International Arbitration and Forum Selection Agreements

Planning, Drafting and Enforcing

Gary B. Born

KLUWER LAW INTERNATIONAL
The Hague • London • Boston

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Sold and distributed in the U.S.A. and Canada
by Kluwer Law International,
675 Massachusetts Avenue, Cambridge, MA 02139, U.S.A.

In all other countries, sold and distributed
by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Library of Congress Cataloging-in-Publication Data

Born, Gary B.
International arbitration and forum selection agreements:
planning, drafting, and enforcing / by Gary B. Born.
p. cm.
ISBN 9041193421 (alk. paper)
1. Arbitration and award. 2. Forum selection clause. I. Title.
K2400.B67 1999
341.5'22--dc21 99-28352
CIP

ISBN 9041193421

Contents

CHAPTER ONE

PLANNING FOR INTERNATIONAL DISPUTE RESOLUTION

A. *Importance of Contractual Forum Selection in International Disputes*

Recent decades have seen an unparalleled expansion of global trade and investment. Together with prosperity, this has brought international commercial disputes. Business enterprises of every description can find themselves entangled in legal proceedings with foreign companies or government entities — sometimes before distant, unsympathetic tribunals. The costs of these proceedings, and the consequences of losing, are often substantial.

Almost every international commercial controversy poses a critical preliminary question — "Where, and by whom, will this dispute be decided?" The answer to this question often decisively affects a dispute's eventual outcome. It can mean the difference between winning and losing, between *de minimis* damages and a multimillion dollar, Euro or pound award.

There are many reasons why the same dispute can have materially different outcomes in different forums. Procedural, choice-of-law, substantive, and other legal rules differ from one country to another. The character, competence, and integrity of tribunals also vary substantially among different forums. Other considerations, such as inconvenience or local bias, may make a particular forum much more favorable for one party than another. All these differences are usually more pronounced across international borders than within purely domestic political systems.

Because of the importance of forum selection, parties to international contracts often include contractual dispute resolution provisions in their agreements. As detailed below, these provisions significantly reduce the uncertainties inherent in international commercial disputes, and can offer a substantial measure of partisan advantage. As a consequence, it is almost always advisable to include a contractual dispute resolution provision in any international contract. These provisions typically take the form of: (1) forum selection clauses, or (2) arbitration agreements.

B. Forum Selection Clauses and Arbitration Agreements

A forum selection clause is an agreement which either permits or requires its parties to pursue their claims against one another in a designated national court. Forum selection agreements can be either "exclusive" (i.e., requiring that all litigation between the parties be resolved solely in their contractual forum, and nowhere else) or "non-exclusive" (i.e., permitting litigation between the parties in their contractual forum, but not prohibiting claims from being brought in other courts which possess jurisdiction). Forum selection agreements are also sometimes referred to as "jurisdiction clauses," "choice of forum agreements," or "forum clauses."

An arbitration agreement is similar in some respects to a forum selection clause, but it also has vitally different characteristics. Briefly stated, international arbitration is a means for definitively resolving a dispute, pursuant to the parties' voluntary agreement, through the decision of a disinterested, non-governmental decision-maker (an "arbitrator"). As this definition indicates, international arbitration has several distinctive characteristics.

First, international arbitration is ordinarily ***consensual*** — the parties must agree to arbitrate their differences. Second, arbitrations are decided by ***non-governmental decision-makers*** — arbitrators do not act as government representatives, but are private persons selected by the parties. Third, arbitration produces a ***definitive and binding award*** — rather than a merely precatory recommendation — which is generally capable of enforcement through national courts. Fourth, arbitration permits substantial procedural ***flexibility*** — the parties are free to select arbitrators, or to adopt specialized procedures, appropriate for their particular transaction, industry, and other needs. Finally, international arbitration is intended to

be ***neutral***, in that it usually seeks to provide a dispute resolution mechanism that takes place outside either party's home jurisdiction and judicial system, and that adopts no single nation's litigation procedures.

Almost all international commercial arbitrations occur pursuant to arbitration clauses contained within underlying business agreements. These clauses typically provide for the arbitration of future disputes relating to the contract pursuant to a specified set of procedural rules (often promulgated by an arbitral institution). As with forum selection clauses, an arbitration agreement is frequently accompanied by a choice-of-law clause, selecting the substantive law applicable to the merits of the parties' claims.

Finally, unlike forum selection agreements, most international arbitration clauses are subject to a specialized legal regime (described at pp. 97–104 below). This regime includes a number of treaties providing for the enforceability of international arbitration agreements and awards. It also includes legislation in many developed and some other states which is supportive of international arbitration agreements and awards. These instruments contribute significantly to the efficacy of arbitration as a means of resolving international disputes.

C. *Functions Served by Forum Selection Clauses and Arbitration Agreements*

Both international forum selection clauses and arbitration agreements serve important functions. First, they may offer one party a favorable forum for resolution of future disputes. For example, financial institutions may require borrowers to accept resolution of disputes in London or New York, thereby ensuring a convenient, competent, and presumptively sympathetic decision-maker. Conversely, a Russian company might urge its European counter-party to accept dispute resolution in Russian courts, for understandable reasons.

Second, even if a party cannot obtain agreement on its preferred forum, it can at least preclude litigation in highly undesirable forums. For example, parties from Korea and the United States might agree upon dispute resolution in a neutral third state (such as England, Singapore, or Switzerland). Dispute resolution could take the form either of proceedings before a neutral national court or an international arbitral tribunal in a disinterested state. Either course would reduce the risk that one party would

be required to litigate in the other party's home courts (or some other undesirable forum).

Third, an exclusive forum selection or arbitration agreement can preclude parallel or multiplicitous litigation of the same dispute in two or more forums at the same time. Absent agreement on a contractual forum, each party may pursue litigation in the forum that it perceives to be most favorable. Given the likelihood of overlapping jurisdiction in different national courts in many international disputes, this can lead to protracted jurisdictional litigation, inconsistent (and perhaps unenforceable) judgments, and multiple sets of lawyers and legal fees. An exclusive forum selection or arbitration agreement can confine litigation of the parties' dispute to a single forum, thereby reducing the expense and uncertainty resulting from parallel proceedings.

Fourth, a forum selection or arbitration agreement makes the parties' contractual relationship more predictable. Parties are better able to assess their rights and duties when there is relative certainty as to the tribunal that may finally resolve their disputes. This is particularly true when a forum selection or arbitration agreement is combined with a choice-of-law provision.

Fifth, in appropriate cases, a contractual dispute resolution mechanism can be tailored to the parties' specific needs. A forum selection clause can select a court with significant commercial (or other) expertise relevant to the parties' transaction; an arbitration agreement can provide for the appointment of arbitrators with particular qualifications, or parties can make such appointments themselves. Dispute resolution provisions can also address issues such as discovery, procedural timetables, availability of appeals, relief, and allocation of legal costs. All of these factors can enhance the predictability and commercial value of dispute resolution procedures.

Sixth, a contractual dispute resolution provision can seek to reduce the difficulties that are often encountered in enforcing national court judgments abroad. Thus, the parties' contractual commitment to a specified judicial forum reduces the risk of successful jurisdictional challenges during an enforcement action. As discussed below, arbitration agreements provide particular advantages in this respect, because of the favorable international legal framework for enforcing arbitral awards.

For all of these reasons, it is almost always advisable to include either a forum selection or arbitration agreement in any significant international contract. Likewise, it is usually wise to agree upon a choice-of-law clause in international commercial agreements. Although the enforceability of these

provisions can seldom be guaranteed, they materially reduce the uncertainties that accompany international dispute resolution and, if drafted with care, may provide a measure of legitimate partisan advantage.

D. *Choosing Between Forum Selection Clauses and Arbitration Agreements*

Deciding whether to adopt a forum selection clause, on the one hand, or an arbitration agreement, on the other, in a particular international transaction is seldom a straightforward decision. Numerous considerations affect this choice, including the identities of the parties, the types of disputes likely to arise under their commercial agreement, the need for enforcement abroad of the parties' dispute resolution agreement and any resulting judgments or awards, the importance of confidentiality and procedural flexibility, the desirability of Solomonic compromises versus all-or-nothing judicial decisions, the importance of multi-party solutions, and the value of appellate review. Of course, all of these considerations must be viewed from the perspective of what is achievable by a party in particular contractual negotiations.

It would be imprudent to prescribe a single dispute resolution mechanism for all transactions or parties. There are too many variables, which counsel in different directions in different transactions for different parties. Nonetheless, it is useful to identify various considerations affecting the choice between a forum selection clause and an arbitration agreement. Working through these considerations in the context of a particular transaction and counter-party, or particular category of transactions, will often indicate what form of contractual dispute resolution mechanism is most desirable for a party. It is also possible (*see* pp. 14–15 below) to formulate several general guidelines to assist parties in choosing between international forum selection and arbitration agreements in particular cases.

1. *Obtaining the Most Favorable Forum*

Commentary on dispute resolution often extols the virtues of "truly international" or "neutral, competent" tribunals. That is commendable. The primary objective of any party, however, must be an agreement to future dispute resolution in the forum where it will have the best chance of

prevailing. Other considerations — including particularly the enforceability of a dispute resolution agreement and any resulting judgment or award — may influence or even override this objective. Nonetheless, ensuring that disputes are resolved in the most favorable forum is the starting point, and usually the ending point, for any analysis.

In many cases, choosing the most favorable forum for a party means choosing the local courts in that party's principal place of business. These courts will be convenient and familiar to the home-town party, and to its regular outside counsel; they will also probably be somewhat inconvenient and unfamiliar to the counter-party. This is especially true where differences in language, culture, and legal traditions are present. Where local courts are subject to political, media, popular or other pressures, the attractions of a home court judicial forum are further sharpened. The same is true if a company is a substantial local employer, or otherwise potentially favored.

Despite the foregoing advantages, a company is not always best-served by litigation in its home courts. Corporate restructurings, widespread employee layoffs, and other factors may bias home town courts against a company. In some cases, various procedural aspects of litigation can make a counter-party's home courts a more favorable venue: these include the availability (or unavailability) of discovery, rules for allocation of the parties' costs for legal representation, or trial by a lay jury or judge. More generally, a party that obtains a favorable judgment in its own domicile may be required to enforce the judgment in its counter-party's home forum, with the attendant uncertainties, costs, and delays. It is therefore prudent to examine critically reflexive assumptions about the desirability of litigating at home in all cases. Nonetheless, in practice this assumption will often either prove correct or be difficult satisfactorily to rebut.

The characteristics that make one party's local courts attractive to it will often make them unacceptable to counter-parties. If nothing else, a healthy mistrust of the potential for home-court bias usually prompts parties to refuse to agree to litigate in their counter-party's local courts. The costs of overcoming this mistrust, with any degree of confidence, are usually uneconomical. As a consequence, outside of lending and similar transactions, it is often difficult for a party to obtain agreement to its local courts.

Even so, the primary objective of any party will remain negotiating for a forum that will resolve future disputes in its favor. Identifying this forum requires determining the kinds of disputes that are likely to arise under the

parties' agreement and considering how they might be resolved in different possible contractual forums. Among other things, this analysis is influenced by the characteristics of different tribunals (i.e., judge v. lay jury), procedural and choice-of-law rules, language, rules for allocating litigation costs, and likely approaches to damages.

2. *Appellate Review*

A salient feature of international commercial arbitration is the absence, in most cases, of appellate review of arbitral awards. Judicial review of awards in most developed countries is narrowly confined to issues of procedural fairness, jurisdiction, and public policy. Any scrutiny of the arbitrators' substantive decisions is ordinarily highly deferential. (*See* pp. 82, 111–12 below.) This contrasts markedly with the availability of appellate review of first instance judgments under national court systems, which may allow either *de novo* relitigation or fairly searching reconsideration of both factual and legal matters.

There are both advantages and disadvantages to the lack of appellate review mechanisms. Dispensing with appellate review reduces both litigation costs and delays. On the other hand, it also means that a wildly eccentric, or simply wrong, arbitral decision cannot be corrected. (It is partially for this reason that many arbitration agreements provide for three-person arbitral tribunals in cases of any significant magnitude.) Deciding which of these tradeoffs to accept in a particular case often requires consideration of the types and sizes of disputes that a contract might produce.

3. *Cost and Speed*

It has long been said, at least in some circles, that arbitration offers a cheaper, quicker means of dispute resolution than national court proceedings. More recently, however, it has become fashionable to describe arbitration as a slower, costlier option. In reality, both international arbitration and international litigation can involve significant expense and delay, and it is unwise to generalize too readily about which mechanism is quicker or cheaper. Nonetheless, some general conclusions can be drawn.

International commercial arbitration is seldom cheap. The parties are required (subject to later allocation of arbitration costs by the tribunal) to

pay the fees of the arbitrator(s) and, usually, an arbitral institution. The parties will also have to pay the logistical expenses of renting hearing rooms, travel to the arbitral situs, lodging, and the like. This entails expenses that do not exist in national court litigation.

Nonetheless, the additional expenses of arbitration will usually pale in comparison with the costs of legal representation if there are parallel or multiplicitous proceedings in national courts. This can be the case where the parties have been unable to agree upon an exclusive forum selection clause, or where their clause is held unenforceable. The possibility of parallel judicial proceedings can be particularly costly where one party is obliged to commence multiple actions in different nations (for example, to deal with unauthorized use of intellectual property in several jurisdictions). Likewise, the expenses of arbitration will typically not approach those that are incurred if there is relitigation of factual issues in national trial and appellate courts. Arbitration also usually does not have the potential for costly, scorched-earth discovery and other procedural steps which may exist in some common law jurisdictions (notably the United States).

International commercial arbitration is also seldom speedy. Outside of some specialized contexts, disputes often require between 18 and 36 months to reach a final award, with only limited possibilities for earlier summary dispositions. Procedural mishaps, challenges to arbitrators, and litigation over jurisdictional issues in national courts can delay even these fairly stately timetables, as can crowded diaries of busy arbitrators and counsel. Nonetheless, in many jurisdictions, national court proceedings are subject to equally significant delays. The possibility of *de novo* or otherwise rigorous appellate review, and new trial proceedings, adds a significant risk of additional delays. As discussed above, arbitration typically does not involve appellate review, thereby reducing both this risk and the possibility of new trial proceedings as a potential source of delay.

On balance, therefore, international arbitration does not generically have either dramatic speed and cost advantages *or* significant disadvantages as compared to national court proceedings. Broadly speaking, the absence of appellate review means that arbitration is likely to be somewhat less slow than litigation, but there will be many exceptions to this generalization. It may be possible to compare more precisely the relative speed and cost of international arbitration and particular national courts with respect to a specific kind of contract or category of disputes. But, even here, the uncertainties of appellate review, summary dispositions, and other procedural developments will often make predictions uncertain.

4. *Competence, Neutrality, and Language*

Many national courts are distressingly inappropriate choices for resolving international commercial disputes. In some states, local courts have little experience with international transactions or disputes; in others, basic standards of judicial integrity and/or competence are lacking. More generally, national courts inevitably apply local procedural rules to international disputes, which may be ill-suited for parties from different legal traditions and regions of the globe. The need to translate evidentiary materials or legal authorities into the language of the forum may create practical problems and jeopardize a tribunal's comprehension of the case.

On the other hand, some national judiciaries include very talented judges with considerable experience in resolving international disputes. The courts of England, Switzerland, New York, and a few other jurisdictions are able to resolve complex transnational disputes with a fairly high degree of reliability. Additionally, with English increasingly serving as the language of international commerce, translations may not be necessary in English, U.S., and some other courts.

Proponents of international arbitration routinely hold out the promise of neutral, highly-competent decision-makers. In this view, parties can select arbitrators with substantial experience in resolving international commercial disputes. They can also choose arbitrators whose nationality is different from that of the companies involved (thus reducing the risks of partiality or parochial prejudice). More broadly, a three-person tribunal, composed of arbitrators drawn from different legal traditions, will often adopt a truly neutral procedural regime, while giving all parties confidence in the arbitration's procedural fairness.

Nonetheless, selecting arbitrators can be an uncertain enterprise. The parties will often be unable to agree directly upon the choice of a sole or presiding arbitrator, thereby requiring appointment by an arbitral institution. Few institutions have proven track-records in international disputes, and inexperienced or disreputable arbitral institutions can make unfortunate appointments. Even experienced institutions sometimes make mistakes in their selections. The absence of appellate review of arbitral awards makes inappropriate appointments especially unfortunate.

On balance, arbitrators selected by one of the leading international arbitral institutions (as discussed below, being the International Chamber of Commerce, the American Arbitration Association, and the London Court of International Arbitration) are likely to have somewhat greater compe-

tence and neutrality than most national courts. A few national judiciaries (or specialized courts) offer comparable competence, and may provide comparable procedural neutrality in particular cases. Even here, however, hardly any national courts can offer the breadth of resources possessed by a tribunal of three experienced international arbitrators. And, just as poor or unsuitable arbitrators can be chosen, even the best national judicial systems have trial judges or lay juries that international businesses would understandably prefer to avoid.

5. *Solomonic Arbitral Compromises Versus Crisp Judicial Decisions*

It is sometimes said that arbitrators are prone to issue Solomonic awards, which compromise the parties' positions with little regard for applicable law. This may well be true in some domestic arbitration contexts (where compromises are sometimes what the parties expect and desire). The image of compromise verdicts is less true, but not entirely wrong, in international arbitration.

Most international arbitrations involve the application of law to fact much like a national court proceeding. It is true that many international arbitrators are reluctant to grant summary dispositions, dismissing a party's claims prior to an evidentiary hearing (other than on jurisdictional grounds). Nonetheless, most international arbitrations are more principled and predictable in the application of law to fact than trials before judges or lay juries. A significant, but relatively uncommon, exception to this are cases where the arbitrators are expressly asked to decide *ex aequo et bono* or as *amiable compositeurs.* (*See* p. 79 below.)

Nonetheless, as discussed above, international arbitrators are generally not subject to meaningful appellate review, and they can encounter pressures arising from their role as the parties' agents. In order to ensure a measure of procedural civility, and because they lack most types of coercive governmental authority, arbitrators can be reluctant to make interim decisions that one party will regard as Draconian. Moreover, three-person arbitral tribunals frequently seek to produce unanimous awards, which can result in some degree of compromise and horse-trading. On balance, this probably produces outcomes that are somewhat less crisp and principled than those of a rigorous national court judge — but no more so than many

available national litigation processes (e.g., many national court or a jury trial).

. *Confidentiality*

. potentially important consideration in designing dispute resolution ions is the extent to which proceedings will be confidential. Broadly ng, international arbitration is more likely than national court litiga- produce a private, confidential dispute resolution process, but there dom any guarantees of confidentiality.

lost national court proceedings offer little by way of confidentiality parties. Hearings and court dockets are open to the public in many ies, and parties are often free to disclose the contents of proceedings bmissions to parties. Competitors, regulatory authorities, and press ntatives are sometimes able to scrutinize the parties' submissions idence. Of course, this may affect what disputes are litigated and how gation occurs. Moreover, public disclosure may impede negotiated omises, by hardening positions or fueling emotions, and may be- n independent instrument in the parties' hostilities.

contrast, international arbitration is usually more confidential than al court proceedings. Arbitral hearings are virtually always closed to ss and public, and in practice both submissions and awards often re- onfidential. The contrast with open public dockets and court pro- gs is significant. Nonetheless, there is no clear duty of confidentiality t international arbitrations and arbitral awards are sometimes made either in enforcement actions or otherwise. Both arbitration awards bmissions can in principle be obtained by governmental regulators y countries.

lthough international enterprises often wisely prefer confidential resolution mechanisms, parties sometimes affirmatively desire that disputes and their outcomes be made public. Where a company has ard form contract, used with numerous counter-parties, it may want etations of the contract to become publicly-known, and binding h precedent, as widely as possible. Thus, financial institutions, intel- property licensors, and franchisors may see litigation as a way to e public awareness or case law that has an impact beyond the parties gation. Arbitration usually does not offer the same possibilities.

7. *Multi-Party and Multi-Contract Issues*

Arbitration agreements in multi-party or multi-contract transactions are seldom straightforward. (*See* pp. 80–81 below.) Drafting an arbitration agreement that binds all relevant parties in a complex (or not-so-complex) transaction can require considerable foresight and drafting skills. In some cases, parties to related transactions will refuse to agree to multi-party arbitration. In other cases, institutional arbitration rules will be ill-suited to a complex dispute.

Despite these obstacles, it is generally possible, with a measure of effort, to draft arbitration agreements for even complex multi-party, multi-contract transactions. Nonetheless, it is often easier in such cases to rely on the jurisdictional authority of national courts. In many states, national law readily permits the exercise of jurisdiction over all related parties in a complex transaction. A forum selection clause may possess advantages in these circumstances over an arbitration agreement.

8. *Facilitating Amicable Settlement*

It is sometimes said that arbitration is more likely than litigation to permit parties amicably to settle their differences. This hypothesis is attributed to the fact that arbitration is consensual from the outset, by virtue of the parties' arbitration agreement. Similarly, arbitral proceedings generally require some measure of procedural cooperation between the parties (for example, in choosing arbitrators).

It is far from clear, however, that international arbitration is systemically more likely than litigation to produce negotiated settlements. There are no reliable empirical data on the subject, and anecdotal experiences vary. Nonetheless, the arbitral process does present parties with numerous opportunities for both procedural cooperation and more general settlement discussions. Approached constructively, these opportunities can be used to pursue a negotiated resolution, at least where parties are so inclined.

9. *Enforceability of Dispute Resolution Agreements*

As discussed below, international arbitration agreements are more readily enforced and more broadly interpreted, in most national courts,

national arbitration treaties and "pro-arbitration" legislation in a substantial number of states. The New York Convention, to which more than 120 countries are party, is particularly important in facilitating the enforceability of international arbitration agreements. (*See* pp. 97–98 below.)

In contrast, there are only a few regional arrangements which adopt effective international enforcement regimes for forum selection clauses. The most notable are the Brussels and Lugano Conventions in Europe. In general, however, international forum selection agreements do not benefit from anything comparable to the New York Convention.

Additionally, many states impose limitations on the enforceability of forum clauses, such as requiring a "reasonable relationship" between the parties' contract and the forum or considering *forum non conveniens* objections to the parties' contractual forum. Similarly, "public policy" or "mandatory law" limitations are usually less significant in arbitral than in judicial proceedings. For these reasons, it is often easier to obtain effective enforcement of an international arbitration agreement than of a forum selection clause.

10. Enforceability of Awards or Judgments

Like international arbitration agreements, international arbitral awards enjoy the protection of the New York Convention, as well as favorable national arbitration legislation in many countries. These instruments provide a "pro-enforcement" regime, with only limited grounds for denying recognition to an arbitral award. Particularly in developed trading states, there is substantial, successful experience with the enforcement of international arbitral awards. (*See* pp. 111–114 below.)

In contrast, there are only a few regional arrangements for the mutual enforcement of foreign judgments (in particular, the Brussels and Lugano Conventions in Europe), and there is no global counterpart to the New York Convention for foreign judgments. Many major trading states, including the United States, are party to no bilateral or multilateral agreement on the enforceability of foreign judgments. In the absence of international treaties, the recognition of foreign judgments in many nations is subject to local law, which often makes it difficult or impossible to obtain effective enforcement. As a consequence, there is generally a greater likelihood that an international arbitral award will actually put the parties' dispute to rest than will

a national court judgment. Of course, where a regional or other treaty for the mutual recognition of foreign court judgments is applicable, the advantages of arbitral awards may be smaller.

E. Planning for Dispute Resolution in International Contracts

The dispute resolution mechanism that a party can realistically obtain in a particular transaction often depends upon its own negotiating strength and its counter-party's interests. Like other contractual terms, the dispute resolution clause is a product of bargaining, compromise, and drafting ability.

Putting aside the question of what can actually be achieved in a particular set of negotiations, it is wrong to adopt an unqualified preference for either international forum selection clauses or arbitration agreements. Both mechanisms have strengths and weaknesses, some of which are more significant in given circumstances than others. Deciding which mechanism is appropriate in a specific case, and for a particular party, usually requires careful consideration of the parties' proposed agreement, their likely future disputes, and their respective interests.

That said, the following general guidelines can be offered:

First, if it is not expected that an agreement or award will need to be enforced abroad, then a forum selection clause selecting a party's home-courts is often the simplest, most desirable option. Enforcement abroad will typically not be necessary where both parties have assets within the contractual forum, and particularly where the local party does not have assets elsewhere. In these circumstances, the convenience, familiarity, and presumptive sympathy of a party's home-courts will usually outweigh other considerations. The same conclusion generally applies if a bilateral or other international treaty provides for the effective enforcement of a party's home-court judgments in its counter-party's places of business.

Second, even if enforcement abroad is a likely necessity, the practical advantages of a truly favorable home-court forum will often outweigh difficulties in enforcement. This requires a party to assess on a case-by-case basis how great the benefits of the local forum are and how significant the enforceability issues will likely be.

Third, if enforcement abroad is important *or* if a favorable local forum cannot be obtained in negotiations, then international arbitration in a favor-

able or neutral forum is generally the most desirable alternative. In almost all cases, a well-designed international arbitration agreement will ensure a dispute resolution mechanism that is sufficiently competent, predictable, and neutral to warrant acceptance. Thus, parties should ordinarily have no reason to reject an otherwise attractive deal, merely because of the need to agree to international arbitration. Indeed, arbitration is often more attractive than a forum selection clause selecting a neutral judicial forum. This is because of the greater likelihood of successfully enforcing arbitration agreements and awards and the relative advantages of a well-designed arbitral process as compared to many national court procedures.

Fourth, the courts of a few developed nations can be selected as neutral forums, subject to confirming the willingness and suitability of such courts to resolve particular disputes. These courts include those of England, New York, Switzerland, and a limited number of other jurisdictions. There may be instances where the procedural and other characteristics of particular national courts (i.e., discovery or jury trial) make them more attractive to a party than other forums, even if the courts are in a neutral third state.

Fifth, litigation in the courts of a counter-party *or* in most neutral courts (i.e., those lacking proven experience in international commercial disputes) is often not an attractive outcome. If such a choice is considered, it should be preceded by careful review of the consequences. There will be cases where inability to obtain a satisfactory dispute resolution provision counsels for walking away from an otherwise acceptable transaction.

The following Chapters discuss the implementation of these observations. Chapters II and III begin with the drafting of forum selection clauses and international arbitration agreements. Chapters IV, V, VI, and VII then provide an overview of the issues that arise in enforcing both dispute resolution agreements and resulting judgments or arbitral awards. Finally, Chapter VIII considers the drafting and enforcement of choice-of-law clauses.

Before continuing, a word about routinized, smaller-scale transactions is appropriate. Contracts for smaller sales and other transactions are seldom extensively negotiated, and the costs of detailed legal review of dispute resolution provisions for such transactions are virtually never justified. In these cases, the most sensible course is inclusion of a standard form institutional arbitration clause or simple forum selection clause in contractual documentation. We consider each of these options below. (*See* pp. 36 and 86–87 below.) In addition, the standard form arbitration clauses recommended by leading international arbitration institutions are collected in Exhibit C.