

Validity Of Asymmetrical Clauses in Arbitration Agreements

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Abstract

Arbitration offers a flexible and expedited mechanism for settling disputes between parties. To initiate arbitration proceedings, a valid arbitration agreement between the parties is required. In some types of contracts, such as financing, parties prefer to enter asymmetrical or hybrid arbitration clauses, allowing one party to choose between arbitration and/or litigation; the other party remains confined to a single option for dispute settlement. This provides one party with a greater advantage in lieu of certain concessions to the other party, leading to unequal treatment. This study concludes that each jurisdiction has treated asymmetric clauses differently, with conflicting decisions. In most jurisdictions, courts have enforced asymmetrical arbitration clauses as valid, considering that they suit parties' situations and the nature of the contract. For successful enforcement, asymmetric arbitration clauses must be drafted carefully, limiting the jurisdictions under which the party benefiting from the asymmetric arbitration clause may bring claims, rather than granting unlimited jurisdiction.

Keywords: *UNCITRAL Model Law, Asymmetrical, Hybrid, Non-Mutual Arbitration Clause, Enforcement of Award.*

Introduction

The accepted universal rule is that the administration of justice must operate according to the principle of equality between parties [1]. Accordingly, parties to a dispute may agree to submit their differences either to the courts for adjudication or to arbitration, with an equal choice. However, certain agreements permit one party to choose either arbitration and/or litigation, while the other party is not allowed the same right but is bound by the choice of its counterparty; this is referred to as an asymmetrical or hybrid arbitration clause.

The principle of party autonomy in arbitration has been recognized under the UNCITRAL Model Law on International Commercial Arbitration 1985 (Article 19). With respect to the contents of arbitration agreements, neither the Model Law nor the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) specified the details [2]; therefore, the parties are free to draft an arbitration clause with a clear commitment to submit the dispute to arbitration.

Arbitration is a private dispute settlement process that permits the parties to choose arbitration procedures and applicable rules [3]. It is common to have dispute settlement agreements providing one or both parties the power to choose between two options, such as two jurisdictions, litigation and arbitration or arbitration and mediation. These clauses are often referred to as asymmetric, hybrid clauses [1], non-mutual, non-synallagmatic, sole option; 'trumping'; and unilateral option agreements [2].

The symmetric clause permits all parties to the agreement to resort to the same dispute settlement mechanism. The asymmetric or hybrid clause, on the other hand, confers the power to choose the method of dispute settlement on one (or some) of the parties, and binds the other/s by the former's option [1]. This type of dispute resolution clause creates unequal treatment between parties and poses uncertainty regarding enforcement.

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Research Problem

There are conflicting decisions from courts regarding the enforcement of asymmetrical arbitration clauses. The courts in some countries declared the asymmetrical arbitration clauses as invalid due to their non-mutual nature or potestative condition. However, in certain types of contracts, courts favored the enforcement of asymmetrical arbitration clauses. This study analyzes judicial decisions from different jurisdictions to determine in which types of contracts asymmetrical clauses are allowed and the reasons why courts have justified the enforcement of asymmetrical or hybrid arbitration clauses.

Research Methodology

The researcher adopted normative legal research and referred to legal rules that are applicable to determine the validity of asymmetrical arbitration agreements. Additionally, the comparative methodology was also followed to analyze the judicial decisions from different jurisdictions in respect of the validity of asymmetrical arbitration clauses.

Discussion

In a symmetric arbitration clause, parties to the agreement have an equal right to invoke the arbitration mechanism in case of any dispute arising between them. However, asymmetric or unilateral clauses allow one party to have more options than the other in selecting a forum for dispute settlement [4]. Furthermore, in an asymmetrical arbitration clause, one party has the option to choose between arbitration and/or litigation or multiple jurisdictions [5], whereas the other party is limited to a single option for dispute settlement [6]. Asymmetrical clauses grant one party the opportunity to start either arbitration or litigation in court; however, the other party has no such option and is bound by the choice of its counterparty [7].

Symmetrical arbitration agreements are based on mutuality and equal treatment between parties; however, in asymmetric arbitration agreements, only one party has the option to choose arbitration, and the other party has the right to choose between arbitration and litigation. Other types of dispute settlement agreements offer a choice between adjudication in the courts of a specific jurisdiction and arbitration [1]. Depending on the parties' commercial disparity at the time the contract was signed, one party may insist on an 'asymmetric' or 'unilateral' jurisdiction dispute settlement clause, which gives that party the right to initiate the proceedings but does not provide a similar choice to the other party [8].

Asymmetrical arbitration clauses, also known as hybrid, split, or optional dispute resolution clauses, allow one party to the arbitration agreement to initiate arbitration proceedings while the opposite party has no such right. Such clauses are generally used in financing transactions to enable the lender flexibility to sue the assets of the unpaid debtor wherever possible; such clauses are also common in film licensing, construction contracts, software solutions [9], and distribution and license agreements [1].

Asymmetric clauses are viewed with suspicion, and courts refuse to give effect to them on the grounds that they are not reciprocal, not having consent from both parties, which is a prerequisite in arbitration, and the submission of a dispute to arbitration contains a condition of compliance [1]. As such, asymmetrical clauses are held unenforceable in some jurisdictions because the promise to arbitrate is illusory [9] as there is no obligation on the parties to submit the dispute for arbitration.

Regarding the enforceability of asymmetric arbitration clauses, the approach of the courts is conflicting, as presented in the following paragraphs:

Australia

In *PMT Partners Pty Ltd (In Liq) v. Australian National Parks & Wildlife Service* [10], the Australian High Court affirmed the legality of asymmetric arbitration clauses that required parties to submit their dispute to arbitration upon meeting specific requirements. Similarly, in *Mulgrave v. Hagglunds* [11], the Queensland Court of Appeal upheld the legality of a hybrid or asymmetric clause that allowed arbitration on the happening of a certain event.

People's Republic of China (PRC)

Article 7 of the PRC Interpretation of Arbitration Law (2005) states that asymmetrical arbitration agreements are invalid. In [*Geox Trading Ltd. v. Riging Group-Ricco Rachel Trading Co., Ltd.*](#) [12] the asymmetrical arbitration clause provided both the seller and buyer with the choice of arbitration;

additionally, the seller was permitted to approach the court at the buyer's place. The court held that this agreement was invalid under Article 7 of the PRC law. A similar decision was made in [Chen Youhua v. DBS Bank \(China\) Co., Ltd.](#), [13] and [Hainan Kangda Loan Co., Ltd. v. Hainan Xinyangguang Junan Real Estate Development Co., Ltd. et al.](#), [14].

In *Jiangmen Jiangci Electrician Co., Ltd. v. Yunnan Copper Co., Ltd.*, [15] the Supreme People's Court of China ruled that under the asymmetrical clause, the choice of court jurisdiction remained valid even though the optional arbitration agreement was invalid. Similarly, in [Fiber Optic Communication Network Company Ltd. v. China Development Bank](#) [16], the Beijing Financial Court held that an asymmetrical arbitration agreement was valid, provided that the other party did not object to the arbitration.

Hong Kong

In Hong Kong, the asymmetric arbitration clauses are enforceable. In *Tommy CP Sze & Co v. Li & Fung (Trading) Ltd. & Others* [17], the court laid down a four-point test to determine the validity of arbitration an agreement; (i) there must be existence of an arbitration agreement; (ii) the agreement must be capable of being performed; (iii) there must be a difference between parties; and (iv) the difference must be within the ambit of the arbitration agreement. In *China Merchants Heavy Industry v. JGC Corporation* [18], the party that approached the court first did not follow the conditions stated in the asymmetrical clause; therefore, the other party pleaded that the court stay the proceedings. The court applied Article 8 Clause (1) of the UNCITRAL Model Law and held that the courter party had the legal right to submit the dispute to arbitration because there is an enforceable arbitration agreement.

Singapore

In *Dyna-Jet Pte. Ltd. v. Wilson Taylor Asia Pacific Pte. Ltd.*, [19] the court upheld the validity of the asymmetrical arbitration clause.

Russia

In *Sony Ericsson Communication Rus Ltd. Liability Company v. Russian Telephone Comp. CJSC* [20], the court held that an asymmetric clause that gives an unfair advantage to one party over the other was against Article 18 of the International Commercial Arbitration Law (ICAL) of the Russian Federation (Law No. 5338-I). Similarly, in *Emerging Markets Structured Products B.V. v. Zhilindustriya Ltd. Liability Company* [21], the court referred to the *Sony Ericsson case* [19](2012) and held that an asymmetrical clause was not enforceable. Nevertheless, in *Red Burn Capital v. Zao Factoring Comp, Eurocommerz* [22], the Russian Federal Court of Arbitration confirmed the validity of the asymmetrical arbitration clause. In *Piramida LLC v. BOT LLC.*, [23] both parties had the option to choose between court or arbitration, and the court held that such a clause was valid and enforceable.

India

In India, due to inconsistent decisions, the validity of asymmetrical arbitration clauses is unclear. In *Union of India v. Bharat Engineering Corporation* [24], the High Court of Delhi held that asymmetrical arbitration agreements were invalid. However, in *New India Assurance Company Ltd. v. Central Bank of India & Others* [25], the High Court of Calcutta held that an asymmetrical arbitration clause constituted an enforceable arbitration agreement. Similarly, in *TRF Ltd. v. Energy Engineering Projects Ltd.*, [26] the Indian Supreme Court upheld the validity of an asymmetric arbitration clause that allowed one party to nominate a sole arbitrator without the consent of the other party.

United Arab Emirates

In Dubai, the approach is unclear because of conflicting decisions. In *Commercial Appeal No. 116 of 2018* [27], the creditor (bank) filed a case before the Dubai courts, as the dispute settlement clause permitted the creditor to choose between arbitration and litigation in court. The Dubai Court of Cassation (COC) upheld the legality of the proceedings. Similarly, in *Appeal No. 1522 of 2023* [28], the Dubai COC upheld the validity of the asymmetrical arbitration clause. However, in *Appeal No. 735 of 2024* [29], the court refused to enforce the asymmetrical arbitration clause.

United Kingdom

In *Baron v. Sunderland Corporation* [30], the court held that an arbitration agreement would only be enforceable if both parties were entitled to mutual rights to refer disputes to the arbitral tribunal; consequently, an agreement giving advantage to one party and not to the other is invalid. However, in

Pittalis v. Sherefettin [31], the English court rejected the argument of mutual or symmetrical rule and held that a hybrid dispute settlement clause was valid as it suited both parties.

In *NB Three Shipping Ltd. v. Herebell Shipping Ltd.*, [32] the dispute settlement clause provided both parties with the option of litigation in court; in addition, one of the parties was empowered with the option to resort to arbitration. The court upheld the validity of the asymmetrical clause.

In *Law Debenture Trust Corporation Public Ltd. Company Vs. Elektrim Finance BV & Others* [33], the agreement contained both parties having the option to resort to arbitration, and particular parties had the option to resort to the English Court; the court upheld the legality of the hybrid arbitration clause. Similarly, in *Deutsche Bank AG v. Tungkum Ltd.*, [34] the court held that the asymmetrical dispute settlement clauses were valid.

In *Mauritius Commercial Bank Ltd., v. Hestia Holdings Ltd., Sujana Universal Indus* [35], the dispute settlement clause allowed one of the parties to resort to English courts and the courts of any other jurisdiction; the court upheld the validity of the hybrid clause. In *Etihad Airways Public Joint Stock Company v. Lucas Flother* [36], the English Court of Appeal upheld the validity of the asymmetric arbitration clause under Article 25 of the (recast) Brussels Regulation (Journal of International Banking and Financial Law 2025). Similarly, in *Barclays Bank PLC v. PJSC Sovcombank* [37], the court enforced an asymmetrical arbitration clause that enabled the claimant to initiate arbitration and restrained the respondent from continuing proceedings in Russian courts.

United States

In the United States courts applied the “separability” doctrine to the arbitration clause, separating it from the main contract to determine the validity of the arbitration agreement. In *Hull v. Norcom Inc.*, [38] the court treated the arbitration agreement as “separate” and “autonomous” from the main contract and required it to fulfill essential requirements of a valid contract [38]. In *Re Am. Express Fin. Advisors Sec. Litig.*, [39], the court enforced the non-mutual arbitration agreement under the FINRA Code of Arbitration Procedure for Customer Disputes. Similarly, in *Barker v. Golf USA* [40], the court held that mutuality of obligations is not essential for an arbitration agreement as long as the main contract provides for consideration. In *Doctor's Assocs., Inc. v. Distajo*, [41], it was held that where the agreement to arbitrate is contained in a single contract, the consideration provided in the contract also covers the arbitration agreement. In *Pridgen v. Green Tree Fin. Servs. Corp.*, [42], the court held that mutuality of obligations is not mandatory for the enforcement of the contract.

In the United States, Section § 2-302 of the Uniform Commercial Code (UCC) contains an unconscionable clause that provides that if the court finds that any clause in the contract is unconscionable at the time of formation of the contract, it may refuse to enforce such contract, or it may enforce the remaining part of the contract excluding any unconscionable clause. The courts in the United States rejected the application of the mutuality doctrine for the arbitration agreements but sometimes relied on theories of unconscionability in declaring asymmetrical arbitration clauses as invalid. Especially in cases where one party is weak in bargaining and the other party, who is drafting the arbitration agreement, is in a dominant position [9]. But the federal courts refused to apply the unconscionability doctrine to determine the validity of the arbitration agreements [43]. In *Willis Flooring, Inc. v. Howard S. Lease Constr. Co.*, [44], the court held that the asymmetrical arbitration clause is binding on the parties, similar to the main contract.

In *Martinez v. Master Protection Corporation* [45], the agreement required employees to submit all claims to arbitration but secured the employer's right to obtain injunctive relief from the court for particular causes of action lacking equality or mutuality; therefore, the court ruled that the asymmetrical arbitration section was not enforceable. Similarly, in *Armendariz v. Foundation Health Psychcare Services Inc.*, [46] the court ruled that asymmetrical arbitration clauses were a lack of mutuality and therefore not enforceable unless there is a “legitimate commercial need” or a “reasonable excuse” for this absence of mutuality.

In the following cases, courts in the United States upheld the validity of asymmetrical clauses: In *Nghiem v. NEC Electronics Inc.*, [47] the court held that asymmetrical arbitration clauses are not unfair; therefore, they are binding on the parties. Similarly, in *Moskalenko v. Carnival plc.*, [48] the court held that there was no reason why justice should require a perfectly equal remedy and upheld the validity of the asymmetrical arbitration clause. In *M.A. Mortenson Company v. Saunders Concrete Company Inc.*, [43] the court rejected the argument of unconscionability and upheld the validity of the asymmetrical arbitration agreement.

Australia

In *PMT Partners Pty Ltd. v. Australian National Parks & Wildlife Service* [10], the High Court of Australia upheld the validity of the asymmetrical arbitral clause.

Ukraine

Ukrainian courts held that the dispute settlement clause offered a choice between litigation and arbitration or between two or more jurisdictions held as valid [9].

Asymmetric Clauses in Europe

Article 25 of the Brussels Regulation (recast) allows parties to a dispute settlement agreement to choose which court they wish for any proceedings between them. There is no mention of the validity of the asymmetric clause in the Brussels Regulations. The asymmetric clause favoring non-European Courts does not fall under Article 25 of the New Brussels Regulations.

The European Council Regulation No 44/2001 (Brussels Regulations) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (which is known as “Brussels Regulation”) clearly recognizes the admissibility of asymmetric clauses in courts (Article 23.1).

In *Societa Italiana Lastre SpA (SIL) v. Agora Ltd. Liability Company* [49], the Court of Justice of the European Union (CJEU) upheld the legality of the asymmetrical jurisdiction clause under Article 25 of the Brussels Regulations (recast).

Italy

In *Sportal Italia v. Microsoft Corporation* [50], the Milan Court of Appeal ruled that asymmetrical arbitration clauses were valid under Article 1331 of the Italian Civil Code 1942. In *Grinka in liquidazione v. Intesa San Paolo, Simest HSBC* [51], one party was under an obligation to refer the dispute to the jurisdiction of the English Courts, while the other party had the option to choose between Italian courts or any other appropriate jurisdiction. By applying Article 23 of the Brussels Regulations, the Supreme Court of Italy upheld the validity of the asymmetrical dispute settlement clause. In both cases, *Simest HSBC* [51] and *Sport Italia* [50], the Italian court held that the asymmetrical clause was valid according to Brussels Regulation 44 of 2001.

France

In the *Madame X. c. société Dubus* case [52], the French Supreme Court rejected the enforcement of an asymmetric clause that allowed one party to choose jurisdiction over the other. In *SCI ICH v. Crédit Suisse* [53], the moneylender had the option to choose an appropriate jurisdiction, whereas the debtor was limited to a single jurisdiction (Zurich, Switzerland). The French Supreme Court held that the asymmetrical arbitration clause was invalid because it contained a potestative condition. Similarly, in the case of *X v. Banque Privée Edmond de Rothschild* [54], the dispute settlement clause contained no option for the non-choosing party to determine the court in which it could be sued; because of the arbitrary character of the clause, the Supreme Court of France held that the asymmetric clause was invalid.

To justify asymmetric clauses, the parties must have equal bargaining power (Luxembourg Tribunal Case No. 153 636, 2014) [55]. In the *Danne* case [56], the French Court of Cassation held that the right to bring proceedings before “any other competent tribunal” was not enforceable. When both parties to the asymmetrical arbitration clause are on equal footing with equal bargaining power, this may be considered just and reasonable. However, when one party is strong and the other is weak, for example, employer and employee or seller and consumer, the asymmetrical clauses lead to unequal treatment between the parties.

In the following cases, French courts approved the validity of asymmetric arbitration clauses:

In *Sicaly v. Grasso Stacon NV. and Grasso Stacon Koninklijke Machine Fabrieken NV* [57], the French Supreme Court upheld the validity of asymmetrical arbitration clauses according to Article 14 of the French Civil Code. In *Apple Sales International v. eBizcuss* [58], the French Supreme Court upheld the validity of the asymmetric clause because it clearly identified the courts in which the non-choosing party could initiate legal proceedings. In another case, the dispute settlement clause offered each party two options: arbitration or judicial proceedings before the competent court at the location where the

buyer is residing; therefore, the court held that the asymmetrical arbitration clause provided equal opportunity to both parties; hence, it was valid [59].

The decisions from France suggest that asymmetrical clauses are not invalid unless they provide unlimited options to the party benefitting from them, in other words, when they are arbitrary in nature and not enforceable [1]. Accordingly, the French Cassation Court accepted the legality of this hybrid clause [60].

Bulgaria

The Supreme Court of Bulgaria refused to enforce asymmetric jurisdiction clauses [1], because they are invalid under Bulgarian law as they are potestative in nature [9].

Spain

There are contradictory decisions regarding the validity of asymmetrical clauses in Spain. In *Case No. 147 (2007)* [61], the dispute resolution clause provided the parties with a choice between courts of Holland jurisdiction or arbitration under the Netherlands' Institutional Arbitration; however, a party ignoring the clause filed a claim before the Court of Madrid. The Commercial Court of Madrid dismissed the claim, stating that Spanish courts lacked jurisdiction based on the agreement between the parties. On appeal, the Appeals Court of Madrid, Spain, upheld the validity of the asymmetrical clause under Spanish law [1].

Germany

In Germany, asymmetrical arbitration clauses are *per se* not invalid unless they violate German public policy [9]. In one case, the German Supreme Court held that an asymmetric clause that provided only the option of choosing between arbitration and jurisdiction was abusive in nature [62]. Similarly, in another case, the court ruled that an asymmetrical arbitration clause was unfair as it imposed an unnecessary burden on the non-beneficiary party of the asymmetrical clause [63]. In a subsequent decision, the court held that asymmetrical clauses were valid if the predisposing party exhibited a justified interest in the choice between arbitration and the courts, and the exercise of such rights was clearly regulated [64].

The reference made to judicial decisions from different jurisdictions suggests that early national court decisions demonstrated that asymmetric arbitration clauses were invalid unless both parties were entitled to the mutual right to submit disputes to arbitration. However, recent decisions have rejected the claim of the mutual consent argument and upheld the validity of asymmetrical arbitration agreements based on their substantive validity of the agreement [7]. In *Sablosky v. Edward S. Gordon Company* [65], the US Court rejected the doctrine of mutuality and upheld it as valid, considering these agreements to be similar to any other contract.

The national courts of Australia, Hong Kong, the United Kingdom, and France have upheld the substantive validity of asymmetrical arbitration clauses, provided that the asymmetric clauses are not ambiguous. While drafting an asymmetrical clause, the party drafting must properly organize the choice of court and clearly identify the jurisdiction of specific courts, instead of unlimited judicial access.

When agreeing on a dispute resolution clause, the parties must consider the enforcement of the award or judgment. If it is a judgment of the court, it may not be enforceable in another country unless there is an existing treaty between the states. By contrast, an arbitral award is enforceable under 172 jurisdictions under the New York Convention (1958) [66]. In commercial and financing disputes, the arbitration mechanism is a preferable option over adjudication in courts, but on many occasions, the suitability of one mechanism or another cannot be decided until the time at which the dispute arises [1].

Conclusion

Asymmetrical arbitration clauses give one party the option to choose between litigation in court and arbitration, while the other party is restricted to any one forum, either litigation or arbitration. When one party is provided with some kind of concession, in lieu of that, the party receiving the concession is bound to concede the benefit of two options (arbitration or litigation) in favor of the counterparty. Recent case law suggests that, despite conflicting opinions, courts favor the enforcement of asymmetrical or hybrid clauses in certain types of contracts. Asymmetrical clauses may carry the risk of invalidating the entire dispute resolution clause if the court declares the hybrid clause unenforceable. Asymmetrical arbitration clauses create tension between parties; therefore, asymmetrical dispute resolution clauses should be avoided unless absolutely necessary. Parties to the asymmetrical arbitration clause for the

enforcement of an arbitral award may prefer a jurisdiction under which the asymmetrical clauses are validly enforceable.

Author Contribution

Mohammed Zaheeruddin is the sole author has contributed all parts of the paper.

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The author reports there are no competing interests to declare.

Conflict of Interest

The author declares there was no conflict of interest.

Ethical Approval

Ethical approval was not required as the study did not involve human participation.

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- [66] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2, accessed on 3rd September 2025.