**NEAR EAST UNIVERSITY**

**INSTITUTE OF GRADUATE STUDIES**

**DEPARTMENT OF INTERNATIONAL LAW**

# Assessing the acceptance of asymmetrical arbitration clauses in international commercial law.

**LL.M THESIS**

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**Nicosia,**

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## Approval

We certify that we have read the thesis submitted by **ABDULRAHMAN MOHAMMED OTHMAN** titled **Assessing the acceptance of asymmetrical arbitration clauses in international commercial** law and that in our combined opinion it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Laws in International Law.

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## Declaration

I hereby declare that all information, documents, analysis and results in this thesis have been collected and presented according to the academic rules and ethical guidelines of Institute of Graduate Studies, Near East University. I also declare that as required by these rules and conduct, I have fully cited and referenced information and data that are not original to this study.

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ABDULRAHMAN MOHAMMED OTHMAN

**Abstract**

**Assessing the acceptance of asymmetrical arbitration clauses in international commercial law.**

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**LL.M, Department of International Law**

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This study seeks to examine the general acceptance of asymmetrical arbitration clauses in different jurisdictions and to see if different states take a consistent practice towards the validity and enforcement of such agreements. The study sought to establish that these agreements have been accepted by a majority of states and therefore gained legal validity under international commercial law. The study provides information on the jurisdictions that accept such clauses and those that do not hereby show if there is a divide between countries in relation to such clauses and the type of divide. Additionally, the study will show that there are certain countries that are on the fence in relation to such clauses and the indicators available that those countries are likely to accept such agreements. Furthermore, this study will provide information useful to legal practitioners when advising their clients on the legal validity of such clauses in which jurisdictions those clauses could be accepted. The study findings that the majority of jurisdictions across the world have accepted asymmetrical arbitration clauses and might recognize and enforce arbitral awards made pursuant to asymmetrical arbitration clauses. Additionally, this thesis finds that there are a handful of countries that are still on the fence, where it is uncertain if asymmetrical arbitration clauses will be upheld and if arbitral awards made pursuant to asymmetrical arbitration will be recognized and enforced.

***Key words*:** arbitration, agreements, asymmetrical, unilateral, clauses.

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## Introduction

Over the years there has been a growing confusion on the legal validity of asymmetrical arbitration clauses in arbitration agreements also known as unilateral option arbitration clauses in different jurisdictions. Asymmetrical arbitration clauses are clauses under arbitration agreements that allow only one party to choose the method of resolving the dispute between the parties. It also allows only one party to bring an action in any jurisdiction while restricting the other party to only one jurisdiction. These agreements are treated differently in different jurisdictions such as Russia and the United Kingdom where these countries take different approaches and this has given rise to the question of their validity. This conundrum has motivated me to conduct this study and seek to examine if there has been a general acceptance of these types of agreement clauses in international commercial law.

It is imperative to first understand the notion of arbitration and international commercial law legal system first before moving to the clauses contained in the agreements such as asymmetrical arbitration clauses. Arbitration can be defined as an alternative way of resolving disputes outside the traditional legal system. A way in which the parties to the dispute decide how the dispute will be settled and who will settle that dispute. There is a view that the roots of arbitration can be traced to the Christian Bible and authors such as Frank Emerson have posited that King Solomon was an arbitrator and back this up by how he settled a dispute between two women who were both claiming the ownership of infant child.[1]

However, modern-day commercial arbitration can be traced to 1786-1790 when an arbitration tribunal was set up by the New York Chamber of Commerce to address disputes by American seamen over wages. Arbitration became more pronounced in 1795 when the United States and Great Britain sought to address their differences through the Jay Treaty which established trade relations between the two countries. Almost a century later, arbitration was back in the fold with the United States using it to address the Alabama claims of 1872 which were damages that were sought by the United States from Great Britain over the damage caused to American ships by Great Britain during the American Civil War.

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[1] Frank Emerson, 'History of Arbitration Practice and Law' (1970) 1 (155-164) Cleveland State Law Review https://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss1/19 accessed 27 December 2021

Twenty-three years later, in 1895 Great Britain and the United States also resolved their disputes once again over the territory of Venezuela through the use of arbitration. The ability to avert war through the use of arbitration and address differences by great powers cemented the belief and use of arbitration within the international community and this led to the creation of the Permanent Court of Arbitration in 1899 in The Netherlands. Contrary to the name the institution is not a permanent court but actually provides assistance to parties that would want to arbitrate by providing a venue and suggesting arbitrators for the parties to choose from among other things.

After the setting up of the Permanent Court of Arbitration, there was an emergence of international arbitration treaties such as the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards also known as the New York Convention which sought to universalize the enforcement of arbitral awards. It obligates state parties to recognize and enforce judgements and awards given by Arbitration Tribunals. The international prominence of arbitration eventually saw the creation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration in 1985 which was later revised in 2006. UNCITRAL Model Law was created to modernize the international legal framework for international trade among states. It provides a guideline of laws that states can adopt in relation to arbitration as was done by Australia when they incorporated the guideline in their Arbitration Act of 1974.

In addition to this, there was also the introduction of UNCITRAL Arbitral Rules in the same year which provides a set of rules for *ad hoc* arbitration. In 1996 the International Centre for Settlement of Investment Disputes (ICSID) was set up through the Washington Convention of 1996. The ICSID deals with government investment disputes, however, under Article 55 ICSID Convention provides for sovereign immunity in the execution of an arbitral award.

On a local level, there has been the formation of different international arbitration institutions with their own rules, such as the London Court of International Arbitration (LCIA) established in 1892 which is one of the oldest international arbitration institutions. There is also the International Court of Arbitration of the International Chamber of Commerce (ICC) established in 1923. In addition to this, there is the Hong Kong International Arbitration Centre (HKIAC) established in 1985 and finally, the Singapore International Arbitration Centre (SIAC)

established in 1991. All these arbitration institutions come with their own arbitration rules which are oftentimes universally accepted, which parties to a dispute can choose to apply depending on which ones they find favourable.

The history of arbitration in common law can be dated much earlier than this. In the case of *Kill v. Hollister 1746,*[2] the English courts posited that arbitration could not replace actual courts and many academics have argued of the hostility of the courts towards arbitration during this period which later resulted in the passing of the Common Law Procedure Act 1854 which harmonized relations between the courts and arbitration, through the act, the courts recognized the appointment of arbitrators and also set out the procedure that the arbitrators could use in asking questions to the court. Furthermore, the courts still had the power to stay arbitration proceedings if a party brought a complaint to the court even if he/she had agreed to be bound by arbitration. It is also during this period that commercial arbitration flourished as merchants retained the provision to settle their disputes between themselves, after this, there was a series of Arbitration Acts that were passed until the Arbitration Act of 1979.

In the US, after the Treaty of Jay, arbitration gained prominence, yet the challenge that ensured is the enforcement of the arbitral awards which led to the passing if the Federal Arbitration Act of 1925 with the New York State leading at the enforcement of arbitration judgements and therefore the coming of the New York Convention Recognition and Enforcement of Foreign Arbitral Awards.

With this brief history of arbitration, it is necessary to move to the contents of arbitration agreements in particular asymmetrical arbitration clauses. It is not exactly clear when asymmetrical arbitration clauses started to be used in international arbitration however the earliest available case of the usage of asymmetrical arbitration clauses is the 1966 case of *Baron vs. Sunderland Corp*[3] where the English courts upheld that an agreement that can confer only one party the right to refer a case to arbitration.

As stated above, asymmetrical arbitration clauses give one party more power over the other in deciding how the dispute will be handled or which forum will handle the dispute. However,

[2] Killer v Hollister [1746]

[3] Baron vs. Sunderland Corp [1966]

where a stronger party has more bargaining power they may also end up drafting this clause in their favour. Oftentimes parties with more bargaining power or leverage have drafted such clauses in their favour subsequently showing that asymmetrical arbitration clauses can be used as both a shield and a sword.

There has been an increase in trade and in turn commercial agreements, the proliferation of these agreements have also seen a rise in the need for arbitration as a form of dispute resolution whenever they arise. In equal measure, parties to these agreements have sought to put themselves in a stronger position, even before the dispute has arisen and with this saw the use of asymmetrical arbitration clauses. However, courts across the globe have taken different approaches to the clauses that give only one party the power to dictate how the dispute will be addressed with some accepting such clauses under the principle of freedom of contract which argues that parties to contract should be allowed to draft terms which they seek to be bound by without interference from the courts. While on the other hand, other courts have held asymmetrical arbitration clauses as null and void as they are unfair.

The focus of this study is to try and unpack the general acceptance of asymmetrical arbitration clauses in arbitration agreements in different jurisdictions and to see if different states take a consistent practice towards the validity of such agreements. The general purpose of this study is to try and establish if these agreements have been accepted by a majority of states and therefore gained legal validity or whether the jury is still out. Another argument that is compelling enough to consider the universal acceptance of asymmetrical arbitration clauses is the validity principle, which is the principle that states that an arbitration agreement should be held valid and enforceable if it is valid and enforceable at least one national law.[4] It is such arguments that have made it imperative to elucidate with empirical evidence whether the international commercial law has accepted asymmetrical arbitration clauses.

[4] Gary Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 (814-848) http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2020/05/validation-principle-1.pdf accessed 22 December 2021

# Chapter I

## 1.1. Legal regimes of international commercial law

In order to appreciate the legal regimes of international commercial law it is imperative to look at the origins of such a regime and the impact that arbitration has on it. International commercial law is concerned with the exchange of capital, goods, and services across international borders or territories. This dates back to the 16th century and Carr and Stone state that "The existence of trade routes such as the Silk Route and the Amber Route crossing boundaries and continents, is an ample evidence that international trade is not a recent phenomenon. The link between economic growth and trade was widely realised and exploited between the fifteenth and eighteenth centuries", but for the sake of this thesis, the history of international commercial law will be start from the General Agreement on Tariffs and Trade (GATT) signed in 1947 by 23 countries.

The aim of GATT was to come up with rules and regulations which sought to eliminate or mitigate the expensive and often times cumbersome features of the protectionist period prior to World War II; thus, essentially, it is a legal agreement for lowering barriers to trade by eliminating or reducing quotas, tariffs and subsidies. Eventually, there was the 1995 Marrakesh Agreement, which annexed GATT of 1947 and included other sectors not touched by the GATT, such as agriculture, human health, which included sanitary and phytosanitary measures, and packing of goods which removed technical barriers. Also, the agreement included trade-related investment measures such as anti-dumping safeguards, subsidies, customs valuation. The Marrakesh Agreement of 1995 is also related to the trade of aspects of intellectual property rights (TRIPS), dispute settlement, and trade policy review mechanism.

The Marrakesh Agreement formed the World Trade Organization (WTO) whose basic principles are for freer trade by lowering custom duties or no import bans and quotas. Moreover, one of the trade principles of the WTO was to trade without discrimination with the most-favored-nation principle, which stipulated that countries when trading should treat other countries equally. There is also the national treatment principle, which states that when trading, it is necessary for countries to treat citizens and foreigners equally, but this only applies once a product, service, or item of intellectual property has entered the market. Another principle of the WTO is

predictability through binding agreement and transparency by creating a rules-based system. It should be noted that the case for free trade and the WTO-Liberal trade policies promote economic growth, reduce poverty and help to raise living standards, and increase dialogue and cooperation among countries and foster world peace.

Carr and Stone note that international trade couldn't flourish without a rules-based system as stated above because there was a need for a "legal framework, which affects the rights and obligations of the parties entering into business transactions at the international level which needed to be clear and certain"[5] thus this saw the formation of international trade law. Another challenge which came with this was the lack of harmonisation of the rules therefore in a bid to harmonize the rules the idea of establishing a new Commission for the harmonization of international trade law was launched by the United Nations General Assembly in furtherance of its Resolution 2205(XXI) in 1966. After this resolution, there was a report by the United Nations Secretary- General on 'Progressive Development of the Law of International Trade,' which was submitted to the General Assembly.

The report called for the formation of an agency to overcome the shortcomings of work in the harmonization and unification of international trade law; hence, the United Nations General Assembly created the United Nations Commission on International Trade Law (UNCITRAL). Patnaik and Lala assert that the United Nations Commission on International Trade Law is "the core body of the United Nations working in the field of International Trade Law for regulating activities of private corporations while conducting their businesses across States. The purpose is to reduce the obstacles to the exchange of goods, capital, and services in order to favor international investment amongst the major part of the modern international community."[6]

Carr and Stone assert that "International organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Conference on Trade and Development (UNCTAD), took on the task of addressing various legal aspects affecting an international commercial contract, such as carriage of goods, sales of goods, agency, factoring and standby letters of credit using international conventions as the preferred method for

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[5] I Carr and P Stone, *International Trade Law* (Routledge, 2018).

[6] D Patnaik and F Lala, 'Issues of harmonization of laws on international trade from the perspective of UNCITRAL: the past and the current work.' (University Institute of European Studies and ITC ILO, 2006) http://works.bepress.com/sridhar/10/ acessed 23 December 2021

achieving the desired harmonization". However, it is imperative to point out that UNICTRAL is not a platform designed for the drafting and enacting trade rules between Member States, or does the body have the powers adjudicate legal disputes relating to cases of private international law between Member States. Also, other organizations including the International Institute for the Unification of Private Law (UNIDROIT) have also made efforts to realize the harmonization of international commercial law.

With the above assertions, it can be seen that international trade since the 16th century and after the formation of the GATT and subsequently the Marrakesh agreement there was a sentiment that there was a need for the formation of international trade law, it is the Marrakesh agreement of 1995 which coined the idea that for international trade to flourish, there was the need for some rules hence the creation of international trade law. Since that time, the international community has made efforts to make uniform international trade rules, in short, to harmonize international trade law. The international community has also made platforms to settle trade disputes through the dispute resolution mechanisms set up within the World Trade Organization and other dispute resolution mechanisms such as the International Center for the Settlement of Investment Disputes (ICSID), which shall be discussed in further detail below.

The legal framework of international commercial law looks at international regulation on the sale of goods and the application of the United Nations Convention on Contracts for the International Sale of Goods also known as the Vienna Convention on the International Sale of Goods 1980 (CISG). In addition to this, the legal framework of international commercial law looks at the obligations that a buyer and seller have in an International Sale of Goods Contract as well as the current Incoterms and their development and legal nature.

Contracts of Sale in international trade are governed by national law, the law of the domicile of the seller or buyer, or by an international treaty such as the United Nations Convention on Contracts for the International Sale of Goods. The regulation of the international sale of goods is primarily dealt with by the CISG, which can be traced back to its drafting stage in 1930 and finally come to be in The Hague in 1964. With this convention, parties to it agreed to exclude the consumer contract from the convention, and these were defined as goods that were bought for personal, family, or household use.

The United Nations Convention on Contracts for the International Sale of Goods as a legal regime of international commercial law gave parties to the contract the autonomy to vary the terms of the convention or even negotiate different terms under their contract. The CISG also contributed to the unification of the terms in trade, such as giving a universal definition of an offer and acceptance, and most importantly, the obligations and the remedies of the seller and buyer. For the sake of this thesis, these shall not be touched in detail, however, they are still worth to be mentioned. It should be noted that under the CISG the duties of the party selling the goods or services includes delivering the goods or services, handing over any legal paperwork concerning the goods or services and transferring the goods or services as the obligation arises under either the contract or convention.

Also, the obligations of the buyer include the obligation to pay and take delivery, just to name a few. Equally, the CISG also provides for the remedies to both the seller and the buyer, and the remedies to the seller being to request for specific performance and avoidance of the contract, among other things. Also, for the buyer, the remedies include time extension and right to cure as well as requesting specific performance.

As alluded to above, for trade to flourish, it was essential to have a rules-based system, and this concluded the harmonization or standardization of contract provisions of international trade. The provisions included things like "who will arrange and pay for the carriage of goods from one point to another, who will bear the risk if these operations cannot be carried out, and also who will bear the risk of loss or damage to the goods in transit."[7] So in a bid to harmonize these provisions, the International Chamber of Commerce (ICC) came up with International Commercial Terms widely knowns as the Incoterms, which are periodically updated by the ICC and the latest being the Incoterms 2020.

Carr and Stone state that "The purpose of Incoterms is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade."[8] These terms do not cover all the disputes that might arise in an international sale contract. However, it gives a guideline to the parties to the contract as to the transport cost, which the seller will cover, the point at which the risk of loss will be transferred from the seller to the buyer.

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[7] Incoterms, 2020.

[8] *Supra* note 5

As it has been seen above there has been a bid to harmonize the rules of international commercial law so that there could be one set of rules applicable to the international sale of goods in different countries. In the UK, the completion of international trade contracts is also governed by the Sale of Goods Act 1979 and there is also recognition of the incoterms released by the ICC such as Free on Board (FOB) contract and Cost, Insurance and Freight (CIF) contracts which have been assimilated into English law. It is worth noting as well that some domestic legal systems in Asia do not accept these types of contacts such as India and Pakistan. Also when interpreting some aspects of an international contract such as choice of law, the English legal system and other domestic legal systems in Europe are assisted by the Rome Regulation I which was introduced by the EU in 2002 and replaced the Rome Convention which was there previously.

It is imperative to note that domestic legal systems in Europe when interpreting international contracts of Sale under international trade law through the Rome Regulation I, could be assisted by "the Giuliano-Largade Report, whose use is permitted under by s. 3(3)(a) of the Contract Act in the interpretation of the Convention".[9] Moving on, the relationship between international trade law and domestic legal systems allows that contract completed under international commercial law such as international contracts of law to be governed by different domestic legal systems, the principle of party autonomy as alluded in *Pittalis v. Sherefettin (1986)*[10] showed that the parties to the contract can choose the law that governs their contract and in some instance, parties could have a split choice where certain clause is governed by different legal systems.

The principles of party autonomy and freedom of contract state that the parties to the contract have the freedom to decide which law will govern the contract including how future disputes are to be settled, as was established in Article 1.1(1) of the UNIDROIT Principle which says parties to a contract are entitled to set the terms which bind them. Additionally, this principle is also recognized throughout the CISG, as Article 11 states that "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form".[11] Article 6 of the CISG affords parties the opportunity to choose terms and contents of a contract,

[9] Rome Regulation I
[10] Pittalis v. Sherefettin [1986]
[11] CISG, Article 11.

also, Article 14 of the CISG among other articles also affords parties the chance to determine a counterparty and whether or not to sign a contract.

In this same vein, parties are allowed to conclude contracts without attaching a certain specific domestic law to govern the contract, parties could agree to appoint a governing law at a later suggest and this is known as the floating law. The Rome convention places a mandatory law on EU member States. In English law, there is an obligation that the law that has been chosen by the parties is bona fide and legal. Article 3(3) of the Convention states that parties should not conclude contracts where the choice of law is an evasion from the mandatory rules to which the contract is connected.

Furthermore, it must be noted that under domestic legal systems an international trade contract can be struck down for illegality of the law chosen by the parties to the contract, also known as applicable law. In essence, it should be noted that under domestic legal systems the applicable law to international trade law contracts or international contracts of sale usually governs the "interpretation of the terms of the contract, damages and the consequences of the breach, extinction of obligations and limitations as well as the consequence of nullity."[12]

In a nutshell, the relationship between international trade law and domestic legal systems largely depends on the domestic law that has been chosen by the parties to the contract as the applicable law, nevertheless, it should be noted that there are some international conventions that prohibit domestic legal systems from treating contracts in a certain way such as the Rome Convention which is now the Rome Regulation I and the New York Convention just to name a few.

### 1.2. Impact of international commercial arbitration.

The impact of international commercial arbitration on international commercial law cannot be underestimated, with some commentators stating that 90 per cent of international commercial contracts are governed by an arbitration clause. The major impact that international commercial arbitration has brought on trade is neutrality and confidence in dispute resolution. The major fear which arose within dispute resolution in international commercial law is that where a claim was

[12] *Supra* note 4

to be brought to the courts of the home country of a party to the dispute, the courts of that country were most likely going to favour the national party of that country thus to some degree the impact on international trade that had been brought by international commercial arbitration is an aspect of neutrality in dispute in resolution.

In addition, another impact that international commercial arbitration has had on trade is that it has enhanced party autonomy in dispute resolution, the fact that parties can be able to pick their own arbitrators and the fact that the arbitrators that will be chosen will have expertise in that area of law to some extent ensures some just decisions. Bringing a case to domestic courts risks the fact that the judges will not have expertise in that particular field and will be decided based on general principles of law wherein in some instances there is a requirement of expertise. Another flexibility is the ability of the parties to choose the rules of arbitration that will apply to the dispute, for instance, LCIA Rules state that where the parties to the dispute would like to nominate arbitrators to a panel of three they must include it in the arbitration agreement.

Moreover, another impact that international commercial arbitration has brought is privacy and confidentiality in dispute resolution. In most high profile cases that go to court, there is unnecessary media attention which might even expose parties involved to their competitors in trade, hence it can be argued that this has brought some protection to parties in dispute resolution. Furthermore, international commercial arbitration has brought swift dispute resolution in international trade, as opposed to going to national courts which are already overwhelmed with cases it could take time for disputes to be resolved.

Kenton and Hirst state that “Some arbitral rules provide the option of an expedited process or set a time limit for the award to be granted. Moreover, it is open to the parties to agree between themselves a timetable which suits their wishes as to speed. Additionally, there is scope for the parties to agree, either at the time of drafting the arbitration clause or subsequently, to limit within reasonable bounds the extent of processes that would otherwise be time-consuming or

expensive, such as the extent of document disclosure and/or the extent to which particular facts must be proved."[13]

In some instances, the use of arbitration can be cheaper as opposed to approaching the courts where parties could spend months and even years in litigation and paying legal fees. Waller J in relation to arbitration said that "... the settlement of actions by means of ADR (i) significantly helps to save litigants the ever-mounting cost of bringing their actions to trial; (ii) saves them the delay of litigation in reaching finality in their disputes; (iii) enables them to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation; (iv) provides them with a wider range of settlement solutions than those offered by litigation; and (v) is likely to make a substantial contribution to the more efficient use of judicial resources..."[14] It should be acknowledged that the cost of arbitration could be quite high especially international arbitration to the point that some scholars have argued that the high cost of arbitration prohibits access to justice.[15]

Also, the fact that parties can be able to enforce the arbitral awards through the New York Convention is also a positive impact that has been brought by international commercial arbitration. In addition to this, the fact that a decision by courts can be appealed and sometimes overturned is another reason why arbitration has brought a positive impact because it brings about the finality of the decision.

However, international commercial arbitration does have its own shortcomings and has not always positively impacted trade. Browne and Catlow state that arbitration is not really binding on parties and some instances in the UK "The court can stay litigation which has been commenced in breach of an agreed method of resolving disputes. This is the case even if that method is not technically an arbitration agreement under the Arbitration Act 1996. Indeed, the courts have increasingly stayed proceedings for ADR to take place, whether or not pursuant to a contractual agreement. For example, in *Cable & Wireless v IBM UK Ltd (2002)*, the parties were

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[13] Maurice Kenton and Peter Hirst, 'Advantages of International Commercial Law' (Mondaq, 18 May, 2020) https://www.mondaq.com/uk/international-tradeinvestment/416416/advantages-of-international-commercial-arbitration accessed 23 December 2020.

[14] K Browne and M Catlow, 'Civil Litigation 2010/11' (Guildford: College of Law Publishing 2010)

[15] David Hacking and Michael Schneider, 'Towards More Cost Effective Arbitration' (Lalive Law, 18 May, 2020) https://www.lalive.law/wp-content/uploads/2017/07/mes_towards_more_cost_effective_arbitration.pdf accessed 24 December 2020

directed to pursue a previously agreed alternative dispute resolution (ADR) method. The court held that there were strong case management grounds for allowing the reference to ADR to proceed"[16]

Moving on, the arbitration awards in some cases are not easily enforceable if the country is not a party to the New York Convention. In the UK, Browne and Catlow posit that "There is no equivalent of s 66 of the Arbitration Act 1996 enabling ADR awards to be enforced as if they were court judgments"[17] In substance, it can be seen that arbitration has brought ease of doing business across national borders through flexible rules of dispute resolution where the parties through the principle of party autonomy and freedom to contract can choose the law to bid the contract as well as the law on how the dispute and who will adjudicate the dispute, unlike the courts where it's not equally voluntary and is rigid and will most likely drag the parties to a long and costly litigation process.

Symmetric arbitration agreements are usually enforceable and there are arbitration agreements that give the power to both parties to a dispute to refer it to arbitration. There are different reasons as to why a dispute might be referred to arbitration, for instance, where there has been a breach of contract. Article 35(1) CISG demands that the buyer receives exactly what he bargained for and the seller must produce the goods in the exact requirements. The default rule stated by Flechtner argues that where there is no agreement on conformity or where the parties have failed to address the issue of conformity in their agreement, it should be implied that Article 35(2) CISG applies.

To this end, it is necessary to draw attention to the *Condensate Crude Oil Mix Case (2002)*[18] where the "buyer alleged non-conformity in oil condensate, known as Rijn Blend, due to a high level of mercury. The buyer, a major player in the oil and gas business, contended that the levels of mercury made Rijn Blend unacceptable for further processing and sales." The tribunal, in that case, examined the application of the standard of reasonable quality test with regards to Article 35(2)(a) and looked at whether "a reasonable buyer would have concluded contracts for Rijn Blend at similar prices if such a buyer had been aware of the mercury concentrations." and it was

[16] *Supra* note 14
[17] Ibid
[18] Condenstate Crude Oil Mix Case, Netherlands Arbitration Institute Case No. 2319 Oct. 15 2002.

found that "other buyers in the market for Rijn Blend were...unwilling to pay the price [sellers] had agreed with [buyer]."[19]

In a similar case between an Italian wine vendor and a German buyer, it was found that the wine delivered by the seller did not conform to the contract as required by the standard set out in Article 35(2)(a) CISG thus the seller was in violation. An Italian wine vendor delivered wine that had been diluted with nine per cent water thus the German buyer (defendant) was not obligated to pay for the wine.

In addition, another reason why a case might be referred to as symmetric arbitration is where the goods are not fit for purpose. Article 35(2)(b) CISG expressly states that goods should be fit for purpose, which the seller has been notified of either expressly or impliedly at the time of the conclusion of the contract. The article 35(2)(b) obligation arises where the particular purposes were revealed to the seller by the time the contract was concluded as was also alluded in the case of *EP S.A.v FP Oy (1998)*.[20] The court passed a judgement in which it found that the intention of the buyer was to obtain goods with certain levels of the vitamin, that "the special purpose ... was known by the [seller] with sufficient clarity," and that "the buyer counted on the seller's expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out."[21]

It should be noted that a particular purpose can overlap with the ordinary purpose of the goods.[22] Drawing attention to Article 35(2)(c) CISG which states that, in order to conform to the contract, goods must "possess the qualities of goods which the seller has held out to the buyer as a sample or model."[23] Thus providing anything which is not held out as the sample is a clear violation of Article 35(2)(c). The aforementioned point was also seen in the *Caterpillar Toys Case*, where it was stated that the "seller provided the buyer with a sample of a toy intended for young children and included a designation indicating it was safe for young children, article 35(2)(c)was violated when delivered goods did not meet safety regulations." The aim of holding out a sample is to

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[19] Ibid

[20] EP S.A.v FP Oy [1998]

[21] Ibid

[22] Joseph Lookofsky, 'Article 25: Avoidance and Fundamental Breach' in J Herbots and R Blanpain (eds) International Encyclopaedia of Laws - Contracts (Kluwer Law International, 2000)

[23] CISG, Article 35.

give a "concrete way for the seller to specify his offer…by holding out the sample the seller is guaranteeing that the goods will have the same qualities as the goods. The only exception is where the seller explicitly states that the goods will not have the same quality as the sample".

Also, the convention states that the seller is only excused from liability if the seller made the buyer aware of the lack of conformity at the conclusion of the contract, or if the buyer could not have been unaware of the lack of conformity at that time. In this case, the burden of proof falls on the seller, which has been described as a burden of proving more than gross negligence as was seen in the *Marble Panel Case*. In addition to this, where a breach of the contract is fundamental the aggrieved party is entitled to a replacement under Article 46(2) CISG. Koskinen submits that "When applying Article 46(2), as regards conformity of goods, it is important to separate generic and specific goods. If the contract made between the parties consists of generic goods, it follows directly from Article 46(1) that the buyer is entitled to require the seller to perform as agreed in case of non-conformity, and accordingly require re-delivery of substitute goods under Article 46(2)..."[24]

Article 46(2) states that where the non-conformity of goods constitutes a breach of contract that is fundamental, the buyer may require delivery of substitute goods. Enderlein and Maskow confirm that "Under the CISG, substitute goods can be requested by the buyer only when the non-conformity of the goods constitutes a fundamental breach of contract..."[25] Schlechtriem states that "The difference between a fundamental and a non-fundamental breach in connection with the delivery of non-conforming goods will thus be the decisive factor in the remedies available to the buyer." In order for us to see if the breach was fundamental, Schlechtriem alludes that "The decisive factor is not only the objective damages which the buyer suffers or could suffer as a result of the non-conformity, but, above all, whether the risk of this particular

[24] Michael Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law' (2002) 36 RJT https://ssl.editionsthemis.com/uploaded/revue/article/rjtvol36num2/bonell.pdf accessed 19 December 2021

[25] F Enderlein and D Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods : Convention on the Limitation Period in the International Sale of Goods : Commentary* (Oceana 1992)

non-conformity was considered so serious by the parties that its existence would eliminate the buyer's interest in the performance of the contract concerning these goods."[26]

Article 25 CISG states that "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract..."[27] Jafarzadeh interprets the term "detriment" within the context of the Convention's *travaux préparatoires* as well as its *intentum*. Jafarzadeh refers to the comments by the Working Group report alluding to that the term detriment which "had to be interpreted in a broader sense and set against the objective test of the contents of the contract itself…" and "infers from the Secretariat Commentary that it is possible to conclude that the drafters intended the word detriment to be synonymous with injury and harm, and it can also be exemplified by monetary harm."

In addition to the above, it is also imperative to look at the impact of asymmetrical arbitration clauses on international commercial law. As seen shall be seen in this thesis, such agreements have caused confusion and have come to be controversial in their very nature. However, there have also brought key principles such as equality of treatment, mutuality and conscionability to the fore of international commercial law. Parties drafting arbitration agreements now have to look at these principles, failure of which they run a serious risk of having their arbitration agreement invalidated. In addition to this, it can be argued that asymmetrical arbitration clauses have also brought the question to the extent to which fundamental principles of commercial law such as party autonomy, freedom of contract and sanctity of contract can go.

The limitations placed on these principles as a result of arbitration will be discussed in greater detail later in the thesis. Another impact of asymmetrical arbitration clauses on international commercial law includes the divide that has been drawn between regions, for it seems evident that common law countries such as the United Kingdom, the United States, Canada, Australia and common law countries in sub-Saharan Africa are more supportive of such agreements as opposed to civil law countries such as France, Luxembourg, Russian and civil law countries in

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[26] Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz, Vienna 1998)
[27] CISG, Article 25.

sub-Saharan Africa. It is therefore evident that where parties from such countries are drawing up international commercial agreements, such tension might arise.

In addition this, it can be argued that another impact that asymmetrical arbitration agreements have had on international commercial law is to give room for countries to invalidate agreements which they are not happy with, for instance, this study shall later show that courts in South Korea uphold asymmetrical arbitration on a normal day, however, where such agreements are concerning the government of South Korea they tend to be thrown out and held as invalid, this therefore, shows that countries will use this controversy around such clauses to invalidate agreements in which they are at a disadvantage.

## Chapter II

### 2.1. Non-contentious jurisdictions

### United Kingdom

As alluded to in the introduction of this Thesis there is a fog around the general acceptance of asymmetrical arbitration clauses, this background section seeks to give context to that fog and illuminate the nuances around the acceptance of such clauses. Also, as stated before, the initial case that introduced asymmetrical arbitration clauses is the case of *Baron vs. Sunderland Corp [1966]*[28] where the English courts upheld the mutuality principle arguing that it is an essential ingredient for an arbitration agreement. The court held that "it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration."[29] This position in English law was later changed by the case of *Pittalis vs. Sherefettin (1986)*[30] in which the court upheld asymmetrical arbitration clauses and did away with the mutuality principle in arbitration arguing that it was immaterial if an arbitration agreement conferred the right to only one person the right to arbitrate, it remained a valid agreement under English law.

In addition to this, the court held that invalidating an arbitration agreement on this basis was violating the principle of party autonomy (a principle which states that parties to a contract should be allowed to decide the terms to which they are bound). This view was further cemented by the case of *Mauritius Commercial Bank Ltd vs. Hestia Holdings Ltd and another (2013)*[31] which upheld asymmetrical arbitration clauses as valid. With these cases, it has become settled that asymmetrical arbitration clauses are valid under English law provided that there is no lack of certainty in the clauses, for instance, in the case of *NB Three Shipping Ltd v. Harebell Shipping Ltd*[32] the English held that unilateral option clauses were not open-ended at that the beneficiary of such clauses should elect a particular dispute resolution mechanism at an early stage. Another condition for the operation of unilateral option clauses under English law is that the beneficiary

[28] *Supra* note 3
[29] Ibid
[30] *Supra* note 10
[31] Mauritius Commercial Bank Ltd vs. Hestia Holdings Ltd and another [2013]
[32] NB Three Shipping v Harebell Shipping [2004] EWHC 2001

of the unilateral clause needs to exercise the option provided in the clause before taking substantial steps either towards arbitration or litigation and failure to do so, they could be wavering the right provided by asymmetrical arbitration clause.[33]

**Australia, Singapore & Hong Kong**

In Australia, courts upheld an asymmetrical option clause in the case of *PMT Partners Pty. Ltd. vs. Australian National Parks & Wildlife Service (1995)*[34] arguing that there was nothing within Australian legislation that restricted the application of agreements where only one individual could choose to either litigate or arbitrate. Also in Singapore, in the case of *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd (2017)*[35], Justice Coomaraswamy stated that "…a dispute resolution which confers on only one party a right to elect to arbitrate is nevertheless an arbitration agreement." Justice Coomaraswamy also added that "…a validly constructed arbitration agreement requires: (1) the consent of both parties to be bound to arbitrate and (2) a conditional or unconditional contractual agreement…"[36] In Hong Kong, in the case of *Suen Kawi Kam v China Dragon Select Growth Fund (2020)*[37], where a jurisdiction clause provided only one party with the ability to litigate in any court and the Hong Kong High Court affirmed that unilateral clauses were valid and enforceable.

**EU countries**

There seems to be a group of EU countries that have taken a similar approach in upholding asymmetrical arbitration clauses, firstly there is Italy which seems to have long-standing support for unilateral arbitration dating back to the 1970s with the Corte di Cassazione judgement. In 2011, the Italian courts also upheld an asymmetrical arbitration agreement in that case of *Sportal Italia vs. Microsoft Corp. (2011)*[38], where only one party to the agreement had the right to refer a dispute to the courts both in Italy and the United States, Washington and the other party was

[33] Philiph Clifford and Oliver Browne, Avoiding Pitfalls in Drafting and Using Unilateral Option Clauses (Latham and Watkins, July 2013) https://www.lw.com/thoughtLeadership/IA-News-in-Brief-Unilateral-Option-Clauses accessed 20 December 2021

[34] PMT Partners Pty. Ltd. vs. Australian National Parks & Wildlife Service [1995]

[35] Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd [2017]

[36] Ibid

[37] Suen Kawi Kam v China Dragon Select Growth Fund [2020]

[38] Sportal Italia vs. Microsoft Corp. [2011]

restricted to Italian courts. This decision was also supported by the case of *Grinka in liquidazione vs. Intesa SannPaolo (2012)*[39] in which the courts held that a unilateral arbitration clause was valid despite one party being restricted to bring a despite to English courts while the other party could bring a case to any court which had jurisdiction.

Secondly, there is Portugal, in the case of *Xilam Animation vs. Lnk Videos (2012)*[40] which involved a license agreement between French and Portuguese companies which contained a unilateral arbitration agreement. The Portuguese courts held that unilateral arbitration clauses were valid and would only be invalidated if they would be grossly unfair to one party. Thirdly, in Spain, in the case of *Camimalaga S.A.U. v. DAF Vehiculos Industriales, S.A.*[41] a dispute between Spanish and Dutch companies, the court held that asymmetrical arbitrational clauses were valid and enforceable in Spain. Similarly, in Germany, the German Federal Court of Justice decision of 1991 held that unilateral clauses were valid and enforceable provided that they were entered into freely.[42] However, in the *Jena* and *Wooden Post* cases the "German Federal Court held an asymmetrical arbitration agreement invalid. The court held that such asymmetrical clauses impose an unreasonable risk on the other party since all efforts and expenses made with regard to litigation will be frustrated"[43]

### 2.2. Contentious jurisdictions

**France & Bulgaria**

In France, the case of *Société Sicaly v. Société Grasso Stacon NV [1974]*[44] provided a reason for one to believe that asymmetrical arbitration agreements were valid under French law. The French courts "held that where it was the common intention of the parties to provide only one of them with the right to choose whether to litigate or go to arbitration such a clause was valid." The case

[39] Grinka in liquidazione vs. Intesa SannPaolo [2012]
[40] Xilam Animation vs. Lnk Videos [2012]
[41] Camimalaga S.A.U. v. DAF Vehiculos Industriales, S.A. [2013]
[42] Clifford Chance: Unilateral Option Clauses Survey 2021
[43] Ibid.

[44] Société Sicaly v. Société Grasso Stacon NV [1974]

was between a French and a Dutch company and the latter has the right to choose between arbitration or litigation in the Netherlands, and the court refused to invalidate the arbitration agreement.

However, in the case of *Mme 'X' vs. Banque Privee Edmond de Rothschild (2012)*[45] commonly referred to as the *Rothschild* case*,* the French courts moved away from this position invalidating asymmetrical arbitration clauses where there was a dispute between Mrs X who was a Spanish citizen and a French bank. The clause only gave the bank the right to refer any dispute between the two parties to the forum of its choice. However, the court argued that the clause was because it violated Brussels I Regulation by providing a potestative condition (a condition which can only be fulfilled by an obligated party if they choose to do so) and that the objective of Article 23 of Brussels I Regulation was not to give only one party the right when it comes to the choice of jurisdiction. The *Rothschild* judgement received a lot of criticism, arguing that the case of *Société Sicaly v. Société Grasso Stacon* had created an impression that there was no prohibition of such clauses under French law.

There is also a view that the arguments presented in the *Rothschild* case were pertaining to the jurisdictional clause that afforded a single party the choice to choose a particular jurisdiction, unlike other disputes pertaining to asymmetrical arbitration clauses where the bone of contention is the actual validity of the arbitration clause on whether the case is to be litigated or taken to arbitration. Even though principles that are raised in the *Rothschild* case seem similar to dispute on the method of dispute resolution, the difference is that, when it comes to the jurisdictional clauses the French courts were bound by Article 23 of the Brussels Regulation which they argued that the objective of Article 23 was not to give only one party the right when it comes to the choice of jurisdiction.

In addition to the above, there an argument that the French courts in *Société Sicaly v. Société Grasso Stacon NV* held that "where it was the common intention of the parties to provide only one of them with the right to choose whether to litigate or go to arbitration such a clause was not

[45] Mme 'X' vs. Banque Privee Edmond de Rothschild [2012]

objectionable."[46] Hence it can be argued that the *Rothschild* judgement is not a departure from this principle as the *Rothschild* is objecting to asymmetric arbitration clauses when it comes to jurisdiction not on whether the case is to be litigated or taken to arbitration.

The French courts reached a similar decision in the case of *Danne vs. Credit Suisse (2015)*[47] which involved the Swiss bank Credit Suisse and a French company, under the dispute resolution clause Credit Suisse could bring a dispute arising from the two parties to any jurisdiction whereas the French company could only bring the dispute to courts in Zurich, Switzerland. The courts held that the dispute resolution was unenforceable as it violated the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters as known as the Lugano Convention.

The French courts held that "a unilateral right of the bank to commence proceedings before *'any other competent court'* does not meet the requirements for legal certainty and predictability under Article 23 of the Lugano Convention."[48] With these cases, it is safe to say that the enforcement and validity of asymmetrical arbitration clauses are contentious in French courts. Similarly, in the Bulgarian Supreme Court of Cassation judgement of 2 September 2011, the court invalidated a unilateral arbitration clause in a loan agreement on the basis that it was contrary to good morals and constituting a potestative right which have been defined as "a right whereby a person may unilaterally affect the legal rights of another person or a counterparty" such rights can only be conferred by an Act of Parliament under Bulgarian law.[49]

**Russia**

There are arguments that Russian courts were supportive of asymmetrical arbitration clauses until 2012 with the case of *Russian Telephone Company vs. Sony Ericsson Mobile Communications*[50] known as the Sony Ericsson case.[51] The case involved an agreement of sale of

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[46] *Supra* note 44

[47] Danne vs. Credit Suisse [2015]

[48] Iurii Ustinov, "Unilateral Arbitration Clauses: Legal Validity" Dissertation, Tilburg University, 2016 http://arno.uvt.nl/show.cgi?fid=142526 accessed 20 December 2020

[49] Ibid

[50] Russian Telephone Company vs. Sony Ericsson Mobile Communications [2012]

[51] *Supra* note 49

telephones between Sony Ericsson and the Russian Telephone company, and the agreement contained a dispute resolution clause which allowed Sony Ericsson to bring a dispute arising from the agreement of sale to "a*ny court having jurisdiction to recover the debt owed for product supplied"*[52] while not affording the same right to the Russian Telephone company.

Upon the dispute being brought before the Russian courts, they held that the asymmetric arbitration clause was invalid arguing that dispute resolution agreements can grant one party to choose a jurisdiction while depriving the other and to do so would be disturbing the balance of power between the parties to the agreement. Unlike the *Rothschild* case which "invalidated the clause in its entirety, the Supreme Court of the Russian Federation turned the unilateral option into a bilateral one. Consequently, both parties had the options provided unilaterally in the clause."[53]

Ustinov takes a different approach; he argues that there are two interpretations that can be drawn from the judgement by the Russian courts, firstly that the court took the unilateral clause into a bilateral one and the second interpretation is that the court only invalidated the clause to the extent that it was unilateral.[54] Gridasov and Dolotova argue that "According to the prevailing view a clause under which only one party has a right to refer a dispute to the state court and the second party is deprived of this right shall become bilateral or symmetric so that both parties, when acting as a claimant, have similar rights to choose between arbitration and state courts.''[55] With these cases and analyses and can be argued that unilateral arbitration clauses will not be upheld in the Russian jurisdiction.

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[52] *Supra* note 50

[53] Maxi Scherer and Sphia Lange, 'The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?' (Kluwer Arbitration, 18 July 2013) http://arbitrationblog.kluwerarbitration.com/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/ accessed 22 December 2021

[54] *Supra* note 48

[55] Alexander Gridasov and Maria Dolotova, 'Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion' (Kluwer Arbitration, 7 May 2019) http://arbitrationblog.kluwerarbitration.com/2019/05/07/unilateral-option-clauses-russian-supreme-court-puts-an-end-to-the-long-lasting-discussion/ accessed 22 December 2021

**United States of America**

Similar to the United Kingdom, the United States initially invalidated asymmetrical arbitration clauses on the basis that they violated the mutuality principle, for instance, in the case of *Hull vs. Norcom Inc. (1985)*[56] the courts invalidated an arbitration clause between an employer and employee which only afforded the employer the option to litigate if a dispute arose. However, in the case *Sablosky v Gordon Co (1989)*[57] the courts took a different approach holding that even though an arbitration agreement gave one party the right to refer a dispute to arbitration, it was valid. The case involved an employment agreement and the court seemed to drift away from the fact that mutuality of remedy was essential in the arbitration agreement.

Adding to the uncertainty of asymmetric arbitration clauses, the invalidation of asymmetrical arbitration clauses was also supported in the case of *Showmethemoney Check Cashers vs. Wanda Williams & Sharon McGhee (2000)*[58], in which the court used *Hull v Norcom Inc.* as precedent arguing that arbitration clauses cannot be used as a shield from litigation by one party and also a sword by the same party by allowing themselves to litigate while denying the same rights to the other party.

Furthermore, in the case of *Armendariz v Found Health Psychcare Servs Inc (2000)*[59]*,* the court held that an arbitration agreement which provided an employer with the right to arbitrate and litigate while denying the other party to the agreement (in this case the employees) the same rights was unenforceable due to the unconscionable principle. The court also held that they can only invalidate an asymmetric arbitration clause if at the negotiation stage of the contract, one party had a stronger bargaining power thus it imposed clauses that were favourable to it. Inequality of bargaining power can be defined as where one party has more or better alternatives than the other party which results in the other party accepting the terms of the agreement. This judgement showed that American courts were starting to move away from the mutuality principle to the unconscionable principle which means "a degree of unreasonableness of an

[56] Hull vs. Norcom Inc. [1985]
[57] Sablosky v Gordon Co [1989]
[58] Showmethemoney Check Cashers vs. Wanda Williams & Sharon McGhee [2000]
[59] Armendariz v Found Health Psychcare Servs Inc [2000]

agreement forcing a court to modify or nullify it."[60] These cases showed that the validity and enforceability of asymmetrical arbitration clauses were uncertain in the American legal system.

**India**

The Indian courts have made conflicting decisions in relation to the validity and enforcement of asymmetrical arbitration clauses which has made their position uncertain on the matter. Eyongndi posits that the reason why there has been uncertainty on the matter within Indian Courts is because the courts favour the mutuality principle over the untrammelled application of the application of *pacta sunt servanda*.[61] The Delhi High Court ruled in the case of *Union of India v Bharat Engineering Corporation (1977)*[62] that asymmetrical arbitration agreements are invalid to the point that the agreement lacks mutuality.

However, the Calcutta High Court took a different turn in the case of *New India Assurance Co. Ltd. v Central Bank of India & Ors (1984)*[63] holding that asymmetrical arbitration agreements were valid and enforceable. This decision set aside an earlier judgement by the Delhi High Court which stated that such agreements were invalid *ab initio*. In the case of *TRF Ltd. v Energy Engineering Projects Ltd (2017)*[64]*,* the Supreme Court of India held that "an arbitration agreement or clause, enabling only one party to choose an arbitrator without the input of the other was not invalid."[65]

In addition to this, the case of *The Black Sea Steamship U.L. Lastochkina ODESSA USSR v Union of India (1975)*[66] indicates that the Indian courts are likely to consider the mutuality principle and the fairness of an agreement clause when ruling on the *competence de la competence* principle, which a principle which is the ability of a court to rule if it has jurisdiction of a particular case. The aforementioned cases indicate that Indian courts could be amenable to

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[60] *Supra* note 48

[61] David Eyongndi, 'Enforcement of Asymmetrical Arbitration Clauses in Nigeria: A Peep into Other Jurisdictions' (2020) 2 (34-62) BiLD Law Journal http://bildbd.com/index.php/blj/article/view/35 accessed 19 December 2021

[62] Union of India v Bharat Engineering Corporation [1977]

[63] New India Assurance Co. Ltd. v Central Bank of India & Ors [1984]

[64] TRF Ltd. v Energy Engineering Projects Ltd [2017]

[65] *Supra* note 61

[66] The Black Sea Steamship U.L. Lastochkina ODESSA USSR v Union of India [1975]

upholding and enforcing asymmetrical arbitration clauses however, the position on this is uncertain.

### 2.3 Acceptance of Asymmetrical Arbitration clauses

This section of the Thesis sought to elucidate how different courts treated asymmetrical arbitration agreements. The section was divided into two highlighting the contentious and the non-contentious jurisdictions. A survey by Clifford Chance gives us a glimpse of the general acceptance of asymmetrical arbitration clauses across the globe and it is clear that most of the countries contained in this survey seem to accept such clauses. As a result of the fact that the majority of the jurisdictions mentioned have not dealt with disputes relating to asymmetrical arbitration clauses it's difficult to say with authority that such clauses have gained acceptance under customary international law. The formation customary international law has been defined as "results from a general and consistent practice of states that they follow from a sense of legal obligation."[67]

It is clear that there is no consistent practice by States in relation to asymmetrical arbitration clauses, for instance, take the United Kingdom, in 1966 it invalidated such clauses through the case of *Baron vs. Sunderland Corp* only to hold the valid and enforceable in 1986 through the case of *Pittalis v. Sherefettin*. Similarly in France, in 1974 through the case of *Société Sicaly v. Société Grasso Stacon NV,* it was held that such clauses were valid but this was later overturned in 2012 in the *Rothschild* case. Maybe a more extreme case is of the United States which has delivered a plethora of conflicting judgements in relation to such clauses, for example in 1985 the courts held in the case of *Hull vs. Norcom Inc.* that such clauses were invalid and four years in 1989 the courts held in case of *Sablosky v Gordon Co* that such clauses were valid and enforceable.

Similarly in Germany, the German Federal Court of Justice decision of 1991 held that unilateral clauses were valid and enforceable provided that they were entered into freely.[68] However, in the *Jena* and *Wooden Post* cases the "German Federal Court held an asymmetrical arbitration

[67] Cornell Law School Legal Information Institute, 2021
[68] *Supra* note 42

agreement invalid. The court held that such asymmetrical clauses impose an unreasonable risk on the other party since all efforts and expenses made with regard to litigation will be frustrated"[69]

Furthermore, in India, in 1977 the Delhi High Court ruled in the case of *Union of India v Bharat Engineering Corporation* that asymmetrical arbitration agreements are invalid to the point that the agreement lacks mutuality and yet in 2017 the Supreme Court of India in the case of *TRF Ltd. v Energy Engineering Projects Ltd (2017),* held that "an arbitration agreement or clause, enabling only one party to choose an arbitrator without the input of the other was not invalid."[70] It is such conflicting judgements from States that have caused confusion on the validity and enforcement of such clauses and led to the view that asymmetric arbitration clauses are controversial in practice. This has also made it difficult for a consistent practice to form in relation to such clauses and for them to gain general acceptance under customary international law.

Also, in relation to the acceptance of asymmetrical arbitration clauses, some courts have not invalidated such clauses completely but amended the extent to which the agreement was viewed to be unfair. For instance, unlike the *Rothschild* case "which invalidated the clause in its entirety, the Supreme Court of the Russian Federation in the *Sony Ericsson* case turned the unilateral option into a bilateral one. Consequently, both parties had the options provided for unilaterally in the clause."[71] This view clearly pours water on the argument that the arbitration clause is invalid merely for the fact that it confers rights on one party to the agreement. One of the leading cases which is deemed to be against asymmetric arbitration clauses, the *Sony Ericsson* case did not dismantle an asymmetric arbitration clause for the mere reason advanced by some scholars but in essence alluded that an asymmetric arbitration clause shall be recognized as an arbitration clause but will be amended to an symmetric one under the Russian jurisdiction.

There seems to be some evidence that the general acceptance of asymmetric arbitration clauses is still a mixed bag and there are a significant number of countries where asymmetric arbitration clauses are still contentious. The survey conducted by Clifford Chance tries to show the

[69] Ibid
[70] *Supra* note 64
[71] *Supra* note 45

acceptance of asymmetrical arbitration clauses across the globe. The thesis will try to examine this survey on a regional basis and try to come to conclusion if there more countries are accepting such clauses or not and then move on to the arguments that have been made by academics and scholars for and against the validity and enforcement of asymmetrical arbitration clauses.

The survey ranges the acceptance of asymmetrical arbitration clauses on a scale of one to five, one being the fact that generally there are no issues in the enforcement of arbitration clauses, two being the fact that issues are unlikely to occur, third being the fact that the position is uncertain, fourth being that issues may potentially arise in the enforcement of such clauses and lastly fifth being the fact that issues are likely to occur.

Starting in the Middle East and Northern Africa, the survey ranges countries such as Egypt, Iran, Israel, Tunisia, Sudan and Jordan are within the scope of one and two which is the fact that there are generally no issues or issues are unlikely to occur in the enforcement of asymmetrical arbitration clauses. Countries such as Qatar, Morocco and Algeria are ranked in the third category where the position on the validity and enforcement of asymmetrical arbitration clauses is uncertain. Then the fourth and fifth categories where there are potential issues or issues are likely to arise in the validity and enforcement of asymmetrical arbitration clauses contains countries such as Lebanon, Saudi Arabia and the United Arab Emirates (UAE). It is worth noting that within the UAE there are certain jurisdictions in which asymmetrical arbitration clauses are valid and enforceable, for instance, the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre. In the case of *A3 v B3* (2019), the ADFGM held that asymmetrical arbitration agreements were valid and enforceable.

Moving on to the rest of Asia, jurisdictions such as Hong Kong, Japan, Malaysia, Pakistan, Singapore and Thailand fall with the scope of one and two which is the fact that there are generally no issues or issues that are unlikely to occur in the enforcement of asymmetrical arbitration clauses. While in countries such as India, Indonesia, Kazakhstan, The Philippines, South Korea and Vietnam the position is uncertain if such clauses will be valid and enforceable. Furthermore, in South America, countries such as Chile and Mexico fall within the scope of one and two where there are generally no issues or issues are unlikely to occur in the enforcement of

asymmetrical arbitration clauses. Argentina falls within the category where the position is uncertain if such clause while in Brazil potential issues may arise.

In Sub-Saharan Africa, countries that fall within categories one and two where there are generally no issues or issues are unlikely to occur in the enforcement of asymmetrical arbitration clauses include Botswana, Burundi, Cameroon, Chad, Equatorial Guinea, The Gambia, Ghana, Guinea, Kenya, Namibia, Nigeria, Rwanda, South Africa, Tanzania, Uganda, Zambia and Zimbabwe. Countries, where the position is uncertain in relation to the enforcement and validity of these clauses, include Angola, Madagascar, Senegal and Togo. Finally, in Sub-Saharan Africa, countries that fall within the fourth and fifth category where there are potential issues or issues are likely to arise in the validity and enforcement of asymmetrical arbitration clauses include the Democratic Republic of Congo, Mauritius and Niger.

In North America, jurisdictions such as Canada, Bermuda, the British Virgin Islands and the Cayman Islands fall within categories one and two where there are generally no issues or issues are unlikely to occur in the enforcement of asymmetrical arbitration clauses. In the United States of America, the position remains uncertain as to the validity and enforcement of asymmetrical arbitration clauses. The Clifford Chance survey did not list any North American jurisdictions where the validity or enforcement of asymmetrical arbitration clauses may potentially face issues or where issues are likely to arise.

In Europe, countries such as Austria, Azerbaijan, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Lithuania, Malta, The Netherlands, Norway, Sweden, Switzerland and Ukraine fall within categories one and two where there are generally no issues or issues are unlikely to occur in the enforcement of asymmetrical arbitration clauses. European countries where the position is uncertain include Luxembourg, Portugal, Slovakia and Slovenia. Finally, European countries where issues are likely or might potentially arise include Bulgaria, the Czech Republic, France, Hungary, Latvia, Poland, Romania, Russia and Turkey.

## 2.4 Enforcement of Arbitral Awards made pursuant to Asymmetrical Arbitration clauses

I will try to examine if arbitral awards made pursuant to asymmetrical arbitration clauses will be enforceable in countries that have not dealt with such clauses before. I will look at Africa, including Central, South, West and East regions; I will also look at Europe, looking at East and Western Europe, then the Americas looking at North and South America and finally Asia looking at the Middle East and South-East Asia.

The New York Convention is a key instrument to the enforcement and recognition of arbitral awards and it is stated that 149 countries are signatories to this convention.[72] Article 3 of the convention provides for mandatory recognition and enforcement of arbitral awards, for instance, it states that "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…"[73]

However, it should be noted that there are exceptions to this Article, an exception which allows the enforcement and recognition of arbitral awards to be denied, such as Article 5(1)(a) of the Convention which states that "the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law where the award was made." Additionally, the enforcement and recognition of arbitral awards may be denied under Article 2 of the Convention which states that enforcement may be denied if it "would be contrary to the public policy of the country where enforcement is sought.''[74]

With the aforementioned authorities it is imperative to note that an asymmetrical arbitration clause may be denied recognition and enforcement of an arbitral award made pursuant to asymmetrical agreement if the jurisdiction is opposed to such agreements, for instance, in 2011 a German decision denied the enforcement of an arbitral award made pursuant to such agreements. The court relied on Article 5(1)(a) in the case *of Subsidiary company of franchiser v. Franchisee*, where the Court of Appeal in Thuringia "refused to enforce an arbitral award rendered in the

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[72] Brian Mambosho, Gerald Nangi and Jeremia Tarimo, 'Tanzania Court of Appeal confirms parties have a right to agree on a dispute resolution forum' (Clydeco, 16 March 2020) https://www.clydeco.com/en/insights/2020/03/tanzania-court-of-appeal-confirms-parties-have-a-r

[73] New York Convention, Article 3.

[74] *Supra* note, Article 5(1)(a)

Netherlands because the dispute resolution clause was too ‘‘one-sided’’ and therefore invalid under Lichtenstein law (the law of the underlying agreement). The clause was not a unilateral option clause per se, but rather an exclusive jurisdiction clause by which all disputes were to be determined by arbitration in New York under the UNCITRAL rules.”[75]

In this regard, I will start looking at West Africa looking at Nigeria and Niger as these are the two countries indicated by the Clifford Chance survey as taking two different approaches but within the same region. In Nigeria ratified the New York Convention and Eyongndi argues that the Nigerian courts are likely to enforce arbitral awards made pursuant to unilateral arbitration clauses[76], he points to the of *Sonnar (Nig.) Ltd. v Partenreedri M.S. Nordwind*[77] in which the Supreme Court of Nigeria held that “where parties contract voluntarily, they are bound to perform their bargain unless there be exceptional circumstances requiring otherwise.”[78] Additionally, Eyongndi points to the case of *AG of Nasarawa State v AG of Plateau State*[79] in which the Nigerian courts held that the principle of *pacta sunt servanda* was an integral part of Nigerian law.

However, there an argument that the validity of asymmetrical arbitration clauses was questioned in the case of *United World Limited v. MTS Limited (1998)*[80] but the Nigerian Court of Appeal held that such clauses were valid. Mayomi interprets the judgement stating that “The *United World Ltd v. MTS Limited* case reflects the current position of Nigerian law that unilateral dispute resolution clauses are, in principle, valid; and that rendering such clauses unenforceable on the basis of perceived unequal terms would be an unacceptable interference with the principle of sanctity of contract.”[81] These aforementioned cases indicate that Nigerian courts are likely to uphold asymmetrical arbitration and this conclusion is similar to the one reached by the Clifford Chance survey.

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[75] Siubha´n Magee and Judith Mullolland, *The Enforceability Of Arbitration Awards Made Pursuant To Unilateral Jurisdiction Clauses* (MEALEY’S International Arbitration Report no. 10: 1-7, 2013) 28

[76] *Supra* note, 61

[77] Sonnar (Nig.) Ltd. v Partenreedri M.S. Nordwind [1987]

[78] Ibid

[79] AG of Nasarawa State v AG of Plateau State [1998]

[80] United World Limited v. MTS Limited [1998]

[81] Kolawole Mayomi, ‘One-sided Right to Arbitration’ (Arbitral Review Column - BusinessDay Newspaper, 13 July 2017) http://www.spaajibade.com/OneSidedArbitration.pdf accessed 27 December 2021

With regards to Niger, the country ratified the New York Convention and the survey by Clifford Chance argues that the courts are likely to follow the approach taken by the French courts and invalidate asymmetrical arbitration clauses. However, the survey goes on to state that the courts in Niger are likely to enforce an arbitral award made pursuant to an asymmetrical arbitration clause provided that it is not contrary to international public policy.

Turning to East Africa, it seems the majority of the countries included in the Clifford Chance survey were amenable to enforcing and validating arbitral awards made pursuant to asymmetrical arbitration agreements. However, it is imperative to touch on the biggest economies in East Africa namely Kenya and Tanzania with $1 800 and $ 1 000 GDP per capita respectively. Kenya is one of the few African countries with an International Arbitration Centre namely the Nairobi Centre for International Arbitration (NCIA) which was established in 2013 and is governed by the NCIA Act 2013.

Additionally, Kenya ratified the New York Convention and because of the similarities between Kenya and the common law approach taken in the United Kingdom, it has been argued that they are likely to take the same approach taken by English courts in the enforcement and validity of asymmetrical arbitration clauses. Also, according to the Clifford Chance survey, the Kenyan courts uphold the sanctity of contracts provided that they reflect the intentions of the parties as was seen in the case of *Macharia Mwangi Maina & 87 Others vs-Davidson Mwangi Kagiri (2014)*[82] therefore it's likely that asymmetrical arbitration clauses will be upheld.

Unlike Kenya, Tanzania is not a state party of the New York Convention so the obligation to recognize and enforce arbitration awards does not carry the same weight as that under Kenyan law which is a state party to the New York Convention. However, the Clifford Chance survey states that asymmetrical arbitration clauses will be held as valid and enforceable if they are drafted in a clear way. In addition to this, in a recent case of S*unshine Furniture Co. Ltd v. Maersk Shipping Co. Ltd & Nyota Tanzania Limited* (2016)[83] heard by the Tanzanian Civil Court of Appeal held that "..the parties to a contract are allowed to decide on a forum and choice of law

[82] Macharia Mwangi Maina & 87 Others vs-Davidson Mwangi Kagiri [2014]
[83] Sunshine Furniture Co. Ltd v. Maersk Shipping Co. Ltd & Nyota Tanzania Limited [2016]

for determining their contractual disputes."[84] This judgement indicates that the courts in Tanzania are likely to validate and enforce asymmetrical arbitration clauses.

Moving on to Southern Africa, the majority of the countries in the region have been ranked by the Clifford Chance survey as recognizing asymmetrical arbitration agreements with the exception of Mauritius. I will look at three countries namely Zimbabwe, South Africa and Mauritius. In Zimbabwe, it's likely that similar sentiments could be echoed in the Zimbabwean courts regarding the validity and enforcement of arbitral awards made pursuant to asymmetrical arbitration clauses. Zimbabwe has ratified the New York Convention and in the case of *Ndlovu v Higher Learning Centre (2010)*[85], the courts held that the general approach is to give an arbitral award the effect of a civil judgement. The Supreme Court of Zimbabwe in the case of *Book v Davidson (1988)*[86] stated that the doctrine of the sanctity of contracts was a fundamental part of Zimbabwean law. The doctrine of sanctity of contracts entails that "once parties duly enter into a contract, they must honour their obligations under that contract."[87]

The Supreme Court of Zimbabwe held that "... If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider -- that you are not lightly to interfere with this freedom of contract."[88] This view by Zimbabwean courts indicates that an arbitral award made pursuant to an asymmetrical arbitration agreement is likely to be held as valid and thus enforceable under the doctrine of sanctity of contracts.

Going to South Africa, it is also likely that arbitral awards made pursuant to asymmetrical arbitration agreements are valid and enforceable in South African courts. The country is a signatory to the New York Convention and has codified UNCITRAL through the International Arbitration Act 15 of 2017. Pillay states that "The cornerstones of the South African law of

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[84] *Supra* note 72
[85] Ndlovu v Higher Learning Centre [2010]
[86] Book v Davidson [1988]
[87] Ibid
[88] Ibid

contract are good faith, freedom of contract, the sanctity of contract and privity of contract."[89] In addition to this, in the case of *Barkhuizen v Napier (2007)*[90], the South African Constitutional Court emphasised that freedom of contract was paramount and that the courts were not concerned with the substantive fairness of the contract but whether the contract was entered into voluntarily.

This is further substantiated by the case of *Afrox Healthcare v Strydom (2002)*[91] where the South African Court of Appeal held that freedom of contract was a constitutional value. However, Christe and Bradfield argue that a strict application of the freedom of contract principle which will result in an unfair contract or unfair contract terms is unlikely to be enforced by the courts.[92] For instance, in cases of consumers and suppliers where a unilateral arbitration clause is extremely one-sided towards the consumers or where enforcing such an agreement would unfair especially towards the consumer such an agreement might not be enforced by the courts. This indicates that we cannot be certain if South African courts will enforce arbitral awards made pursuant to asymmetrical arbitration clauses since the courts have not dealt with a case relating to such a case.

Moving on to Mauritius, the country is a state party to the New York Convention and the survey states that there is no reason why courts in Mauritius would not enforce unilateral option clauses. Although the International Arbitration Act of Mauritius is silent on the validity and enforceability of asymmetrical arbitration clauses, the survey states that "…it is believed that such clauses would be deemed potestative and rendered invalid."[93]

Similarly in Central Africa, particularly the Democratic Republic of Congo (DRC) it is believed that such an agreement would be invalid in DRC as the law requires the parties to the contract to have equal rights. Additionally, although the DRC is a state party to the New York Convention, domestic legislation giving effect to the New York Convention contains some reservations, for instance, the New York Convention will not apply to disputes related to immovable property or

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[89] Miranda Pillay, "The impact of *pacta sunt servanda* in the law of contract" Dissertation, University Pretoria, 2015. https://repository.up.ac.za/bitstream/handle/2263/53181/Pillay_Impact_2015.pdf?sequence=1&isAllowed=y

[90] Barkhuizen v Napier [2007]

[91] Afrox Healthcare v Strydom [2002]

[92] RH Christie and GB Bradfield, *Christe's The Law of Contract in South Africa* ( South Africa LexisNexis 2011)

[93] Clifford Chance Survey 2021.

rights relating to immovable property. In light of such reservations, it remains unclear if the Congolese courts are likely to recognize and enforce arbitral awards that have been made pursuant to asymmetrical arbitration agreements.

This brings us to Western Europe, it seems Belgium which once colonized DRC is taking a similar approach to that of the DRC, for instance, Belgium passed a law stating that from the 1st of December 2020, business to business contracts certain clauses will be presumed abusive if they create an imbalance between the parties and therefore automatically struck down. The Economic Law Code pursuant to a law of 4 April 2019 allows contracts with a clause(s) that create an imbalance between parties to a business to business contract (mainly enterprises) to be struck down. However, the law does not apply to "contracts relating to financial services and public tenders."[94]

This indicates that the enforcement of arbitral awards made pursuant to asymmetrical arbitration agreements could be an issue in Belgium. Although the upper Belgian courts have not yet dealt with asymmetrical arbitration clauses, and Belgium is a party to the New York Convention, the introduction of this law shows that such agreements create an imbalance between parties by affording only a single party the right to settle the dispute through arbitration or litigation over the other party, and this could be held as abusive and thus struck down. The survey by Clifford Chance also supports this view stating that although a lower court in Belgium has upheld the validity and enforcement of asymmetrical arbitration clauses before, there is a view among the commentators in Belgium that upper courts might take the same view taken by the French courts.

This also moves us to Luxembourg where the courts have previously held asymmetric clauses to be valid and enforceable. There is a view that since the courts in Luxembourg tend to rely on cases coming out of the superior French courts for guidance, the upper courts may also take the approach taken in the *Rothschild* case. However, the country is a party to the New York Convention and the survey by Clifford Chance states "there is no reason to believe that an

[94] Ibid

arbitral award given pursuant to a unilateral option clause will not be enforceable in Luxembourg."[95]

On to Eastern Europe, there is a view that asymmetrical arbitration clauses would be held as invalid and therefore unenforceable in Latvia. Although Latvia is a state party to the New York Convention, arbitral awards made pursuant to asymmetrical arbitration clauses may be unenforceable in the Latvian Courts. This is because in some instances where consumers contracts that provide both parties with the ability to refer a dispute to arbitration have been held to be unfair in the past by Latvian courts and therefore it cannot be excluded that the same courts would not hold "asymmetrical arbitration clauses as contrary the principle of equal treatment and therefore invalid and unenforceable."[96]

A similar approach is believed to be taken by the courts in Romania. Although Romania is not a party to the New York Convention, it is a party to several treaties facilitating the recognition and enforcement of an arbitral award. The Romanian courts to date have not yet looked at the legality of asymmetrical arbitration clauses, but the country's Civil Procedure Code states that an arbitration clause that only gives a single party to choose either arbitration or litigation shall be invalid. Similarly, the awards given by an arbitration tribunal pursuant to unilateral option agreements will not be enforceable within the courts in Romania.

With regard to South America, there is a view that courts in Brazil may hold asymmetrical arbitration clauses to be invalid and therefore unenforceable due to the fact that Brazilian law requires the consent of both parties for arbitration proceedings to be regarded as legitimate. Brazil is also party to the New York Convention therefore it is unclear if the country will enforce arbitral awards made pursuant to an asymmetrical arbitration clause. However, it should be noted that just a decision made in Germany, a country can rely on the New York Convention to deny the enforcement and recognition of an arbitral award made pursuant to an asymmetrical arbitration clause.

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[95] Ibid
[96] Ibid

Similarly in Argentina, it is unclear if the court will uphold or annul asymmetrical arbitration clauses. The Clifford Chance survey argues that it cannot be excluded that the Argentinian court will hold such clauses to be in violation of the equal treatment principle and therefore invalid. Argentina is also a state party to the New York Convention, so it remains unclear if the courts will enforce an arbitral award made pursuant to an asymmetrical arbitration clause. In North America, specifically Canada and the British Virgin Islands as well as Bermuda, it is believed that unilateral option clauses will be upheld and enforceable and this is similarly applicable to arbitral awards made pursuant to asymmetrical arbitration clauses.

Moving to the Middle East, there is a view that courts in both Saudi Arabia and the United Arab Emirates are unlikely to uphold unilateral option clauses on the grounds of unfairness. Although both Saudi Arabia and the United Arab Emirates are parties to the New York Convention, it remains unclear if arbitral awards made pursuant to asymmetrical arbitration clauses will be held as valid and enforceable in both Saudi Arabia and the United Arab Emirates. However, it should be noted as alluded to earlier that there are some jurisdictions within the United Arab Emirates that have held such agreements to be valid and enforceable. In relation to Southeast Asia, according to the Clifford Chance survey, the courts in Vietnam "recognise the validity of bilateral option clauses, as well as the validity of unilateral option clauses which provide a consumer with the unilateral option to take a dispute to arbitration under Article 17 of the 2010 Law on Commercial Arbitration of Vietnam. The validity of clauses providing a unilateral option to non-consumers is unpredictable and might violate the principle of equality under Article 3.1 of the 2015 Civil Code of Vietnam."[97]

Although Vietnam is a state party to the New York Convention, Article 3.1 of the 2015 Civil Code of Vietnam indicates that arbitral awards concerning non-consumers made pursuant to asymmetrical arbitration clauses might not be enforceable and valid in Vietnam. This is also similarly applicable to Indonesia and the Philippines where it's not clear if courts in both countries will enforce such agreements since they have examined such clauses however, there remains a risk that despite being a party to the New York Convention, these countries might not recognize arbitral awards made pursuant to asymmetrical arbitration clauses.

[97] Ibid

Lastly, moving onto East Asia, there is a view that such clauses are invalid since Chinese courts require consensus for the dispute to be dealt with under arbitration and this also entails that Chinese courts might be unwilling to recognize and therefore enforce arbitral awards made pursuant to asymmetrical arbitration clauses. China has also made a reservation to the New York Convention stating that it will only apply the Convention on the basis of reciprocity.

It is also unclear in South Korea if unilateral arbitration clauses will be held as valid by the South Korean Courts. The Clifford Chance survey gives a rationale for this uncertainty stating that "In a number of cases decided between 2002 and 2004, lower courts held that option clauses were valid and enforceable. However, in a more recent series of decisions dealing with a particular group of option clauses appearing in contracts to which the Korean government or a Korean state entity was a party, the Supreme Court has held that the option clauses at issue were unenforceable as arbitration agreements in the absence of a waiver of objections to arbitral jurisdiction or implied consent to arbitrate."[98]

The findings of this survey show that jurisdictions on the African continent are more likely to uphold and enforce asymmetrical arbitration agreements even though the majority of them have not dealt with a dispute concerning such clauses. The survey showed that of the 29 African countries covered 20 are likely to uphold and enforce asymmetrical arbitration clauses and it is unclear in six countries if such clauses will be upheld or enforced. Lastly, in 3 countries the clause is unlikely to be upheld or enforced. Similarly, of the 34 European jurisdictions covered, 20 are likely to uphold and enforce asymmetrical arbitration clauses whereas in five jurisdictions it is unclear if such a clause will be upheld and enforced. Furthermore, in nine jurisdictions, asymmetrical arbitration clauses are unlikely to be held as valid and enforced.

Also, of the 22 Asian jurisdictions contained in the survey, 11 are likely to uphold and enforce asymmetrical arbitration clauses and in seven jurisdictions it's uncertain if such clauses will be upheld as valid and enforceable, and finally, in four jurisdictions such clauses are unlikely to be held as valid and enforceable. In the Americas, of the 10 jurisdictions covered, seven are likely

[98] Ibid

to uphold and enforce asymmetrical arbitration clauses, whereas in two jurisdictions it is unclear if the courts will uphold and enforce such a clause, and only one jurisdiction is unlikely to uphold and enforce asymmetrical arbitration clauses.

It is also important to note that there are jurisdictions that were covered in the Clifford Chance survey that do not fall within the major continents, jurisdictions such as New Zealand and Australia, which fall within the pacific. In both jurisdictions, the survey indicates that such agreements are likely to be held as valid and enforceable. For instance, the survey states that "The High Court of New Zealand has recently (in 2019) upheld a unilateral option clause, citing English authority. It is likely that any award based on an arbitration pursuant to a unilateral option clause will be enforceable under New Zealand law."[99] Also, in Australia the survey states that "Whilst the Australian courts have not examined the validity of unilateral option clauses *per se*, by reference to favourable court decisions in relation to similar clauses, it is likely that they would be held to be valid. Similarly, it is likely that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Australia."[100]

In a nutshell of the 97 jurisdictions examined, 60 jurisdictions are likely to uphold and enforce asymmetrical arbitration clauses, whereas in 20 jurisdictions it's uncertain if such clauses will be upheld, and finally in 17 jurisdictions, asymmetrical arbitration clauses are unlikely to be enforced. If anything this indicates that despite conflicting judgements from some jurisdictions, there is a slow indication that such clauses seem to be gaining acceptance by a substantial number of countries, for instance looking at this survey, the number of jurisdictions which are uncertain (sitting on the fence) and those that are unlikely not enforce asymmetrical arbitration clauses combined together (37) do not outnumber the jurisdictions that are likely to enforce and recognize such agreements (60). In addition to this, it is also worth pointing out that this survey has shown that the fact that jurisdiction is uncertain or is unlikely to uphold asymmetrical arbitration clauses does not entail that they are also unlikely to recognize and enforce arbitral awards made pursuant to an asymmetrical arbitration agreement.

[99] Clifford Chance 2021
[100] Ibid

## 2.5 Arguments for and against asymmetrical arbitration clauses

### Party Autonomy

Different scholars have made different arguments for the enforcement and validity of asymmetrical arbitration clauses, for instance, Professor Fentiman regarding asymmetric arbitration clauses stated that "…Indeed despite their asymmetric, optional character it is difficult to conceive how their validity could be impugned or what policy might justify doing so…"[101] In addition to this, there is a view that asymmetric arbitration clauses should be upheld because of the validation principle. As alluded to before in this Thesis, the validation principle supports the view that an international arbitration agreement has to be considered valid and enforceable if it would be so considered valid under at least one of the national laws potentially applicable to the agreement.[102]

Furthermore, Born argues that the choice of the law governing international arbitration agreements should be approached from an international perspective which is characterized by the application of the validation principle and the international non-discrimination principle.[103] The non-discrimination principle set out in the New York Convention forbids the application of discriminatory national laws that would affect the validity or enforceability of international arbitration agreements. The convention sets forth a uniform international rule prohibiting discrimination against arbitration agreements. Article II (1) of the New York Convention imposes an obligation on states to recognize arbitration agreements that parties have undertaken to submit to dispute resolution.[104]

In essence, the argument is that by denying the validity of the arbitration agreement undertaken by the parties a State party to the New York Convention will be discriminating against asymmetric arbitration thereby violating the principles set out in the Convention that of non-discrimination. Article II of the New York Convention goes on to state that "Each Contracting State shall *recognize* an agreement in writing under which the parties undertake to submit to

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[101] Richard Fentiman, 'Universal jurisdiction agreements in Europe' (2013) 1 (24-27) Cambridge Law Journal accessed 23 December 2020

[102] Gary Born, International Commercial Arbitration (Kluwer Law International, 2009)

[103] *Supra* note 4

[104] Ibid

arbitration…"[105] This aspect also applies to an international contract of sale that contains arbitration agreements, for instance, "The non-discrimination principle set out in the New York Convention forbids the application of discriminatory national laws that would affect the validity or enforceability of international arbitration agreements. The convention sets forth for the uniform international rule prohibiting discrimination against arbitration agreements."[106] However, as shall be seen in this Thesis, this same convention also provides for exceptions under which the recognition and enforcement of asymmetrical arbitration clauses can be denied.

In addition to the above, another argument made for the validity and enforcement of asymmetrical arbitration clauses is that by invalidating such agreements, the powers that be would be violating the principles of party autonomy and freedom of contract. The principles of party autonomy and freedom of contract state that the parties to a contract have the freedom to decide which law will govern the contract including how future disputes are to be settled, as was established by the principles of the International Institute for the Unification of Private Law (UNIDROIT Principles) aimed at harmonising commercial laws of States into uniform law. Article 1.1(1) of UNIDROIT Principles states that parties are free to enter into a contract and to determine its content.

This principle is also recognized throughout the United Nations Convention on Contracts for the International Sale of Goods (CISG), as Article 11 states that "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form"[107], Article 6 of the CISG grants parties the right to determine provisions of a contract, Article 14 of the CISG and other articles give the right to choose counterparty and to sign or not to sign a contract. Additionally, Article 35(3) of UNCITRAL Arbitration Rules gives effect to the principle of freedom of contract by using applicable law agreed by the parties as stated "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract…"[108]

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[105] New York Convention, Article 2.
[106] *Supra* note 4
[107] CISG, Article 11
[108] Ibid, Article 35(3)

Moreover, this principle is recognized in English law as was established in the English case *Pittalis v. Sherefettin 1986*, it is understood that the argument of this principle has often been countered by the doctrine of inequality of bargaining which states that a contract or its terms can be set aside if they are grossly unfair to one party that is clear that those terms are only in the contract because one party had more bargaining power. However, enforcing this doctrine is accompanied by the need to analyse the bargaining power of the parties before the contract was concluded as it can be argued that the existence of terms more favourable to one party in a contract cannot always be attributed to unfair bargaining power. In addition to this, the principles of party autonomy and freedom of contract also have limitations that prohibit for instance court endorsing illegal agreements under the guise of party autonomy and freedom of contract. Such limitations can equally apply to asymmetrical arbitration clauses if they give raise to unfair contract terms.

Also, another argument for the validity and enforcement of asymmetrical arbitration clauses is the *pacta sunt servanda* principle, which is a Latin term which entails that contracts or agreements must be kept. By invalidating an asymmetrical arbitration agreement the courts will be violating this principle. This principle is also recognized in international law under the Vienna Convention on the Law of Treaties (VCLT) which states that agreements signed by states should be respected and performed in good faith. Article 26 of the VCLT states, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[109] Although there are exceptions to this principle such as unforeseeability where "the court may rule if the performance of the contract has become excessively onerous due to an exceptional change of circumstances, which would clearly reveal that it would be unjust to oblige the debtor to execute his/her obligation."[110]

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[109] VCLT, Article 26

[110] Ionel Bostan and Adrian Stoica, 'Exceptions to the principle of the binding power of contract effects on the relationships between the contracting parties under the New Civil Code' (Acta Universitatis George Bacovia Juridica, 2016)
https://www.ugb.ro/Juridica/Issue9EN/14.%20Excep%C8%9Bii%20de%20la%20principiul%20for%C8%9Bei%20obligatorii%20a%20efectelor%20contractului.Ionel%20Bostan.Adrian%20Stoica.EN.pdf

In addition to this exception, the courts cannot uphold a contract at all cost in order to satisfy the *pacta sunt servanda* principle, as alluded to before, where a contract is clearly unfair, it would be remiss for the courts to simply enforce such a contract without any due regard to justice and equity and the guise of *pacta sunt servanda*.

Another doctrine that flows from the *pacta sunt servanda* principle is the doctrine of sanctity of contracts which states that when parties have entered into a contract, they must honour the terms of that contract. This doctrine is also recognized in the American Constitution under the 'Obligation of Contracts' clause which prohibits States from "passing any law impairing the obligation of contracts". Also, it seems that this doctrine has gained prominence in international law, for instance, Article 74 of CISG "seeks to provide an incentive for parties to keep their promises."[111] There is some weight to this argument because if contracts cannot be honoured then parties can enter contracts which they fully know are unfair so as not to honour their obligations citing that the terms of the contracts were unfair. In such a case no contract would stand, this also brings the question, to what extent should be a contract be set aside on the besides of unfair contractual terms.

South African courts on the sanctity of contracts in the case of *Burger v Central South African Railways*[112] state that "It is a sound principle of law that a man when he signs a contract, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."[113] Furthermore, to add to the above, the *caveat subscriptor* principle can be used to support the upholding of asymmetrical arbitration agreements, it's a principle that means let the seller be aware and states that "When signing a contract, the individual automatically agrees to the conditions stated within it, regardless of whether they have read and/or understood them."[114]

This is similarly applicable to parties to unilateral option clause agreement in the sense that were they sign such an agreement, they should be bound by it. However, such a principle is blind to the conditions around the signing of the contract, for instance, situations in which one party has

[111] CISG, Article 74
[112] Burger v Central South African Railways [1903]
[113] Ibid
[114] Ibid

more bargaining power to bulldoze unfavourable contractual terms on the other party, it is therefore prudent when applying this principle to also consider the context in which the contract was signed. For the courts to bury their hands in the sand regarding this would engender unconscionable results.

**Equality of treatment**

After having taken note of the arguments made in favour of the validity and enforcement of asymmetrical arbitration clauses it is necessary to look at the arguments against such clauses. There have been arguments made that asymmetrical arbitration agreements should be set aside because there are one-sided and violates the principle of equal treatment by conferring rights only to one party. Smit argues that asymmetrical arbitration agreements are "so wholly one-sided and unfair that the courts should feel no reluctance in finding it unacceptable."[115]

The principle of equal treatment was alluded to in the case of *Siemens AG and BKMI Iondustrienlagen GmbH v Dutco Consortium Construction Company Ltd* (1992)[116] known as the *Siemens-Dutco* case and it states that parties to the contract should be treated equally and must not be discriminated against. The case involved the appointment of arbitrators and the parties to the dispute were forced to accept a joint arbitrator and upon the dispute reaching the French courts, the Cour de Cassation stated "equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen."[117]

This argument is also supplemented in the *Sony Ericsson* case where it was implied that the "right to equality of arms" is violated by asymmetric arbitration clauses. Equality of arms entails that there should be "be a fair balance between the opportunities afforded the parties involved in litigation." This principle is also set out in Article 5 of UNCITRAL Arbitration Rules and Article

[115] Hans Smit, 'Contractual Modifications of the Arbitral Process' (2009) Penn State Law Review http://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%20995.pdf accessed 27 December 2021

[116] Siemens AG and BKMI Iondustrienlagen GmbH v Dutco Consortium Construction Company Ltd [1992]

[117] Stefan Kröll, 'Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases' (Kluwer Arbitration, 15 October 2010) http://arbitrationblog.kluwerarbitration.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/ accessed 27 December 2021

18 of Model Law on UNCITRAL Arbitration Rules which states that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[118]

In addition to this, it has been argued that asymmetrical arbitration clauses violate Article 6 of the European Convention of Human Rights (ECHR) which provides for the right to a fair trial. However, some scholars have argued that this is a misinterpretation of the concept, as "the principle relates to a fair trial, which means that the parties have equal procedural rights (due process) once the proceedings have begun. In other words, equal footing before a specific forum not with regards to the choice of forum."[119]

Furthermore, another argument put forward for invalidating asymmetrical arbitration clauses is the principle of mutuality. The principle of mutuality is a English law doctrine which states that either all is bound or neither is bound. The premise of the principle is consideration wherein the conclusion of the contract each party must give something in return of something. It is under this principle that some courts have invalidated asymmetrical arbitration clauses citing that they lacked mutuality. The aspect of mutuality shall be touched on a bit further in this thesis.

However, Nassar argues that invalidating such clauses on this basis is absurd[120], and he substantiates this with an argument from Draguiev who states that "it is sufficient to note that under general rules of contract law, consideration should be present, but need not be adequate…the unequal position[s] of the parties, including presumably the imbalanced consideration, should not be grounds for invalidity."[121] It should be noted that there is a general understanding that mutuality no longer applies to unilateral contracts.

In addition to the above, another argument used by some European countries to invalidate asymmetric arbitration clauses is that such clauses are in violation of EU law, particularly Article 23 of Brussels I Regulation. In the *Rothschild* case, the court held that asymmetric arbitration clauses were contrary to "the finality of the extension of jurisdiction provided for in Article 23"

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[118] Model Law, Article 18.

[119] Youssef Nassar, 'Are Unilateral Option Clauses Valid?' (Kluwer Arbitration, 13 October, 2018) http://arbitrationblog.kluwerarbitration.com/2018/10/13/are-unilateral-option-clauses-valid/ accessed 28 December 2021

[120] Ibid

[121] Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) Journal of International Arbitration https://ssrn.com/abstract=2542591 accessed 29 December 2021

and therefore should be invalidated. However, some scholars have argued that the court in the *Rothschild* case misinterpreted this section of the Brussels I Regulation and that Article 23 is the epitome of party autonomy to choose how disputes are to be settled.[122]

For instance, Article 23 of the Brussels I Regulation states that "If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."[123] From the aforementioned paragraph, it is clear that it gives powers to parties on how to settle a dispute including asymmetric arbitration clauses and how the court in the *Rothschild* case reached a different interpretation is subject to criticism.

Also, another argument that has been advanced against the validity and enforcement of asymmetrical arbitration clauses is the principle of unconscionability. As alluded to earlier, this principle states that an agreement is so unreasonable that it cannot be enforced that it is apparent that the party with more economic bargaining power must have used this position to impose unfair clauses on the other party. In essence, it is argued that courts may refuse to validate and enforce an asymmetrical arbitration clause because they are extremely one-sided that in the construction of such a clause one party must have had more bargaining power which imposed such a clause on the other party as was alluded in the case of *Armendariz v. Foundation Health Pyschare Service*.

However, to invalidate an agreement under this principle it is imperative for the courts to analyse the bargaining powers of the parties involved because it cannot be that every time there exist a unilateral option clause, the party which is benefiting must have had more bargaining power. Also, the Achilles heel of this argument is where the clause which is being challenged is in favour of a weaker party or where the bargaining powers of the parties involved are equilibrium. Freitas et al also state that another argument against such clauses is "The doctrine of unconscionability, as laid out under Art. 3.2.7 of the UNIDROIT Principles, states that a contract

[122] Supra note, 119
[123] Brussels Regulation I, Article 23

or term may be avoided if the contract or term unjustifiably gives the other party an excessive advantage."

### 2.6. Party autonomy vs Equal treatment

The key principles that have been in contention throughout this thesis are the principle of party autonomy and the principle of equal treatment. The courts of different jurisdictions that have either invalidated or upheld asymmetrical arbitration clauses have relied on either of these principles. Therefore this section seeks to examine both principles in turn. The principle of party autonomy flows from the contract law principle of freedom to contract. According to Elliott and Quinn the principle of freedom of contract "promotes the idea that since parties are the best judges of their own interests, they should be free to make contracts on any terms they choose – on the assumption that nobody would choose unfavourable terms. Once this choice is made, the job of the courts is simply to act as an umpire, holding the parties to their promises; it is not the courts' role to ask whether the bargain made was a fair one."[124]

In relation to arbitration, party autonomy allows the parties to choose the terms to be bound by and be free from restrictions imposed by national law, in addition to this, Ustinov argues that party autonomy is the heart of arbitration.[125] The very essence of arbitration is guided by party autonomy which allows parties to the dispute to choose the rules applicable to the substance and arbitration agreement, these could be a national law, transnational laws or general principles of law among many others.[126] In addition to this, party autonomy also entails that parties are able to choose the forum to which the dispute will be settled and the arbitrators who will decide on the dispute. The principle of party autonomy is at every stage of arbitration proceedings. For instance, Article 29(2) UNCITRAL Arbitration Rules recognizes the right of the parties to object to witnesses, it states that "After an expert's appointment, a party may object to the expert's

[124] C Elliot and F Quinn, *Contract Law* (eds) (Pearson 2015)
[125] Supra note 48
[126] Ibid

qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made."[127]

International commercial law has also accepted the principle of party autonomy, for instance, Article V(1)(d) of the New York Convention alludes to the parties' right to choose the composition of the arbitration panel and the procedure to be followed. Additionally, Article 19(1) of UNCITRAL Model also alludes to party autonomy stating that parties are free to choose the procedure that will be followed by the arbitral tribunal. Furthermore, the ICC Rules of Arbitration also provide for party autonomy, stating that parties may choose the rules of arbitration where the rules of the ICC are silent. Moreover, the LCIA also makes mention of party autonomy stating that parties may agree to the conduct of the arbitration proceedings.

In addition to the above, another principle that seems to flow from party autonomy and supports the view that asymmetrical arbitration clauses ought to be upheld and enforced is the doctrine of sanctity of contract or *pacta sunt servanda*, which have already been touched upon in this thesis these principles flow from party autonomy in the sense that they advocate for the view that once parties have exercised their freedom to be bound by certain terms of a contract, the courts, in turn, should not only respect that freedom but the terms agreed upon.

However, it should be noted that party autonomy may face some limitations such as the legal validity of the arbitration agreement. The agreement itself may fail to meet the basic legal requirements thereby limiting the principle of party autonomy. For instance, Article 18 of UNCITRAL Model Law provides for equal treatment of parties both by the arbitral tribunal and the procedural agreements reached by parties, therefore, this principle restrains party autonomy in relation to rules of procedure.[128] Also, Binder argues that "A key aspect of this principle is that no party shall be given an advantage over the other. The asymmetrical arbitration agreement blatantly contradicts this principle by conferring only on one the advantage of initiating arbitral proceedings at any given time."

[127] UNCITRAL, Article 29(2)
[128] *Supra* note 4

Additionally, another limitation which the principle of party autonomy may face is the doctrine of privity which entails that a contract can only bind parties to it and no third parties can enforce the contract or be sued under it. This entails that an arbitration agreement cannot provide terms that can bind other parties besides those party to the contract. This also entails that the arbitral tribunal does not have the power to compel witnesses or third parties to provide documentation or evidence as this can only be done by approaching the courts. Also, where parties choose institutional arbitration which contains mandatory rules on the procedure, this entails that parties have given up their right to decide how the arbitration will be conducted and some extent a limitation on party autonomy. Also, the principle of party autonomy is limited by public policies of different jurisdictions Ustinov states that this "serves well in cases when parties are trying to abuse their autonomy, e.g. it prevents parties from using arbitration to legitimize illegal and immoral agreements."[129]

Moving on to equality of treatment, the very definition of equality treatment has already been alluded to in this thesis but put simply it entails that all parties to the agreement should be treated equally. This principle is also enshrined under Article 18 of UNCITRAL Model Law which states that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[130] This principle can come into conflict with other principles of international arbitration law, for instance, where parties to an agreement have agreed that one party should have special treatment for whatever reason. The principle of equal treatment would seek to intervene in this scenario but also it imperative to consider the principle of party autonomy which allows the parties to choose the terms as they see fit and that courts should not interfere. There is a view that for an arbitration agreement to be valid "there must be a conferral of reciprocal and mutual rights or obligations on both parties."[131]

Some scholars have argued that asymmetric arbitration clauses may be unable to attract universal acceptance due to the fact that in their very nature they violate the principle of equality enshrined

[129] Supra note 48

[130] UNCITRAL, Article 18

[131] Adrian Briggs, 'One-Sided Jurisdiction Clauses: French Folly and Russian Menace: Banque Edmond de Rothschild v X' (2013) 2 Lloyds Maritime & Commercial Law Quarterly accessed 29 December 2021

in international and regional human rights instruments.[132] For instance, Article 3 of the Banjul Charter provides for the right to equality before the law and equal protection of the law and Article of Inter-American Charter of Human Rights provides for the right to equal protection stating that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."[133] Also, there are arguments which state that asymmetric arbitration clauses are not in line with ECHR which provides for a fair trial[134]; the argument is that Article 6 of ECHR provides for equal rights before a particular forum and not the choice of forum hereby making the general acceptance of asymmetric arbitration clauses within European countries more potent.

In addition to the above, some authors argue that such clauses are inherently unfair and should be unenforceable in all circumstances thereby arguing that there should be no general acceptance of asymmetric arbitration clauses.[135] Additionally, some scholars argue that although there is no authority that will invalidate an asymmetric arbitration clause per se, countries such as Russia that have had a consistent approach in relation to asymmetric arbitration clauses, for instance, finding that they breach a party's equality[136], and therefore general acceptance unlikely. Moreover, there is a view that arbitration agreements that only confer the right to initiate proceedings to one party are potestative in nature which means they depend "entirely on the intention of only one of the Parties," as such potestative clauses have the ability to exceed the limits of party autonomy.

This seems to be the main bone of contention between the enforcement of unilateral arbitration clauses. Whether the courts interfere and enforce the principle of party autonomy or the courts uphold the unilateral arbitration clause and not interfere in line with the principle of party

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[132] Peter Ashford, 'Is an Asymmetric Disputes Clause Valid and Enforceable?' (2020) Arbitration: The Int'l J. of Arb., Med. & Dispute Mgmt https://www.foxwilliams.com/uploadedFiles/Peter%20Ashford%20CIArb%20article%5B1%5D.pdf accessed 29 December 2021

[133] Banjul Charter, Article 3.

[134] Bas van Zelst, 'Unilateral Option Arbitration clauses: An unequivocal choice for arbitration under the ECHR?' (2018) Maastricht Journal of European and Comparative Law https://doi.org/10.1177/1023263X18755968 accessed 30 December 2021

[135] *Supra* note 115

[136] Aleksandr Struzhko, 'Belarus: Asymmetrical Arbitration Agreement: Validity And Enforcement.' (Mondaq, 8 February 2021) . https://www.mondaq.com/arbitration-dispute-resolution/1033446/asymmetrical-arbitration-agreement-validity-and-enforcement accessed 30 December 2021

autonomy. However, there have been arguments that, applying the principle of equality of treatment in order to annual a unilateral arbitration clause as was the approach taken by the Russian courts in the *Sony Ericson* case is failing to understand the principle of equality of treatment as the only kicks in once proceeding have begun.[137]

The principle of equality of treatment is underpinned by fairness, which entails that contract should be "both economically and generally viable, fair and reasonable". Mupangavanhu explains the tension that can arise between party autonomy and equality of treatment, in the South African context he states that contractual term will not be enforced where "where such enforcement would be unjust and unreasonable." In the case of *United Reformed Church, De Doorns v President of the Republic of South Africa and Others* (2015)[138] the court stated that "... in determining the weight to be attached to the values of freedom and dignity and equality the extent to which the contract was freely and voluntary concluded will be a vital factor... the role of the courts is not merely to enforce contracts but also to ensure that a minimum degree of fairness which include consideration of the relative position of the contracting parties, is observed ..."[139]

Furthermore, the principle of mutuality also flows from equal treatment in the sense that it argues that all parties should be bound or neither is bound. Essentially all the parties to the contract should be bound to perform their duties and obligations or the law will treat the contract as none of them are bound. The most famous mutuality case is that of *Harrison v. Cage* (1698)[140] which included a promise to marry. However, there seems to be a general understanding that unilateral contracts do not require mutuality, and to reiterate the English case of *Baron v Sunderland Corp* (1966), when asked if mutuality "is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration." The courts stated that "Mutuality is not an 'essential ingredient' under English law, but it is in some jurisdictions."[141]

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[137] *Supra* note 48

[138] United Reformed Church, De Doorns v President of the Republic of South Africa and Others [2015]

[139] Ibid

[140] Harrison v. Cage [1698]

[141] B*aron v Sunderland Corp* [1966]

Another principle that flows from equal treatment is the principle of unconscionability which argues that an agreement is so one-sided that it would remise of the court to enforce such an agreement. This has been an argument that has been used to support equal treatment and against unilateral arbitration agreements that they are so one-sided that allowing parties to arbitrate or litigate on those terms would be unfair. Such a principle seeks to look at the bargaining powers of the parties to see if a stronger party forced their will on the weaker party.

Under English law, the principle has been codified under Article 2 of Uniform Commercial Code which states that "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." A similar approach was reached in the English case of *Nagrampa v Mailcoups Inc* where the courts found that an asymmetrical arbitration clause was so grossly one-sided that it was unconscionable.

# CONCLUSION

This thesis sought to examine the acceptance and legal validity of asymmetrical arbitration clauses under international commercial law. This search was brought about by the uncertainty associated with such agreements and subsequently the enforcement of arbitral awards made pursuant to asymmetrical arbitration agreements. This study looked at different jurisdictions and found that although the majority of courts in different jurisdictions had not dealt with a dispute concerning unilateral option clauses, because of how their legal system was set up, most of them are likely to uphold and enforce arbitration agreements that contain unilateral option clauses and also enforce arbitral awards that were made pursuant to unilateral arbitration agreements.

In addition to this, this study also found that there were a handful of jurisdictions that were on the fence in relation to such agreements. In other words, it is still uncertain if such agreements would be held as valid and therefore enforceable due to either conflicting judgements relating to unilateral option clauses coming from the courts of that particular jurisdiction or how the legal system was set up. This uncertainty did not translate to these jurisdictions failing to enforce and recognize arbitral awards made pursuant to asymmetrical arbitration clauses as the majority of the countries were state parties to the New York Convention, although that possibility could not be excluded completely. Furthermore, this study also shows a significant number of jurisdictions that did not recognize and uphold unilateral option clauses on the basis that they violated the equality principle.

In relation to the recognition and enforcement of arbitral awards made pursuant to an asymmetrical arbitration agreement, this study also found a mixed bag as some countries which did not uphold the initial asymmetrical arbitration agreement were likely to enforce the arbitral award made under such an agreement. In a nutshell, this study found that the uncertainty around such arbitration clauses is a contention of legal principles, the principle of party autonomy on one hand and the party of equality of treatment on the other. However, it can be argued that asymmetrical arbitration agreements are gaining acceptance under international commercial law.

My general analysis of asymmetrical arbitration clauses is that they are deeply problematic and even though the outcome of each case is based on its, I concur with arguments made by scholars such as Smit that in their very nature asymmetrical arbitration clauses are inherently unfair and should be set aside by the courts. Although there is some merit to the arguments of freedom to contract and the doctrine of sanctity of contract, the majority of cases where such cases have been upheld the courts have not examined the context or environment leading to the conclusion of such agreements to look at the bargaining powers of the party or any other influencing factors pushing a party to agree to such unfair terms. In my view, for the courts to bury their heads in sand and uphold such agreements merely to satisfy principles such as freedom to contract or sanctity of contract without looking at the context in which such agreements were concluded is deeply problematic.

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