Volume 16. Number 1. June 2021 Page 130-147

Pandecta

http://journal.unnes.ac.id/nju/index.php/pandecta

Asymmetrical Arbitration Clauses: A Comparative Study of International and Indonesian Arbitration Law

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DOI: http://dx.doi.org/10.15294/pandecta.v16i1.29522

Article info

Article History:
Received : March 17td 2021
Accepted: May 15td 2021
Published: June 1st 2021

Keywords:
arbitration agreements; dispute settlement; international commercial arbitration; asymmetrical arbitration clauses; contracts

Abstrak

Artikel ini menyajikan studi tentang validitas klausul arbitrase asimetris, klausul yang menggabungkan arbitrase dan opsi pilihan pengadilan, dalam kontrak komersial internasional. Klausul-klausul ini menunjuk suatu metode penyelesaian sengketa yang memberikan posisi yang lebih menguntungkan bagi salah satu pihak dalam suatu kontrak, sehingga menimbulkan perdebatan tentang keabsahannya di tingkat internasional. Terlepas dari kemudahan yang dibawa tren dalam bisnis, bentuk klausul arbitrase ini diragukan oleh pengadilan di banyak yurisdiksi. Sayangnya, Indonesia sendiri belum memiliki legal standing yang tegas mengenai hal ini karena klausul arbitrase asimetris tidak diatur secara eksplisit oleh undang-undang arbitrase Indonesia. Penelitian ini dilakukan melalui metode yuridis normatif, yaitu dengan menggali hubungan antara teori dan praktek mengenai klausula arbitrase asimetris melalui analisis kasus hukum dan ketentuan hukum arbitrase internasional dan hukum arbitrase Indonesia serta dianalisis melalui prinsip-prinsip kontrak internasional dan Indonesia. hukum. Artikel ini bertujuan untuk memberikan analisis mengenai akibat hukum dari memiliki klausul arbitrase asimetris dalam kontrak komersial dan arbitrase komersial. Terakhir, penelitian ini menawarkan metode interpretasi terhadap klausul-klausul tersebut yang mendukung validitasnya di bawah hukum arbitrase internasional dan hukum arbitrase Indonesia.

Abstract

This article presents a study of the validity of asymmetrical arbitration clauses, a clause that combines arbitration and a choice of court option, in international commercial contracts. These clauses designate a method of dispute settlement that gives a more favorable position for one of the parties to a contract, hence, creating a debate on its validity on an international level. Despite the convenience the trend has brought in business, this form of arbitration clause has been called into doubt by courts in numerous jurisdictions. Unfortunately, Indonesia itself has yet to have a firm legal standing on this matter as asymmetrical arbitration clauses are not explicitly regulated by the Indonesian arbitration law. This research is conducted through a normative juridical method, that is by exploring the relation between theories and practices concerning asymmetrical arbitration clauses through analyzing case law and provisions of international arbitration law and the Indonesian arbitration law, and are also analyzed through principles of international and Indonesian contract law. This article aims to provide an analysis regarding the legal effects of having asymmetrical arbitration clauses in commercial contracts and commercial arbitration. Lastly, this study offers a method of interpretation towards such clauses that favors their validity under both international arbitration law and Indonesian arbitration law.

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ISSN 1907-8919 (Cetak)
ISSN 2337-5418 (Online)

1. Introduction

The rapid increase of business transactions in the global economy have given rise to a need to resolve contractual disputes in the most efficient way possible. International commercial arbitration is currently the most preferred method to do this (Drličková, 2017: 55) and one example of the solution to this need is apparent by the use of asymmetrical dispute resolution clauses, specifically asymmetrical arbitration clauses (hereinafter "**AACs**"). The increased use of this clause is evident by multiple case law from different jurisdictions, including from Indonesia, as will be elaborated in the below discussions. AACs or also referred to as "one-sided" or "unilateral" clauses, is a dispute resolution clause that restricts the parties to a contract to bring proceedings to a particular forum, whilst simultaneously granting one or more parties the option to submit a dispute to arbitration (Zelst, 2018: 19; Draguiev, 2014: 19). In its most common form, an AAC provides a standard arbitration clause for both parties but is supplemented with an additional option for one party to submit the dispute to a competent state court and vice versa.

Including an AAC into an agreement can be highly beneficial to the party enjoying the extra option. AACs grants the beneficial party the advantage of choosing the dispute to be settled by means of litigation or arbitration, depending on what best accommodates its business interests, without requiring consent from the other party (Zelst, 2018: 78; Nidam 1996: 147)). Such clauses are also used to ensure better enforcement against a debtor's assets. Although AACs used to only be common in tenancy and construction contracts (Nesbitt & Quinlan, 2006: 133), it has now become increasingly common in commercial contracts. This is because businesses tend to seek a dispute resolution method that would provide them a more favorable position, usually to guarantee better enforcement against a debtor's assets (Draguiev, 2014: 19). The use of AACs as a dispute resolution clause reflects the necessity of business people to bypass ordinary pathways for dispute resolution methods and to opt for a tailor-made mechanism in order to suit their business needs. However, the benefits provided by AACs' flexibility are becoming hindered by the real-world uncertainty as to whether these clauses will perform as they are originally intended to (Ustinov, 2016:2).

To date, there has yet to be an agreed approach towards AACs used in cross-border commercial contracts due to the objective differences in substantive and procedural laws in each jurisdiction. In the context of commercial contracts, AACs are most often included in contracts where the parties' commercial standing is not of equal footing. It is not unlikely for courts to determine AACs as invalid due to this reason. In fact, there has been a number of decisions issued by courts in numerous jurisdictions declaring that AACs' invalidity or having significant defects (Draguiev, 2014: 19). The contradicting standpoint towards AACs poses a threat to the clauses' flexibility, diminished by the practical ambiguity of their actual effect (Bérard et al., 2017). Indonesia itself has yet to declare its stance on this matter. Although there have been very little cases in Indonesia concerning the validity of asymmetrical dispute clauses, one of which being a case between Societe Generale v. Hadi Raharja, it is inevitable that in time, international contracts where one of the parties is from Indonesia will include an AAC. When this happens, the unclear stand of Indonesia's arbitration law concerning this matter will give rise to problems concerning AACs' validity and subsequent enforceability. This is because a valid arbitration agreement is the source of conducting the arbitration itself (Israhadi, 2018: 1)

The uncertainty on the validity of AAC could bring disaster to the dispute settlement process in its entirety. If a court determines that an AAC is not valid and unenforceable when an award reaches the enforcement stage, there is a high possibility that the award will also be deemed not valid and unenforceable. The purpose of the New York Convention, which has been universally accepted as a key tool that makes international arbitration work, is to guarantee that an international arbitral award will be able to be enforced

in the jurisdiction(s) where the counterparty has assets (Magee & Mulholland, 2013: 184). This would render the whole arbitration proceedings moot, not to mention the potential rise to limitation issues in the event a new claim is filed (Clifford & Browne, 2013). Moreover, determining the validity of AACs are of upmost importance as an arbitration agreement has 2 (two) important consequences; first, it excludes the jurisdiction of ordinary courts of law over disputes covered by a valid arbitration agreement; and second, a valid arbitration clause is a prerequisite to enforcing an arbitral award rendered in the dispute covered by the arbitration clause (Cordero-Moss, 2014: 212). Hence, the obscurity on AACs' validity is essential to be resolved.

Although cases on asymmetrical arbitration clauses have been continuously emerging in various jurisdictions, this matter has yet to be decided in Indonesia, specifically under its arbitration law. Further, until today there are a minimal number of Indonesian literatures on this specific matter and the below discussion attempts to remedy this situation by proposing a method of interpretation of the Indonesian Arbitration Law favoring the validity AACs.

This article will first discuss on how AACs in commercial contracts operate, then case law from various jurisdictions will be explored in order to have a deeper comprehension on how different jurisdictions have different approaches towards AACs. Finally, this article will attempt to examine AACs validity from the perspective of the UNIDROIT Principles of International Commercial Contracts as a set of principles of private commercial law between states, and also from both international arbitration law (UNCITRAL Model Law on International Commercial Arbitration) and Indonesian Arbitration Law (Law No. 30 Year 1999 Concerning Arbitration and Alternative Dispute Resolution).

2. Method

This research used a juridical normative method with descriptive analytical approach. The data used secondary materials obtained from reviewing relevant case law documents and other literatures related to asymmetrical arbitration clauses. All materials used in this research were obtained through documentary study. In this research, the secondary data used consists or primary, secondary and tertiary legal materials.

The primary legal materials include authoritative legal materials comprised of national legislations and international soft laws such as the UNCITRAL Model Law on International Commercial Arbitration, the UNIDROIT Principles of International Commercial Contracts and the Indonesian Arbitration Law (Law No. 30 Year 1999 on Arbitration and Alternative Dispute Resolution). The secondary legal materials are supporting documents used to obtain relevant information related to the primary legal materials (Mamuji, 2005: 4). These materials comprise of books, journals, papers, and other documents obtained through electronic sources. Lastly, tertiary legal materials are materials that provide explanations of the primary and secondary legal materials, such as dictionaries, encyclopedia and other supporting documents. These data were primarily obtained from electronic sources of information.

The method of normative legal research analyzes the applicable laws from an internal perspective, where the object of research are the norms of the relevant law itself (Diantha, 2017: 12). This article attempts to analyze relevant rules of law applicable towards the issue of an asymmetrical arbitration clause's validity. This is done by reviewing and analyzing data from books, journals, articles, regulations, reports, doctrines, and multiple case law. Research from this method of approach aims to provide a juridical argumentation when there is absence of law, an ambiguity within the law and conflict of norms.

3. Result and Discussion

Operation of Asymmetrical Arbitration Clauses

An AAC is contractual, such that it is binding to the parties' who drafted it. This is

based on the valid intent of the contracting parties. An AAC may be included as a dispute clause, or it can take form in a separate agreement on its own (Draguiev, 2014: 22). In practice, the operation of AACs varies between each contract. In some contracts, both parties are provided with a standard arbitration clause supplemented with the option to go to litigation to only one party, while in others, both parties are provided with the right to go to litigation but one party is given the choice to submit the dispute to arbitration.

AACs are dispute clauses where the parties have different rights (Ashford, 2020: 347). AACs have quite an elaborate structure. The choice of forum in such a clause is multilayered; on the first tier, the parties may agree on a combination of dispute resolution mechanisms, i.e., state court litigation and arbitration. The second layer of the AAC may further elaborate the first tier, that is whether the choice will be exclusive or not. An AAC may determine one exclusive mechanism for dispute settlement for one party and also provide a choice between 2 (two) different dispute settlement mechanisms for the other party. Essentially, an AAC provides flexibility for the beneficiary of the clause to select the dispute resolution method most appropriate to the case.

Generally, it is insignificant which of the contracting parties that initiates legal action, whether it be arbitration or state court proceedings. If it is the counterparty who commences court litigation, the beneficiary is not barred from unilaterally invoking arbitral proceedings (Zelst, 2016: 367). This means that the AAC's beneficiary can request the court to deny jurisdiction in support of arbitration. Contrarily, if the AAC's beneficiary acts as the claimant, it has the discretion either to invoke court proceedings or arbitration. In that case, the respondent is bound to the beneficiary's choice. It is important to note that the circumstances in which the beneficiary may utilize its right, either to litigate or arbitrate, is fundamentally dependent on the wording of the AAC.

Besides AACs that gives parties the right to refer to a certain forum but giving an advantage only to one, in a sense that only one party is given the option of choosing between 2 (two) forums, there are cases where only one party is given the right to arbitrate whereas their contractual counterpart was not given the right to refer the dispute to any forum. For example, the Dyna-Jet v. Wilson Taylor Asia Pacific in 2017. Accordingly, regardless of the form of the arbitration clause, in assessing whether or not an arbitration clause is an AAC, attention should be given to the imbalanced right of the parties, all the same time taking into consideration the principle of party autonomy.

Different Approaches in Different Jurisdictions

Different jurisdictions have different approaches towards determining the validity of AACs. Although there are jurisdictions that has generally upheld the use of AACs, in others, there is a view that AACs depart from the keystone principle of agreement between the contracting parties. Generally, countries with civil law systems, such as Russia and China, tend to object to the use of AACs, whereas countries with common law system, such as the England and Singapore, tend to support its validity. However, not all countries with civil law system considers the use of AACs as invalid as each country have their own requirement for a valid arbitration agreement. Furthermore, users of AACs must be aware of the potential difficulties it may held, this includes considerations towards the enforcing state's regulations on AACs. This awareness can also protect the parties from being forced to litigate in an unwanted forum. Below will be discussed case law concerning the validity of AACs from both countries with common law system (Singapore and England) and countries with civil law systems (China and Russia).

Singapore

Singapore is one of many jurisdictions that has adopted the Model Law. In 2017, the decision of the Singapore Court of Appeal on the Wilson Taylor Asia Pacific v. Dyna-Jet case held that an AAC is valid and enforceable. This was the initial decision of the Singapore

Court in regards to asymmetrical arbitration agreements. The clause in dispute are as follows:

> *"Any claim or dispute or breach of the terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law; and held in Singapore."*

The arbitration clause in the Dyna-Jet case provided that arbitration may be conducted to amicably resolve the dispute solely at the election of one party (Dyna-Jet). Here, not only was the parties' right "asymmetrical", there was a lack of mutuality in a manner that arbitration was only available at the choice of Dyna-Jet. What must also be given attention to is the fact that the dispute resolution clause states that the parties must first attempt to solve any dispute through consultation. If a solution is not reached, then the dispute may be settled through arbitration, at the choice of Dyna-Jet. The word "may" shows that arbitration is not an obligation, rather it is an option to Dyna-Jet.

Dyna-Jet, as the claimant, first brought the dispute to the Singaporean Court rather than arbitration. To this, Wilson Taylor submitted for a stay of court proceeding under Section 6 of the Singapore International Arbitration Act ("IAA"), which governs that there are 3 requirements for a stay of court proceedings. *First*, the parties to the court proceedings must have a valid agreement to arbitrate between them; *second*, the dispute being processed in court (or any part thereof) must fall within the scope of the arbitration clause; and *third*, the parties' arbitration clause is not inoperative, null and void, or incapable of being performed.

For the first argument, Dyna-Jet submitted that the dispute clause did not contain a valid agreement to arbitrate due to its optionality character and the fact that it lacked mutuality. Further, it argued that based on the optionality characteristic argument, a valid arbitration agreement must give a present obligation to arbitrate should a dispute arise. In regards to the lack of mutuality, Dyna-Jet argued that the arbitration agreement is invalid as only they had the right to confer an obligation to Wilson Taylor under to arbitrate, while Wilson Taylor had no such rights. These arguments were rejected by the Court.

The Court deems the arbitration agreement valid despite its asymmetric or optional character based on the modern Commonwealth authority (Thevar & Choo, 2017). For the second requirement, the Court held that since Dyna-Jet had chosen to submit the dispute to the Singaporean Court, the dispute is not within the scope of the arbitration agreement. This thereby released Dyna-Jet from any obligation to arbitrate. As the second requirement was not fulfilled by Wilson Taylor, the Court stated that it was not necessary to analyse whether the third requirement was satisfied.

In considering whether such a clause could constitute a valid arbitration clause, the Court affirmed the High Court's finding that it was immaterial that Dyna-Jet was the only party which was able to commence arbitration, and that it was equally immaterial that Respondent was not compelled to select arbitration, but rather, had this left as an option open to it. The court held that such a clause constituted a valid arbitration agreement under Singapore's arbitration legislation, despite lacking the characteristic of mutuality, because both parties, that are both corporate entities, agreed to be bound by the arbitration agreement. Although in other countries the parties' intent to arbitrate (arbitration as an obligation) is required, the Singapore court held that the fact that arbitration in this case acts only as an option is immaterial and therefore the arbitration agreement is valid. Based on these reasons, the court declared that the requirements under Section 6(1) IAA has been fulfilled (Henderson & Chua, 2017).

Although the Singaporean courts have yet to made a definitive decision on this issue, the above explanation shows that dispute settlement clauses which grants only one party to a contract the sole option to arbitrate will be enforced by the Singapore courts. On the basis of the court's reasoning in enforcing

this clause, it is likely that a similar dispute settlement clause granting one party the option to file claims to court over a default arbitration clause would be sustained.

Russia

In the widely reported case Russkaya Telephonnaya Kompaniya (RTK) v. Sony Ericsson in 2012, a landmark case concerning AACs in Russia, the dispute resolution clause was held invalid as it was considered a violation of the balancing of the rights of the contracting parties. However, before 2012, the approach from the Russian jurisprudence has not always been negative towards AACs. For instance, in 2009, in the case between Red Barn Capital v. Factoring Company Eurocommerz, the Russian appellate and cassation courts reached a decision that AACs are consistent with the Russian law, permitting the claimant (Red Barn Capital) to litigate (or arbitrate) as provided in their AAC. This shows that historically, the Russian courts held that AACs are generally valid and legally effective.

In the Russkaya Telephonnaya Kompaniya (RTK) v. Sony Ericsson case, the dispute resolution clause in that contract provides that disputes which cannot be settled through negotiations shall be finally settled in line with the Rules of Conciliation and Arbitration of the ICC, by three (3) arbitrators appointed accordant with the Rules. However, it further states that this arbitration clause does not restrict Sony Ericsson's rights to submit to a competent court. The court invalidated the dispute settlement clause based on grounds of unconscionability and general principles for civil rights protection. The dispute settlement clause was deemed to be in violation of the parties' procedural equality, balance between the parties' interest and was held adverse to the nature of the dispute settlement process (Scherer & Lange, 2013). In order to comply with this principle, a dispute clause cannot grant only one party (Sony Ericsson) the right to refer to a competent state court and deprive RTK of equal rights (Bakumenko, 2020: 93). Accordingly, the party whose right was infringed by such a dispute clause shall be entitled to submit disputes to a competent court. This is so that it may enforce its assured rights to court protection on terms that initially exist only for its counter-party.

Combined with the arbitration clause set out in the dispute clause, the prorogation agreement grants Sony Ericsson a preference against RTK, being the only party granted the option of forums for dispute settlement. Consequently, the AAC was held invalid as it situated the beneficiary of the AAC in a privileged position. This caused imbalanced towards the parties' interests and it violated the equality between the parties. In the interest of fair hearing and judicial protection of parties, an equal opportunity to refer to court must be given to both parties as only in this case the court ensures a party's right to a complete, effective and fair court defence. In regards to this, the asymmetric clause in the contract was construed as a symmetrical one, permitting both parties the right to submit claims to the Russian courts. This judgement is unclear as to the effect of AACs as the Russian law permits the party without the option to proceed with litigation before the Russian courts.

It is important to note that despite the Supreme Arbitrazh Court's decision, Russian law does not entail a symmetric arbitration agreement. Both courts before and after this decision have taken different approaches towards this matter. This makes enforcement of AACs in Russia complex, as it much depends on the wording of the AAC itself. However, contrary to an AAC, a symmetric optional dispute resolution clause will likely be enforced as it is based on the fact that the clause gives both parties the right to either arbitrate or litigate. To illustrate a symmetric optional clause, in the LEKS LV v. ASSA case in 2011, between a Latvian company and a Russian company, an award was enforced where the arbitration clause provided that all disputes under the contract were to be settled in accordance with Latvian law, "at the election of the party bringing the action either in court or at the Riga Independent Arbitration Court…".

England and Wales

The English courts have consistently held that AACs, i.e., dispute resolution clauses allowing for only one party to submit a dispute to arbitration, as valid and enforceable under the English Law. This, however, was not always the case. Until 1986, the English law required mutuality in an arbitration agreement, such that parties to a contract must be given the same rights to submit disputes to arbitration. In the case of Pittalis v. Sherefettin, however, Fox L.J stated that he saw no reason why an agreement that conferred the right to refer to arbitration on only one party should not be a valid arbitration (Merkin & Flannery, 2019: 68). The Court then redefined the mutuality requirement as it sees no lack of mutuality in an agreement between two persons that have agreed to confer the right to submit to arbitration to only one of them. The decision of the Pittalis v. Sherefettin case is not authority for the proposition that mutuality is not a fundamental requirement of an arbitration agreement under English law, but it is right to state that such mutuality may extend to the parties of that agreement agreeing to grant the right to initiate arbitration only upon one of them.

In the NB Three Shipping v. Harebell Shipping case in 2004, a dispute settlement clause granting one party only the right to stay arbitration proceedings was upheld. The dispute resolution clause in this case provides that the courts of England shall have the jurisdiction to resolve any dispute, however the Owners' (NB Three) shall have the option to bring any dispute hereunder to arbitration. Here, the High Court granted the Owners a stay under Section 9 of the 1996 English Arbitration Act as it deems that refusing a stay of court proceedings would not comply with the parties' agreement over their choice of forum. The English courts have held that the beneficiary of an AAC must, at an early stage of the dispute resolution process, elect a particular dispute resolution mechanism (Clifford & Browne, 2013). The High Court further confirmed the AAC's validity as a unilateral choice of arbitration was considered to have fulfilled the requirements of a valid arbitration agreement.

In another case, Law Debenture v. Elektrim Finance in 2005, a request to stay arbitration proceedings was granted. This is because under the parties' AAC, the right to seek settlement through arbitration was subject to the option to litigate. The court decided that the existence of an additional advantage for one party does not invalidate the right to litigate as in practice, many contractual provisions confer an advantage to one party only. Moreover, there is no contradiction in law in giving one party better rights than the other. The courts deem that the imbalanced nature of the AAC does not invalidate it. This is because once a dispute has arisen, and any of the parties has chosen a forum designated by the arbitration agreement, the choice of forum crystallizes and there should be no room left to resort to other forums. Therefore, the imbalanced right of the parties is effectively restored at the stage where the real settlement of the dispute will take place. Hence, the AAC in the case of Law Debenture v. Elektrim Finance was deemed valid. The above cases exhibits that the English courts will uphold an AAC if it was the dispute resolution of the parties' choice.

China

To date, there is very little case law in China concerning AACs. One of the most initial cases was in 1999, where the Beijing Higher People's Court held that an AAC was not valid, deeming such clauses as unconscionable or unfair. It must be noted that in China, the same level courts or even lower courts might decide differently on the same issue. This is because cases do not have any precedential value there. Article 7 of the Judicial Interpretation of the Supreme People's Court on the application of the People's Republic of China Arbitration Law regulates that an agreement granting parties to a contract the option to either apply to arbitration or court is ineffective, unless after one party submits to arbitration, the other fails to object within the period before the first hearing (Article 20(2) of the Arbitration Law).

It can be inferred from Article 14 of the

Judicial Interpretation that the People's Court may be more willing to sustain an AAC if it was included in a foreign-related contract. However, these clauses are likely to be held as unfair especially if the party who benefits from the extra option is the non-Chinese party.[1] Article 16 of the Arbitration Law of the People's Republic of China necessitate that an agreement to arbitrate, amongst others, must incorporate an express intention to arbitrate. In regards to AACs, there are concerns that courts might not recognize the validity of AACs due to the lack of the requisite agreed intention to settle the parties' disputes through arbitration.

Validity of AACs under International and Indonesian Arbitration Law and under Principles of International and Indonesian Contract Law

To date, the validity of AACs has yet to be explicitly governed by any international arbitration law. This article will provide an analysis on the use of AACs in international commercial contracts and in the practice of international commercial arbitration under the Model Law, Indonesian Arbitration Law (Law No. 30 Year 1999), Indonesian Contract Law and under international contract law, the UPICC 2016.

Validity of AACs under UNCITRAL Model Law on International Commercial Arbitration 1985

The validity of AACs in international commercial contracts will be examined under the Model law as it provides for application of a set of uniform international principles that mandates the presumptive validity of international commercial arbitration agreements, and also a validation principle applicable to the choice of law governing such agreements. The Model Law does not explicitly regulate on the validity and enforceability of AACs; however, the Model Law does regulate on arbitration agreements and its forms. Article 7 of the Model Law defines what an arbitration agreement is. There are 2 (two) fundamental principles on arbitration agreements regulated by Article 7, that is arbitration agreements may relate to a dispute that has already taken place or yet to occur. It also necessitates agreements to arbitrate to be made in written form (Holtzmann & Neuhaus, 1995: 240-241). The Model Law does not further regulate on how to determine an arbitration agreement's validity. This has resulted in it being criticized as lacking authority to regulate arbitration agreements. Here we will also analyse whether the Model Law is open to the possibilities of confirming AACs validity.

One may argue that the invalidity of AACs arise from the lack of equality of the parties as regulated by Article 18 Model Law that concerns equal treatment of the parties. Although Article 18 is under Chapter V that is titled Conduct of Arbitral Proceedings, it is arguable that the equality of parties principle enshrined under this article has an expansive reach. From Article 18's wording and the fact that said article is under Chapter V that governs the conduct of the proceedings, it is quite evident that Article 18 should not apply in determining the validity of arbitration agreements. However, in the final session of the drafting of the Model Law, the Working Group directed that the provision be amended to emphasize that the principle of equality and the right to present one's case should not only be observed by the arbitral tribunal, but also by the contracting parties when drafting any rules of procedure (UNCITRAL Records A/40/17), which includes also the parties' negotiations, a matter that comes before the commencement of arbitral proceeding. Likewise, Article 18 should also apply to arbitration agreements.

The view that the principle of equality under Article 18 should be of broad application is consistent with the French Cour De Cassation decision in the Siemens-Dutco Case, which required equal treatment of parties, even at the stage of tribunal composition. The takeaway from this is that the principle of equal treatment under Article 18 should apply throughout the whole arbitral process,

1 Herbert Smith, "Dispute Resolution and Governing Law Clauses in China-Related Commercial Contracts An Introductory Guide to Drafting Clauses That Work and Avoiding Technical Traps", 2011, 25.

even during the conclusion of the parties' arbitration agreements. As evidenced by the Valens v. Hopkins case in 2010, arguments that AACs are in violation of the principle of equal treatment enshrined under Article 18 is based on the understanding that equal treatment of the parties is ensured when no party is given any advantage over the other.

Inclusion of an AAC as a dispute settlement clause in a contract means that performance of the arbitration clause would be subject to a condition which could only be satisfied under the discretion of only one of the parties. The conditions emerging from the use of AACs reflect an intrinsic imbalance of the position of the parties within the contract due to one party enjoying excessive rights (Gaillard & Savage, 1999: 268; Draguiev, 2014: 1). When a dispute arises, the party with the advantage would be able to choose a forum that is most favorable to them, whether it be courts or arbitration. It is undeniable that AACs give an advantage to one party over the other in regards to the right to choose a forum. AACs confer an enormous advantage on one party only since that party will be given the right to debilitate any legal action initiated by the other party through requesting a stay of court proceedings in favour of arbitration (Draguiev, 2014: 24-25).

In 2005, Poland adopted a new arbitration statue that is based on the provisions of the Model Law. The principle of equality of parties principle under Article 18 of the Model Law was incorporated in Article 1161(2) of the Polish Civil Procedure Code. The adoption of this rule was based on Article 32(1) of the Constitution of Poland, declaring universal equality before the law. Initially, agreements with a unilateral option to arbitrate for dispute settlement would be invalidated. However, after further legislative work, the approach adopted based on this principle is that provisions of arbitration agreements that are in violation of the equality of parties principle should be invalidated. Therefore, if a provision in a dispute clause granted only one party the option between arbitration and litigation, such an agreement would be invalidated in terms of granting that one party the right to submit to arbitration (Bakumenko, 2020: 95). This shows that although Article 18 is most likely intended to only apply to the arbitral proceedings, its principle remains significant to the parties even at the stage of the drafting the arbitration clause. Hence, the reasoning that AACs violates the principle of equal treatment could be used to invalidate an it under Article 18 of the Model Law.

On the other hand, there are also strong contradicting arguments on the applicability of Article 18 in assessing the validity of AACs. This argument is based on the interpretation of Article 18's wording itself, that the principle of equal treatment is a procedural right, which only applies after the commencement of the arbitral proceedings. From the Model Law Digest, it can be inferred that Article 18 lays down the fundamental requirements to achieve procedural justice and requires comparable standards to all the parties throughout the arbitration process (Model Law Digest, 2012: 97). The Model Law Digest also states that although the principle in Article 18 apply to all the stages of the arbitration, the purpose of Article 18 itself is not to protect parties to a contract from its own failures or strategic plans, rather, it is to protect them from injudicious conduct by an arbitral tribunal (Model Law Digest, 2012: 97). Another argument on why Article 18 is confined to only the conduct of arbitral proceedings is the fact that the Model Law drafters did not place Article 18 under Chapter I, titled "General Provisions", indicates that while they recognized the importance of the principle of equal treatment, they intended to confine Article 18's application to the conduct of arbitral proceedings alone. In this context, the arbitral process begins from the notice of arbitration to the making of the award (Born, 2020: 2173). By this interpretation, the drafting of an arbitration agreement is not part of the arbitral process, hence, Article 18 should not be applicable to determine an AAC's validity.

Another argument confirming AACs validity against the principle of equal treatment is party autonomy. Party autonomy is a principle that gives parties to a contract

substantial autonomy to design their own mechanism for dispute settlement and tailor the rules to their specific needs, largely free from the constraints of national law (Moses, 2018). Under Article 19(1) Model Law, party autonomy acts as a guiding principle in determining the procedure to be followed in international commercial arbitration. Based on this principle, courts across the world, particularly in Model Law jurisdictions, AACs have been upheld as generally, parties to a contract have the freedom of designing their own dispute resolution mechanism (Born, 2014: 870; Tektona, 2011: 87). In the argument of AACs validity, party autonomy prevails over the mere fact that there is an imbalance between the parties in a provision in an agreement. In a commercial contract, it would be quite complicated to invalidate an AAC based on the argument of equality of the parties as a principle. This is because in commercial agreements, it is common to have a contractual provision that gives an additional advantage to one party over the other. English case law, as discussed above, immensely supports this view.

In light of the above, it is apparent that the fact the Model Law has yet to regulate on AACs could give rise to serious issues concerning its validity. As a result of the uncertainty of the AACs' validity under the Model Law, contradicting arguments arise out of Article 18 which is based on the principle of equal treatment of the parties. It is clear that AACs are becoming a trend in both the business sector and also commercial arbitration. Thus, it would be paramount for the Model Law, which was intended to assist states in rectifying and modernizing their arbitration laws, to regulate on the use of AACs as an arbitration agreement for international commercial arbitration so that states that has yet to have a regulation on this issue could refer to the Model Law as guidance.

Validity of AACs under the UNIDROIT Principles of International Commercial Contracts

The UPICC is a set of principles that coordinates private commercial law between states and because it plays a crucial role in international commerce; that is the UPICC provide for general principles of contracts including its formation, invalidity, interpretation and termination (Karume, 2016). The UPICC apply to both contracts that expressly states the UPICC's applicability or contracts in which the governing law has not been chosen. However, such contracts must have an international component in them in order for the UPICC to apply; in order words, they should be international contracts. Here, the UPICC is will be applied to examine an AAC's validity. The validity of AACs that will be analysed from the UPICC perspective will only be concerning AACs that are included in international contracts.

A basic tenet of the UPICC is that individuals should have the freedom to enter into a contract and to decide its content. Under Article 1.3 of the UPICC, that is based on the pacta sunt servanda principle, a contract validly entered into are legally binding upon those who made it. A corollary of this principle is that a contract may be amended or terminated so long as the parties agree. However, modification or termination without consent can only be admitted when such conduct complies with the terms of the contract or when expressly governed in the UPICC, one of which being the existence of gross disparity between the parties as governed by Article 3.2.7. Under Article 3.2.7, an AAC may be avoided due to gross disparity if at the time the contract was concluded, the AAC unjustifiably gives one party only an excessive advantage. An advantage is considered "excessive" if it creates a disequilibrium of the performance and counter-performance of the contract that is so great as to shock the conscience of a reasonable person. The excessive advantage must also be unjustifiable.

There is no accurate threshold in determining if an advantage is unjustifiable as it must be determined by evaluating all relevant circumstances surrounding the case. However, there are two factors that deserve special attention, *First*, if the parties had an unequal bargaining position. The UPICC states that

unequal bargaining power means that one party to a contract has taken unfair advantage of the counterparty's dependence, economic distress or urgent needs, or its improvidence, ignorance, lack of experience, or lack of bargaining skill. The superiority of bargaining power of one party based only on market conditions would not suffice. It is considered to be unconscionable if a party to exploit its economic power to make its counterparty accept an AAC without fully understanding its unfairness (Smit, 2010: 391, 393). There are instances where courts invalidated an AAC with the approach of such clause being unfair to the "little guys" (Drahozal, 2002: 542) *Second*, the nature and purpose of the contract. The UPICC states that there are certain circumstances where an excessive advantage would be unjustifiable even if the beneficial party has not abused the counterparty's weak bargaining position. These circumstances often depend on the nature and purpose of the contract. Other than these 2 (two) factors, one that must also be taken into account are other factors surrounding the case, such as the ethics prevailing in such businesses.

These conditions, however, have rarely been met in the context of commercial contracts. This is due to the fact that in most instances, parties to a commercial contract had equal bargaining power in negotiating the contract terms. Even when not, courts tend to determine that the requirement of an unjustifiable excessive advantage is not fulfilled as even though a clause in a contract confers an advantage to only one of the parties, the other party had full acknowledgement of said terms before agreeing and signing it.

In the case of Koda v. Carnival Corp (Unilex Case No. 1528) in 2007 that concerns an excessive advantage to one of the parties in an employment agreement, the courts decided that the notion of gross disparity argued by the employee was not fulfilled as the employee had full acknowledgement of the disparity in the arbitration clause, that is the fact that the arbitration venue is in a different country from the employee's residence, before agreeing to those terms. In reaching its decision, the court did not directly quote from Article 3.2.7, however, the motions filed generally cited the principles of Article 3.2.7 UPICC. From this decision, it can be seen that despite the weaker bargaining position the employee has in that contract, requirements under Article 3.2.7 were not fulfilled because of the mere fact that the employee had acknowledged the disparity before signing the contract. Bear in mind that the threshold of gross disparity for parties to a commercial contract are higher than those in an employment agreement or a consumer contract.

In a more recent case concerning the sale of property, the seller argued that the sale price agreed upon reflected an excessive advantage and a gross disparity between the parties because as it turned out, it was only a small fraction of the true value of the property. However, the court declared that there was no excessive advantage in the transaction under Article 3.2.7 UPICC given the seller's experience as a business person. This shows just how high the threshold for gross disparity under the UPICC is. In light of the above, it is fairly evident that invalidating an AAC in a commercial contract under the notion of gross disparity under Article 3.2.7 UPICC is difficult. The immensely high threshold makes it onerous to invalidate an AAC, as in commercial contracts, parties are most likely to be experienced business persons who are considered to have the knowledge and sufficient understanding in agreeing to sign a contract.

Validity of AACs under the Indonesian Contract Law (Book III Law of Obligations)

Freedom of contract is one of the most fundamental principles of Indonesia's Contract Law (Law of Obligations, Book III of the Civil Code). It is regulated under Article 1338 of the Civil Code which governs that parties to a contract have the autonomy to include any provision they wish, subject only to mandatory provisions of Indonesian Law. Under this principle, an individual may or may not make a contract. Article 1338 further regulates that an agreement made by the parties bind them as the law does. This, however,

must comply with the law.

An agreement made under the Indonesian Law must fulfill the requirements governed by Article 1320 of the Civil Code. Thus, although parties are free to enter into any agreement, or in this case an arbitration agreement, it must comply with the general requirements for a valid contract as governed by Article 1320. These requirements include the subjective and objective conditions. The subjective conditions include consent from the individuals who are bound thereby and legal capacity of the parties, whereas the objective conditions are a lawful cause and a specific subject matter. In the event the agreement made does not fulfill the subjective conditions, the agreement may be cancelled. However, in the event the objective conditions are not met, the agreement will be held null and void. This means that the agreement will be considered to have never existed.

In its ideal form, freedom of contract requires a state to recognize the autonomy of individuals in deciding matters which affects that individual and to acknowledge that parties to a contract are better arbiters of their own interests than the legal system, and is better qualified to evaluate the reasonableness and fairness of the way chosen to implement those interests (Chrenkoff, 1996: 37). Thus, adherence to this principle necessitate that parties to a contract be left alone to decide what sort of contract it wants, with whom and on what terms. The courts are merely concerned with whether fairness was adhered to in the parties' negotiation process, that is in ensuring that the voluntariness of the parties' consent are not compromised by factors such as fraud, duress, misrepresentations and mistake (Zimmermann, 1996: 577).

The courts, needless to say, are also concerned with the enforcement of these contracts, and beyond these 2 (two) areas, there is also scope for judicial interference. It must be noted that the freedom of contract principle applies under the assumption that the parties involved in the contract are of equal strength, socially and economically (Hartono et al., 2001: 98). Under Article 1338 Civil Code, agreements must also be made in good faith. However, even at commercial contracts it is not uncommon that the parties are not of equal strength. This is most evidently seen from the discrepancies of obligations in the contract which roots from the difference of the parties' bargaining positions. The inclusion of an AAC may be one of the realizations of this discrepancy.

Generally, an AAC as an agreement concluded under Indonesian Law must fulfill the requirements regulated by Article 1320 Civil Code. As the first and second condition are subjective, the validity of AACs will be assessed through the third and fourth condition. The third condition provides for an agreement to be made under a lawful cause. AACs undisputedly gives an advantage to one party over the other, however, this does not in and of itself invalidates it as equal obligations and rights in every provision of a contract is not required by Indonesian Contract Law. This condition is further regulated by Article 1337 Civil Code, which stipulates that an agreement is legal if it does not go against the law, moral norms or public order. However, AACs do not violate any moral norms upheld by the Indonesian society, nor will its enforcement disrupt public order.

The fourth condition requires an agreement to be made based on a specific subject matter. As a dispute settlement clause, the purpose of an AAC is to serve as an agreement on the parties' dispute settlement mechanism, including also the parties right to either resort to arbitration or state courts to resolve their dispute, and the obligation to follow what was agreed upon in that clause. Based on freedom of contract principle, parties to a contract have the freedom to incorporate terms suitable to their needs, however still in accordance with the law. In the instances where AACs are included in commercial contracts, one reason why a party would agree on limiting its rights and giving its counterparty extra benefits is because it has a weaker bargaining position. However, it is important to note that a weaker bargaining position does not mean that the party was under duress to sign an agreement. This is where the debate lies. The incorporation of

an AAC is one of the instances of parties designing terms of their contract that suits their business needs. However, would this be the case if there was a discrepancy in the parties' bargaining position? This discrepancy is seen from both social and economic aspects of the parties. In assessing whether the inclusion of AACs is valid under Indonesian Contract Law, special attention must be given to the intention of the party doing so.

As have been stated above, contracts are to be made by the parties in good faith. Hence, the parties' intention in including an AAC as a dispute resolution clause in their contract is a substantial factor in determining its validity. However, it is arguable that the tribunal, when applying the good faith principle, will ultimately depend on the jurisdiction where the arbitrators or the institution is located (Henriques, 2015: 361). Referring to case law elaborated above and views of the Model Law and the UPICC, the same can be applied to assessing the validity of an imbalanced dispute settlement clause in a commercial contract. Commercial contracts are most often, even almost always, concluded by business entities. These business entities have the legal capacity and are considered to have the experience needed to conclude a business agreement.

Despite having different bargaining powers, parties to a commercial contract with the experience and understanding of a business person is considered to fathom the legal effects of including an AAC into their agreement. Thus, a business person that voluntarily agreed to a dispute resolution clause that gives an advantage to its counterparty, made a decision based on their understanding of the industry. This shows that most scenarios of negotiations of commercial contracts, even without an equal footing, the parties would have a say in what is concluded in the contract. It is a completely different scenario than in the negotiations of a standard contract in consumer agreements or employment agreements where the negotiation is done by a "take it or leave it" method. It can be concluded that even though parties to a commercial contract had different bargaining positions in the negotiation of the contract, judgement are also to be made towards each parties' experience in the relevant field of business.

In conclusion, to determine whether the parties to a contract concluded the arbitration clause in good faith or not, judgement must be made on a case-by-case basis. This is simply because the intention of each party and the wording of each AAC differs in each case. Hence, interpretation to an AAC in a contract depends on the situation surrounding each case. In the event it was found that the agreement was not made in good faith by the party submitting the AAC, then the dispute clause may be declared invalid as this indicates a violation of Article 1338 of the Civil Code. However, if it was found that the parties concluded such an agreement that confers an extra option to one of the parties in good faith and in compliance with the freedom of contract principle under Article 1338 Civil Code, then the dispute settlement clause is valid under Indonesian Contract Law.

Validity of AACs under Indonesian Arbitration Law (Law No. 30 Year 1999)

Arbitration agreements, generally, are to be made subject to Article 1320 Civil Code, as elaborated above. More specific regulations concerning arbitration agreements and commercial arbitration are provided by the Indonesian Arbitration Law, Law No. 30 Year 1999 on Arbitration and Alternative Dispute Resolution. The Indonesian Arbitration Law governs all conduct of domestic and international arbitration in Indonesia. The Indonesian Arbitration Law itself is not formulated based off of the Model Law, although it does have more similarities than differences to it (Adolf, 2002: 132).

As in every other jurisdiction, the Indonesian Arbitration Law provides that the availability of the arbitral process for dispute settlement is rooted upon the parties' consent. As the Civil Code recognizes that all legally executed agreements bind the individuals who formed and agreed to such an agreement, the parties have the freedom to agree upon arbitration as their dispute resolu-

tion method, thereby opting out the court's jurisdiction. This is also regulated under the Indonesian Arbitration Law. However, the Indonesian Arbitration Law does not specifically govern on the use of AACs in commercial arbitration. Hence, the question is how does an AAC perform if a valid arbitration agreement opts out the court's jurisdiction and whether or not it is considered as a valid arbitration agreement under the Indonesian Arbitration Law.

The Indonesian Arbitration Law provides a definition for arbitration agreements in Article 1(3). It differentiates between an arbitration clause in a contract; an agreement to arbitrate concluded by the parties before a dispute has arisen, and a submission agreement; an agreement to arbitrate the parties concluded after a dispute has arisen. The validity of arbitration agreements is governed by Article 9, which requires an agreement to arbitrate to be made in written form and signed by the parties. AACs are arbitration agreements made by the parties when concluding their contract; before there was any dispute. This shows that AACs are in accordance with Article 1(3) on definitions of arbitration agreements and the requirements for a valid arbitration agreement under Article 9.

There is a notion from law practitioners in Indonesia that under Article 2 Indonesian Arbitration Law, a clause that gives a unilateral right to one party only the option either to choose arbitration or litigation is invalid (Sukirno & Sihombing, 2019). This is because Article 2 governs that parties must agree in writing to settle disputes through arbitration. The fact the an AAC or any other unilateral option clauses does not infer an obligation to arbitration upon the parties constitutes a violation of Article 2 of the Indonesian Arbitration Law. However, it must also be noted that the fact that the parties have agreed on arbitration as one of the options of dispute resolution infers that the parties' have consented to settle a dispute through arbitration, although not expressly conferring an immediate obligation to arbitrate.

Articles 3 and 11 of the Indonesian Arbitration Law governs that where the parties have agreed to arbitrate, the court does not have, and may not take, jurisdiction. Article 3 stipulates that the district court shall not have jurisdiction over disputes between parties that are bound by a valid arbitration agreement. Article 11 further emphasizes what is governed by Article 3. Article 11 states as follows:

> *"(1) The existence of a written arbitration agreement shall eliminate the right of the parties to seek resolution of the dispute or difference of opinion contained in the agreement through the District Court. (2) The District Court shall refuse and not interfere in settlement of any dispute which has been determined by arbitration except in particular cases determined in this Act."*

From Article 3 and Article 11, it is clear that the Indonesian Arbitration Law strictly prohibit parties from resorting to state courts if a valid arbitration agreement was concluded between them, other than for enforcement purposes or other relief that may be sought after the issuance of the final award. Moreover, the Indonesian Arbitration Law strictly requires both parties to agree on arbitration in order to be able to arbitrate their disputes. This means that as long as the parties involved agree to resort to arbitration, the agreement would be enforceable. If we were to dig a little deeper, this would show that AACs will be enforceable as long as when the beneficial party resorts to arbitration, its counterparty does not object. However, if the counterparty objects, the AAC would not be enforceable under Indonesian Arbitration Law as it indicates dissent to arbitrate from one of the parties. On the contrary, the same reasoning of AAC's validity under Article 2 applies also here as evidently, the fact that the parties concluded an AAC as their dispute resolution clause indicates that both parties have agreed to resolve their dispute through arbitration as one of the forum options.

This also shows the existence of an imbalanced right of the parties in choosing a forum for dispute resolution. However, what must be noted is that once the party with the extra option chooses a forum, the other option will no longer be available for recourse. For instance, if the party with the extra

option chooses arbitration, then the option for recourse to the agreed state court would cease to exist. This aligns with Article 3 and Article 11. Vice versa, if the party with the extra option chooses litigation, the counterparty cannot then resort to arbitration. Another scenario would be when the party with the restricted option acts as the claimant. If this is the case and the party chooses litigation, the counter party with the extra option would have the right to stay the court proceeding and resort to arbitration, if it deems appropriate. The right to stay the proceeding applies also to if the claiming party resorts to arbitration.

Although the Indonesian Arbitration Law has yet to explicitly govern on the use of asymmetrical clauses, the case between Societe Generale (claimant) and Hadi Rahardja and Star Prospekty (respondents) proves that the Supreme Court of Indonesia will uphold a dispute clause that only gives one party extra options in comparison to its counterparty. In this case, it was agreed that Singaporean law will be the governing contract law and that the Singapore courts will have jurisdiction towards any dispute that may arise between the parties. However, claimant had the extra option to refer any dispute to another state court. Even though the parties' agreement in this case did not contain the option to arbitrate, the same principles that apply in that agreement applies to AACs, such that only one party has the option to refer to 2 (two) different forums whilst the other is not provided with the same rights.

In the case of Societe Generale and Hadi Rahardja and Star Prospekty, the Supreme Court of Indonesia's Decision No. 3253K/Pdt/1990 permits claimant to submit the dispute to the Indonesian courts (Basuki, 2018: 6.39). Under the parties' asymmetrical dispute resolution clause, claimant chose to submit their dispute to the West Jakarta District Court. The respondent claimed that the court does not have jurisdiction pursuant to Article 6(d) of the parties' agreement as it stated that the contract is governed by Singaporean law, even though Societe Generale has the option to go to other courts. In the decision No. 206/Pdt/G/1987/PN.Jkt.Bar, the district court declared that it does not have jurisdiction to adjudicate the dispute as although it admitted that it is possible for claimant to submit to other courts, the West Jakarta District Court deemed that the facts of the case show that Singaporean court is the forum for dispute resolution.

This case reached the Jakarta High Court, where it had a different take on the matter from the lower court. The Jakarta High Court decided that the Indonesian court has jurisdiction to adjudicate the dispute on the grounds of party autonomy and the fact that procedural matters are determined by the law where said procedures are conducted (Latip, 2002: 216). Based on this reasoning, the Jakarta High Court deemed that it has jurisdiction to over the parties' dispute and that Indonesian procedural law shall apply. This decision was upheld by the Supreme Court of Indonesia. Prima facie, it can be understood that since the Supreme Court's decision is binding, asymmetrical dispute resolution clauses are accepted in Indonesia. However, it must also be noted that in reaching such a decision, the court did not concern itself with the matter of the asymmetrical nature of the dispute clause. The court's decision was based on the reasoning that Singaporean law governs only the substantive part of the contract and does not govern the procedural part of the dispute resolution. In the end, the Supreme Court admitting the claimant's right to submit the dispute at hand to other courts other than the Singapore court, does not determine the Indonesian courts' stance on the validity of asymmetrical dispute clauses.

4. Conclusion

Different jurisdictions have different approaches towards the use of AACs. One of the reasons being the different interpretation of each state's arbitration law. In Singapore, that has adopted the Model Law, the court deems an AAC valid under Singaporean Law despite of the clause's optionality character. The validity of a clause with an option to arbitrate in Indonesia is still being disputed. Under the Indonesian Arbitration Law, alt-

hough at first glance, it may seem that AACs are not in accordance with it, the law states that so long the parties have expressly agreed to an arbitration clause, then the agreement legally binds the parties. This shows that there is potential of the Indonesian Arbitration Law admitting the validity of AACs. However, the fact that AACs are not yet explicitly regulated by the Indonesian Arbitration Law will inevitably give rise to questions concerning its validity and enforceability.

Another reason why the issue of why AACs' validity is greatly debated is because although it is not uncommon to have parties to a commercial contract with different bargaining positions, special attention is given to when the party with the better bargaining position attempt to draft this position into their arbitration agreement. This is done by the party with the higher bargaining position by incorporating for themselves a more generous set of options of forums, whilst at the same time restricting the options to their contractual counterparts. This conduct has led to the argument of AACs' invalidity under the UPICC. Nonetheless, until today AACs has yet to be proven to fall under the notion of gross disparity under the UPICC.

We believe that that are a number of ways to reassess the established practices in some jurisdictions, including in Indonesia, concerning the invalidity of AACs that could be taken into consideration. *Firstly*, in commercial contracts it is common for parties to have imbalanced rights and obligations. These imbalances do not serve as a basis to render the contract invalid. The same view should be applied towards AACs in a commercial contract. *Secondly*, the principle of equality of parties under the Model Law should not be able to invalidate an AAC, as in principle, it applies only after a procedure had already been commenced. This fundamental principle however, can be applied if the AACs was drafted in such a way that would deprive the weaker party of their right to a fair proceeding in the course of dispute settlement mechanism that has already been initiated. For these reasons, the asymmetric nature of an arbitration clause in a commercial contract should not be an infringement to its enforcement.

As convenient as this clause may be for businesspersons, in determining whether or not to include an AAC, careful considerations must be given to its drafting and inclusion into a contract. Parties must also be aware of the potential difficulties in enforcing such a clause or even to avert being forced to litigate in an unwanted forum. This is because different jurisdictions have different approaches towards AACs as there has yet to be an agreement on this matter internationally. It is essential for the Model Law as a guide for states in reforming and modernizing their arbitration law to regulate AACs so that states could refer to the Model Law if they have yet to regulate on AACs. As for Indonesia's arbitration law, it is also crucial to regulate on AACs. Without an authoritative order governing this matter, problems will also arise for the enforcement of foreign awards in Indonesia.

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