standards of interpretation because they know that the letter-of-credit device is operating as a backup for them, perhaps in the same way that trade association arbitrators in the US can afford to operate in a formalistic way because non-legal sanctions applied by the relevant commercial community are available to enforce the more substantive aspects of parties' obligations.[10]

D. HIGH FIXED COST OF LITIGATION

Finally, whatever the ex post costs of considering trade usage, parties will be more willing to bear them in international settings because they are relatively small compared to the fixed cost of litigating in the first place. Pursuing a dispute internationally is more costly than pursuing one domestically, other things being equal, because of the need to transport lawyers, witnesses, and evidence to a distant location for litigation, the need to hire arbitrators or local counsel, and the difficulty of collecting any monetary award in a foreign jurisdiction. As indicated previously, these high costs explain why low-cost dispute resolution mechanisms, such as letters of credit and arbitration, are popular in the international setting and why litigation is relatively rare. Nonetheless, in some cases it is unfortunately necessary to litigate and to spend the associated resources in doing so. Because many of these expenditures are fixed in amount and do not depend on the intensity of litigation, however, the incremental cost of considering additional evidence, given that there is already going to be litigation, is relatively low in comparison. More generally, it makes sense to litigate more intensively in litigation that is characterized by higher stakes or higher overhead costs, and in the international setting it is these cases that are typically brought before arbitrators or courts.[11]

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10 See generally Bernstein, 99 Mich L Rev at 1732–33, 1745 (cited in note 4) (stating both that trade arbitrators apply a formalistic approach to interpretative questions and that non-legal sanctions, not arbitral awards, actually provide the main incentive to keep one's commercial commitments). Note also that the mechanism that Bernstein identified as backing up the incentive to comply with trade usage—reputation and the resultant threat of losing repeat or referral business—is substantially weakened in the international setting where communication networks are more diffuse and repeat dealing is less common.

11 This implication is a special case of what Chicago-trained economists know as the Alchian-Allen theorem, which holds that when transportation costs are fixed, market forces will lead to goods of relatively high quality trading across distances and goods of relatively low quality trading near home, because fixed transportation costs make the relative price of quality higher near the source than farther away. See Thomas E. Borcherding and Eugene Silberberg, *Shipping the Good Apples Out: The Alchian and Allen Theorem Reconsidered*, 86 J Pol Econ 131 (1978) (analyzing the argument formally and concluding that it is a useful generalization, if not a logical implication of economic theory); Eric P. Bertonazzi, Michael T. Maloney, and Robert McCormick, *Some Evidence on the Alchian and Allen Theorem: The Third Law of Demand?*, 31 Econ Inquiry 383 (1993) (presenting empirical evidence confirming the generalization); David Hummels and Alexandre Skiba, *Shipping the Good Apples Out? An Empirical Confirmation of the Alchian-Allen Conjecture* (Natl Bureau of Econ

III. CONCLUSION

Gillette is correct both when he argues that the value of incorporating trade usage into contractual interpretation depends on the business and institutional context, and when he argues that the international context is different in this regard in the setting of international sales transactions. Understanding why the international context is different, however, requires considerable attention to the details of that context. Indeed, because of the difficulties of generalizing about the costs and benefits of formality, scholars should be more restrained about recommending formal regimes of interpretation beyond their ability to be certain that the resulting net benefits are really positive. A more defensible approach would be to advocate making it easier for contracting parties to choose an interpretative regime for themselves; and this is, in fact, what the CISG does for them in most respects.

Research, Working Paper No W9023, June 2002) (also presenting evidence), available online at <www.nber.com/papers/w9023.pdf> (visited Mar 28, 2004).