator determines otherwise	9 (10.5%)
Parties bear own unless claim or defense unreasonable	2 (2.3%)
Any claim waived	1 (1.2%)
None	45 (52.3%)

13. Post-Award Proceedings

The majority of arbitration clauses in the sample (50 of 86, or 58.1 percent) included an "entry-of-judgment clause" providing generally that "judgment of the court shall be entered upon the award made pursuant to the arbitration."[171] Gary Born explains that "[i]t is customary to include [such clauses] in domestic US arbitration clauses . . . due to language in § 9 of Chapter 1 of the [FAA], which has been interpreted as requiring contractual agreement on judicial enforcement of any arbitral award."[172] While the requirement may well not apply to international arbitrations subject to Chapters 2 or 3 of the FAA, Paul Friedland nonetheless concludes that "[f]or contracts that provide for arbitration in the United States or for contracts where enforcement may be sought in the United States, . . . it is advisable" to include an entry-of-judgment clause.[173]

Otherwise, relatively few arbitration clauses addressed post-award proceedings (other than by providing simply that the arbitration award was final and binding). Two clauses (of 86, or 2.3 percent) provided for an arbitral appeals process, albeit only for large

171. 9 U.S.C. § 9 (2012).
172. BORN, FORUM SELECTION CLAUSES, *supra* note 82, at 90.
173. FRIEDLAND, *supra* note 82, at 103.

awards.[174] No clauses opted for expanded court review of awards, perhaps because such provisions are unenforceable under the FAA.[175] Conversely, fourteen clauses (of 86, or 16.3 percent) provided that any award was not subject to appeal or waived the right to appeal. US courts do not give effect to such provisions, but some other countries do.[176] Finally, one clause sought to limit court review of any award to the grounds available under Article V of the New York Convention, while another provided that a court may "revo[ke]" an award only for fraud or clear bias on the part of the arbitrators.[177]

Table 30. Provisions Addressing Post-Award Proceedings

	Number (%) of Clauses
Appellate arbitral tribunal	2 (2.3%)
No appeal	14 (16.3%)
Validity of award may be challenged only on Article V grounds	1 (1.2%)
Award "revocable" only for fraud or clear bias by arbitrators	1 (1.2%)
Parties agree to abide by award	1 (1.2%)
Final and/or binding award	48 (55.8%)
None	19 (22.1%)

V. FORUM SELECTION CLAUSES IN INTERNATIONAL SUPPLY CONTRACTS

This Part examines the forum selection clauses in this Article's sample of international supply contracts. Like the previous Parts, it first discusses prior studies on point and then examines in detail the provisions contained in the sample.

174. One clause specified $5 million as the monetary threshold, while the monetary threshold in the other was redacted.

175. *See* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584 (2008) (stating that the power to vacate an arbitration award is limited and the ability of a court to review those awards is limited) (citing Wilko v. Swan, 346 U.S. 427 (1953)). *But see* Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 101 (Tex. 2011); Cable Connection v. DIRECTV, Inc., 190 P.3d 586, 599 (Cal. 2008) (permitting parties to contract for expanded review in state court under state arbitration law).

176. *See* RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL & INV'R-STATE ARBITRATION, § 4-22 (AM. LAW INST., Tentative Draft No. 7, 2019). *Compare* Federal Statute on Private International Law Act, art. 192 (Dec. 18, 1987) (Switz.), *in* 5 INT'L HANDBOOK ON COMMERCIAL ARBITRATION, *Switzerland* at Annex-II (Mar. 2008) (permitting some parties to waive right to bring vacatur action in Swiss courts), *with* Code of Civil Procedure, Book IV, Arbitration, art. 1522 (Jan. 13, 2011), *in* 2 INT'L HANDBOOK ON COMMERCIAL ARBITRATION, *France* at Annex I-14 (May 2011).

177. Again, the enforceability of such provisions is questionable under US law. *See Hall Street Assocs.*, 552 U.S. at 584.

A. *Background*

The empirical studies relating to forum selection clauses—like those studies relating to choice-of-law clauses—may be usefully sorted into two baskets. The first basket contains studies that seek to identify which courts are most frequently selected in such clauses. The second basket contains studies that are less focused on the choice of forum than on the other language in the clause. To date, most of the empirical research in this area has focused on the first issue.

In 2009, Theodore Eisenberg and Geoffrey Miller reviewed 2,882 commercial contracts filed with the SEC over a seven-month period in 2002.[178] When these contracts contained forum selection clauses—which was true in only 39 percent of the agreements—they sought to determine which courts were chosen most frequently. They found that New York was the most popular choice (41.2 percent), followed by Delaware (10.8 percent), and California (6.5 percent).[179] Eisenberg and Miller also found that when a contract contained a forum selection clause, the clause was exclusive approximately 58 percent of the time.[180] Among these exclusive clauses, the overwhelming majority contemplated that litigation could proceed in *either* state *or* federal court.[181] Relatively few of these exclusive clauses dictated that litigation must proceed exclusively in a state forum or a federal forum.[182]

In 2012, Joseph Grundfest and Neil Miller reviewed 133 forum selection clauses that appeared in the organizational documents (charter, bylaws, etc.) of public companies between 1991 and 2011.[183] They found that virtually all of these clauses designated Delaware as the forum for the resolution of intra-corporate disputes.[184] They also found that 92 percent of these clauses were modeled after a single clause written into the charter of a company that went public in 2007, suggesting the existence of strong path dependence in this area of contract drafting.[185]

In 2012, Matthew Cain and Steven Davidoff reviewed 1,020 public company merger agreements filed with the SEC between 2004 and

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178. *See generally* Eisenberg, *Flight to NY*, *supra* note 19, at 1475.

179. *Id.* at 1504.

180. *Id.* at 1511.

181. *Id.*

182. *Id.* They found that 8.4 percent of all the exclusive clauses selected a state court to the exclusion of a federal court and that 7.5 percent selected a federal court to the exclusion of a state court.

183. *See generally* Joseph A. Grundfest & Neil Miller, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 33 (2012).

184. *Id.* at 367–68.

185. *Id.* at 352.

2008.[186] They found that 60 percent of the forum selection clauses in these agreements selected Delaware as the forum in which to resolve disputes as compared to only 11 percent that selected New York.[187] Overall, they found that there was a "net positive flight to both Delaware and New York from other jurisdictions."[188]

In 2015, Mark Weidemaier reviewed 402 commercial agreements filed with the SEC between 2000 and 2012.[189] Approximately 60 percent of these agreements arose out of domestic transactions between US companies, 34 percent arose out of international transactions involving at least one US party, and 6 percent arose out of international transactions between non-US parties. In reviewing the international contracts, Weidemaier found that New York was the forum chosen most frequently (25 percent of clauses), followed by California (15 percent) and Delaware (10 percent).[190] He also found that approximately 73 percent of the forum selection clauses in the sample were exclusive.

In 2016, John Coates sought to explain the substantial increase in the length of the typical M&A agreement between 1996 and 2014.[191] Part of the explanation, he found, lay in the fact that only 21 percent of M&A agreements he studied executed in 1996 had a forum selection clause as compared to 100 percent of the M&A agreements executed in 2014.[192] He also found that many of the more recent agreements selected New York as the forum to resolve any financing-related disputes while still selecting Delaware to resolve any disputes arising out of the merger agreement.[193] This finding provides support for the conventional wisdom that New York is the preferred US forum to resolve commercial disputes and that Delaware is the preferred US forum to resolve corporate disputes.

B. *Empirical Results: Provisions in Forum Selection Clauses*

This subpart describes the following provisions in the forum selection clauses in this sample of international supply contracts: (1) jurisdiction selected; (2) scope; (3) choice of state or federal court; (4) consent to jurisdiction or venue; (5) *forum non conveniens*; (6) service of process; and (7) enforcement of judgments.

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186. Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 94 (2012).

187. *Id.* at 94.

188. *Id.*

189. *See generally* Weidemaier, *supra* note 5, at 1865.

190. *Id.* at 1918.

191. Coates, *Why Have M&A Contracts Grown?*, *supra* note 99.

192. *Id.* at 51.

193. *Id.* at 23.

1. Jurisdiction Selected

A total of fifty-six forum selection clauses in the sample specified twenty-two different jurisdictions—thirteen US jurisdictions and nine non-US locations. The identity of the chosen jurisdiction was redacted in one clause. The most commonly chosen US jurisdiction was New York with California running a distant second. The most commonly selected international jurisdiction was England, as shown in Table 31.[194]

Table 31. Location of Court Selected in Forum Selection Clause

US City/State	Number of Clauses	Non-US Jurisdiction	Number of Clauses
Manhattan, NY	12	England	4
New York State	7	Japan	2
Santa Clara County, CA	5	Switzerland	2
Delaware	5	Other	6
Nevada	3		
Los Angeles, CA	2	Redacted	1
New Jersey	2		
Other	6		

In some instances, the forum chosen was the same as (a) the principal place of business, or (b) the place of incorporation of one of the contracting parties. In other instances, the law chosen was the law of a "neutral" jurisdiction with no connection to either the buyer or the seller, as reported in Table 32.

Table 32. Forum Location as Compared to Location of Parties

Forum Location:	Number (%) of Clauses
State of Buyer Place of Incorporation	3 (5.4%)
State of Buyer Headquarters	15 (26.8%)
Neutral Third State	22 (39.3%)
State of Seller Headquarters	13 (23.2%)
State of Seller Place of Incorporation	1 (1.8%)
Connection to Both Buyer and Seller	1 (1.8%)
Unknown	2 (3.6%)

194. One clause stated that the contract would be governed by Japanese law if the suit were brought in Japan and by California law if the suit were brought in California. This contract was coded as choosing both Japan and California.

New York was the most commonly selected neutral jurisdiction (15 clauses), followed by England (2 clauses).

2. Scope

This Article has previously discussed the issue of scope—whether a clause covers non-contractual claims—in the context of choice-of-law clauses and arbitration clauses. In this subpart, the Article turns to the scope of a forum selection clause.

These clauses can be divided into five general categories with respect to scope. First, there are the clauses whose scope is *ambiguous*. This category includes clauses stipulating that a court shall hear cases "arising out of" or "with respect to" or "under" the agreement.[195] Second, there are the clauses whose scope is *broad*. This category includes clauses that authorize a court to hear cases "relating to" or "in connection with" the agreement.[196] Third, there are the clauses that are *very broad*.[197] This category includes clauses directing courts to hear *any* dispute arising out of the "relationship" between the parties rather than those disputes with some connection to the contract.

Fourth, there are clauses that are *narrow*. These clauses provide that a court shall have jurisdiction to hear contractual claims but not non-contractual claims.[198] Fifth, and finally, there are clauses that *do not address this issue of scope*. These clauses merely state that the parties "consent to" or "submit to" venue or jurisdiction in a given court. In practice, these clauses are likely to be assigned a broad scope because the parties have consented to jurisdiction or venue in a given forum without limitation. As a pure textual matter, however, they do not specifically address the question of whether the forum selection clause covers non-contractual claims.

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195. *See generally*, John F. Coyle, *Interpreting Boilerplate Forum Selection Clauses*, 104 IOWA L. REV. (forthcoming 2019).

196. *Id.*

197. *Id.*

198. One such clause provided that a court would have exclusive jurisdiction to resolve disputes "commenced to interpret or enforce the provisions of this Agreement." OEM Supply Agreement by and between Control4 Corp. and Lite-On Electronic Company Ltd, § 21.5.2 (July 18, 2013). Another stipulated that a court would have sole jurisdiction over any "action which in any way involves the rights, duties and obligations of either party hereto under this Agreement." Supply Agreement by and between Intersect Ent, Inc. and Hovione Inter Ltd, § 13.6 (June 23, 2014). Still another clause stated that a given court must hear "[a]ll disputes between the parties as to the validity, execution, performance, interpretation or termination of this Agreement." Supply Agreement by and between Aceway Corp. and Shenzhen G.N.D. Technology Co., Ltd, § 10.3 (Aug. 12, 2013).

Table 33. Scope

	Number (%) of Clauses
Ambiguous	
Arising out of	14 (25%)
With respect to the agreement	2 (3.6%)
Hereunder	1 (1.8%)
Broad	
Arising out of or in connection with	10 (17.9%)
Arising out of or relating to	9 (16.1%)
Relating to	3 (5.4%)
In connection with	2 (3.6%)
Very Broad	
Relationship	2 (3.6%)
Narrow	
Tied to various contractual matters	4 (7.1%)
Did not address issue	9 (16.1%)

Table 33 sorts each of the forum selection clauses in the sample into one of these five categories. It shows that approximately 30 percent of the clauses in the sample were *ambiguous* with respect to scope, 43 percent stated a *broad* scope, 3.6 percent evidenced a *very broad* scope, and 7.1 percent had a *narrow* scope. Conversely, it shows that roughly 16 percent of the clauses did not address the issue of scope.

3. State or Federal Court

When a forum selection clause provides that a dispute must be resolved by a court in the United States, a question that sometimes arises is whether the chosen court is (1) a state court, (2) a federal court, or (3) either a state court or a federal court. In many cases, the text of the clause will provide an answer to this question by specifying "state court" or "federal court." In other instances, however, the text of the clause will be ambiguous. To resolve such ambiguities, US courts have developed two default interpretive rules. The first such rule holds that choosing to have a case resolved by the courts "of" a state is to choose a state court to the exclusion of a federal court.[199] This is because only state courts are deemed to be "of" a state. The second such

199. Coyle, *Interpreting Boilerplate Forum Selection Clauses*, *supra* note 195.

rule holds that choosing to have a case resolved by the courts "in" a state is to select both state and federal courts.[200] This is because state and federal courthouses are located "in" that state. When these interpretive rules are applied to the clauses in the sample, they generate the results described in Table 34.

Table 34. Selection of State or Federal Court

Forum Location:	Number (%) of Clauses
State court only	9 (16%)
State or federal court	27 (48.2%)
Federal court only	5 (8.9%)
Non-US court	15 (26.8%)

The danger in choosing a federal court as the exclusive forum for any litigation, of course, is that federal courts are courts of limited subject matter jurisdiction. If the federal court lacks diversity jurisdiction, and if the dispute does not present a federal question, then the federal court lacks subject matter jurisdiction to hear the case. As a matter of best practice, therefore, parties are generally well-advised to consent to jurisdiction in state court if the federal court lacks subject matter jurisdiction. However, only two of the five clauses selecting federal court as the forum contained a fallback clause stipulating that the case would be heard in state court if the federal court lacked subject matter jurisdiction.[201]

4. Jurisdiction and Venue

There are two basic varieties of non-exclusive forum selection clauses. In the first, the parties consent to jurisdiction in the chosen forum. In the second, the parties consent to venue in the chosen forum. There were fifteen non-exclusive forum selection clauses in the sample. The parties consented to jurisdiction *and* venue in the chosen jurisdiction in eight clauses.[202] The parties consented to jurisdiction—

200. *Id.*

201. *See, e.g.,* Supply Agreement by and between Tesla Motors and Panasonic Industrial Company, § 15(g) (Feb. 27, 2012) ("The parties hereby agree that any and all causes of action arising under this Agreement shall be brought only in the United States Federal District Court for the Southern District of New York or, if the United States Federal District Court does not have jurisdiction, the Supreme Court of New York County, and the parties hereby submit to the jurisdiction of said Court, and agree not to object to the venue nor the convenience of the forum.")

202. Six of the clauses specified that the consent to jurisdiction in a given forum was "irrevocable."

but made no reference to venue—in six clauses.[203] These findings raise the question of whether there is a meaningful distinction between these two types of clauses. Does a consent-to-jurisdiction clause also function as a consent-to-venue clause? And does a consent-to-venue clause also function as a consent-to-jurisdiction clause?

The courts are split on these issues. With respect to consent-to-jurisdiction clauses that do not reference venue, some courts have held that such clauses *do* function as a consent-to-venue clause.[204] Other courts, however, have held that consent-to-jurisdiction clauses that do not reference venue *do not* function as consent-to-venue clauses.[205] With respect to consent-to-venue clauses that do not mention jurisdiction, most courts have held such clauses *do* function as consent-to-jurisdiction clauses.[206] All things being equal, therefore, a well-drafted non-exclusive forum selection clause should make reference to both jurisdiction *and* venue to avoid any confusion. As discussed above, however, this was done in just over half (8 out of 15) of the non-exclusive forum selection clauses in the sample.

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203. In the one instance where there was neither a consent to jurisdiction nor venue, the clause provided that "the injured party has the right to commence legal actions against the other in a court of the United States of America." Although one could debate this point, we coded this clause as a non-exclusive forum selection clause even though the parties did not consent to jurisdiction or venue in any US state.

204. *See* Florsheim Grp., Inc. v. Vila, No. 01 C 3334, 2001 U.S. Dist. LEXIS 17106, at *4 (N.D. Ill. Oct. 18, 2001) ("A consent to jurisdiction operates as a consent to venue, as well, and precludes a motion to transfer for improper venue."); Corbin Russwin, Inc. v. Alexander's Hardware, Inc., 556 S.E.2d 592, 596 (N.C. Ct. App. 2001) (observing that "a consent to jurisdiction clause waives personal jurisdiction and venue").

205. *See* Heller Fin., Inc. v. Shop-A-Lot, Inc., 680 F. Supp. 292, 294 (N.D. Ill. 1988) ("Although defendants submitted to the jurisdiction of Illinois courts, it does not necessarily follow that venue properly exists in Illinois. Because jurisdiction and venue are distinct concepts, a plaintiff who establishes jurisdiction over the defendant's person must additionally meet venue specifications."); Bank of N.Y. Mellon Tr. Co., Nat'l Ass'n v. Gebert, 2014 U.S. Dist. LEXIS 64511, at *8 (S.D.N.Y. May 9, 2014) (holding venue to be improper notwithstanding consent-to-jurisdiction clause).

206. *See* Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377 (7th Cir. 1990) ("There would be no point to a clause that placed venue in Milwaukee County . . . but left the defendants free to object that they were outside the court's jurisdiction."); Northwestern Nat'l Ins. Co. v. Dennehy, 739 F. Supp. 1303, 1306 (E.D. Wis. 1990) ("The court finds that when a party consents to venue in a particular court, it implicitly consents to the exercise of personal jurisdiction by that court."); Mut. Fire, Marine & Inland Ins. Co. v. Barry, 646 F. Supp. 831, 833-34 (E.D. Pa. 1986) ("The courts have determined that venue selection clauses contain an implied consent to personal jurisdiction."); Richardson Greenshields Sec., Inc. v. Metz, 566 F. Supp. 131, 133 (S.D.N.Y. 1983) ("A waiver of objection to venue would be meaningless . . . if it did not also contemplate a concomitant waiver of objection to personal jurisdiction."); Jacobsen Constr. Co. v. Teton Builders, 106 P.3d 719, 728 (Utah 2005) ("[F]orum selection clauses need not make specific mention of a consent to jurisdiction when the language of the clause makes the parties' intention to resolve disputes in a particular forum evident."). *But see* Glob. Packaging, Inc. v. Superior Court, 127 Cal. Rptr. 3d 813, 821 (Cal. Ct. App. 2011) ("The trial court took a clause referring to "venue," translated "venue" into "forum," and then extended "forum" to include personal jurisdiction. This stretches [the consent-to-venue clause] beyond what its actual words can bear.").

5. *Forum Non Conveniens*

The doctrine of *forum non conveniens* stipulates that a court that has jurisdiction over the parties and the dispute may nevertheless decline to hear the case when another court is "the more appropriate and convenient forum for adjudicating the controversy."[207] In the forum-selection-clause context, the doctrine of *forum non conveniens* is relevant in two ways. First, where one party has filed suit in the chosen forum, the defendant may argue that the suit should be dismissed because the chosen forum is an inconvenient forum. In this context, the doctrine is being deployed to *evade* the forum selection clause. Second, where one party has filed suit outside the chosen forum, the defendant may argue that the suit should be dismissed because that forum was not the one chosen by the parties and is hence an inconvenient forum.[208] In this context, the doctrine is being deployed to *enforce* the forum selection clause.

To the extent that the sample clauses engage with the doctrine of *forum non conveniens*, they do so exclusively in the first context—addressing the possibility that a defendant may invoke the doctrine of *forum non conveniens* to evade an otherwise valid forum selection clause. Nineteen forum selection clauses (33.9 percent) specifically waived the argument that the forum named in the clause was an inconvenient forum.[209] The practical effect of such a clause is to preempt one argument—that the doctrine of *forum non conveniens* forbids the case from being litigated in the chosen forum—that a defendant might otherwise make in an attempt to evade a forum selection clause.

6. Service of Process

In the United States, a court may only assert personal jurisdiction over a defendant in a lawsuit when that individual has been properly served with process. Eleven forum selection clauses (19.6 percent) in the sample specifically addressed this issue. Seven of these stated that service via registered or certified mail to the address listed in the "Notices" section of the contract would constitute proper service. One stipulated that process may be served on any party anywhere in the world. One provided that each party consented to process served as permitted by the law of the state of the chosen forum. And two stated that nothing in the agreement would impact the ability of either party to serve process in any manner permitted by law. The remaining 81.4

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207. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007).

208. *See* Atl. Marine Constr. Co. v. United States Dist. Court, 571 U.S. 49, 63–66 (2013).

209. The remaining 37 clauses in the sample (66.1 percent) did not address the issue of *forum non conveniens*.

percent of the clauses in the sample did not address the issue of service of process.

7. Enforcement of Judgments

If a plaintiff is successful in its claim against a defendant in the chosen forum, that plaintiff may subsequently seek to enforce the resulting judgment against the defendant's assets elsewhere. In theory, the existence of an exclusive forum selection clause could present an obstacle to such an effort. The defendant might argue that since the parties had agreed that *all* litigation relating to the contract should proceed in the chosen forum, the plaintiff is forbidden from seeking to enforce the judgment in a different court in a different state. The defendant might take the position, in other words, that the exclusive forum selection clause functions as a waiver of the plaintiff's right to enforce a judgment rendered by the chosen court in other jurisdictions.

To head off this argument, six forum selection clauses in the sample (10.7 percent) include language specifying that each party "may commence an action in a court other than the [chosen forum] solely for the purpose of enforcing an order or judgment issued by one of the above-named courts or in connection with injunctive relief." The effect of this language is to make clear that the parties—in agreeing to an exclusive forum to litigate disputes relating to their agreement—do not intend to waive their right to enforce any resulting judgment against the defendant's assets elsewhere.[211]

VII. CONCLUSION

While the primary object of the Article is descriptive rather than normative—it seeks to describe the contents of agreements that have heretofore been largely ignored by legal scholars—the foregoing findings have normative implications for three groups: (1) legal scholars, (2) judges, and (3) contract drafters.

In recent years, a growing number of legal scholars have sought to better understand how boilerplate contract language evolves and changes over time and—crucially—how much significance should be attached to relatively small changes in such language. Perhaps the most comprehensive body of literature has explored changes in the language of the *pari passu* clause, a piece of contract boilerplate that

211. *See* LHO New Orleans LM, L.P. v. MHI Leasco New Orleans, Inc., No. 05C-04-214 SCD, 2006 Del. Super. LEXIS 148, at *10 (Del. Super. Ct. Apr. 11, 2006) ("The . . . language that a final judgment 'may be enforced in any other jurisdiction' recognizes the fact that enforcement of a final judgment may require the initiation of proceedings outside of Louisiana where assets are located.").

is regularly written into sovereign debt agreements. Over the course of many years, the language of these clauses came to exhibit minor variations.[212] These variations, in turn, present interesting conceptual questions. Is the different language in these clauses legally significant? Or is this just an example of random but essentially meaningless variation in standard contract boilerplate? These questions have preoccupied legal scholars for more than a decade. The result? Dozens of papers—and one book—that seek to offer insight into the choice of just a few words in this single piece of contract boilerplate.[213]

As discussed above, there are likewise a great many small differences in contract language in the dispute resolution clauses explored in this Article. Are these differences legally significant? Or are they just examples of random but essentially meaningless variations or encrustations in standard contract boilerplate? To date, these are questions that virtually no one has sought to answer, notwithstanding the fact that these clauses appear in many, many more contracts than the *pari passu* clause. In providing a thorough descriptive account of these variations, this Article lays the groundwork for future contract scholars to subject these clauses to the same level of scholarly scrutiny that the *pari passu* clause has enjoyed over the past decade.

Turning next to judges, the Article enables them to gain a better sense for how much significance to attach to the *absence* of a term. If a judge knows that many arbitration provisions in international supply agreements contain a carve-out for provisional relief, for example, that judge may attach more significance to the fact that the arbitration clause in *this* agreement lacks such a provision. Conversely, if a judge knows that it is exceedingly rare for a forum selection clause in an international supply agreement to expressly waive a party's right to seek a dismissal on *forum non conveniens* grounds, then that judge may not attach much significance to the absence of such a provision in *this* agreement. Obviously, there are limits to this sort of analysis. The fact that a choice-of-law clause does not contain "excluding conflict-of-laws principles" language probably does not mean the drafters intended to select the whole law of the chosen jurisdiction. But knowing more about the universe of these agreements—including

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212. One clause might state that the bonds "will at all times rank *pari passu* with all other unsecured and unsubordinated indebtedness" while another stated that the bonds "will rank *equally in right of payment* with all other unsecured and unsubordinated" (emphasis added).

213. For a small sampling, see MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 9–12 (2013); Stephen J. Choi, Mitu Gulati, & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 1 (2017); W. Mark C. Weidemaier, Robert Scott, & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 L. & SOC. INQUIRY 72, 95–96 (2013).

which provisions are standard and which are not—may help judges make sense of the individual clauses in individual cases.

Finally, the Article has a great deal to offer to contract drafters. Lawyers called upon to draft lengthy contracts on behalf of their corporate clients—quite rationally—spend the bulk of their time drafting substantive deal terms. They spend much less time focused on the miscellaneous boilerplate provisions relating to dispute resolution at the back of the agreement. When they must engage with these provisions, moreover, they will frequently have relatively little information about what provisions are "market" and which are not. In providing insight in what words and phrases other market actors typically write into the dispute resolution provisions in their international supply agreements—what terms are "market," in essence—the Article provides information that is available nowhere else. In so doing, it provides a useful roadmap to the associate trying to make sense of the mass of boilerplate at the back of a contract and to the partner asked to update the firm's template agreements.

Appendix 1. Type of Dispute Resolution Clause, by Country of Non-US Party

	Arbitration Clause	Exclusive Forum Selection	Non-exclusive Forum Selection	No Dispute Resolution Clause	Total
Australia	5	1			6
Austria	6			1	7
Barbados	1				1
Belgium	1				1
Bermuda	1	1		1	3
Both non-US parties	1		2		3
British Virgin Islands		1	2		3
Canada	10	3	3	6	22
Cayman Islands			1		1
China	5	5			10
Colombia	1				1
Costa Rica	2				2
Czech Republic	1				1
Finland	1				1
France	1	2		1	4
Germany	10	2	1		13
Hong Kong		1			1
India	4	2			6
Ireland	3	4		1	8
Israel	2				2
Italy	4	1			5
Japan	5	4	1		10
Mexico		2			2
Netherlands				1	1
Norway	1				1
Poland	1				1
Portugal	1				1
Russia	3				3
Singapore	1	1			2
South Africa			1		1
South Korea	2				2
Spain	1				1
Sri Lanka			1		1
Sweden	1				1

Switzerland	6	3		2	11
Taiwan		3			3
United Kingdom	5	4	2	1	12
Uruguay	1	1			2
Vietnam			1		1
Total	87	41	15	14	157