

# VALIDITY OF ASYMMETRICAL CLAUSES IN ARBITRATION AGREEMENTS

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## ABSTRACT

*Arbitration offers a flexible and expedited mechanism for the settlement of disputes between the parties. In order to initiate the arbitration proceedings a valid arbitration agreement between the parties is required. In some types of contracts, such as financing, the parties prefer to enter asymmetrical or hybrid arbitration clauses that allow one party to choose between arbitration and/or litigation, while the other party is confined to a single option for dispute settlement. The asymmetric arbitration clauses provide one party greater advantage in lieu of certain concessions to the other party, which may lead to unequal treatment between the parties. The study concludes that each jurisdiction has treated asymmetric clauses in a different manner with conflicting decisions; however, in the majority of jurisdictions have enforced the asymmetrical arbitration clauses as valid, considering that such dispute resolution clauses suit the parties' situations and the nature of the contract. The research recommends that asymmetric arbitration clauses must be drafted carefully by limiting the jurisdictions under which the party in benefit of the asymmetric arbitration clause may bring the claims, instead of giving unlimited jurisdiction..*

**Keywords:** UNCITRAL Model Law, Asymmetrical, hybrid, non-Mutual arbitration clause, Enforcement of Award

## INTRODUCTION

The accepted universal rule is that administration of justice must be operated by the principle of equality between the parties (Alvaro López de Argumedo Piñeiro & Constanza Balmaseda, 2013). Accordingly, the parties to the dispute may agree to submit their difference either to courts for adjudication or to arbitration, with an equal choice to choose. However, there are certain agreements that permits one party to choosing the option of either arbitration and/or litigation, but the other party is not allowed the same right but is bound by the choice of its counterpart, which are referred to as asymmetrical or hybrid arbitration clauses.

The principle of party autonomy in arbitration has been recognized under the UNCITRAL Model Law (Article 19). In respect of the contents of arbitration agreement, neither the Model Law nor the New York Convention, 1958, specified the details (Morten Frank, 2019), therefore, the parties are free to draft an arbitration clause, with a clear commitment to submit the dispute to arbitration.

Arbitration is a private dispute settlement process that permits the parties to choose the arbitration procedure and applicable rules (Zaheeruddin M, 2020). It is common to have dispute settlement agreements providing one or both parties the power to choose between two options, such as two jurisdictions, litigation and arbitration, or arbitration and mediation. These clauses are often referred to as asymmetric, hybrid clauses ((Alvaro López de et al., 2013), non-mutual, non-synallagmatic, sole option; 'trumping'; and unilateral option agreements (Morten Frank, 2019).

The symmetric clause permits all the parties to the agreement to resort to the same dispute settlement mechanism, whereas the asymmetric or hybrid clause confers the power to choose the method of dispute settlement to one (or some) of the parties, and the other/s are bound by the former's option (Alvaro López de et al., 2013). This type of dispute resolution clauses creates unequal treatment between the parties and poses uncertainty for the enforcement.

## OBJECTIVE OF THE STUDY

The object of this paper is to examine the validity of asymmetrical arbitration clauses in different jurisdictions with the help of decided case law. There are conflicting decisions from the courts with regard to enforcing the asymmetrical arbitration clauses; however, in some specific types of contracts, courts are in favor of the enforcement of the asymmetrical arbitration clauses.

## METHODOLOGY

The present research adopted a formal legal method aimed at studying the approach of courts from different jurisdictions while dealing with the asymmetric or hybrid arbitration clauses. The paper analyzes the judicial decisions to find out the reasons on which courts justified the enforcement of the asymmetrical arbitration clauses.

## DISCUSSION

### **Asymmetrical or Hybrid Arbitration Clause**

In a symmetric arbitration clause, parties to the agreement have the equal right to invoke the arbitration. Whereas asymmetric or unilateral clauses allow one party greater options than the other for selection of a forum for dispute settlement (Emily Fox, Maura McIntosh, Vanessa Naish, Ceri Morgan & Tiphaine Leverrier, 2025). Further, in an asymmetrical arbitration clause, one party has the option to choose between arbitration and/or litigation or multiple jurisdictions (Miguel Gómez Jene, 2019), while the other party is limited to a single option for dispute settlement (Fang Zhao, Han Ma & Linlin Li, 2024). The asymmetrical clauses grant one party to start either arbitration or litigation in courts, but the other party has no such option and is bound by the choice of its counterparty (Gary B Born, 2025).

The symmetrical arbitration agreements are based on mutuality and equal treatment between the parties, but in asymmetric arbitration agreements, only one party has the option to choose arbitration, and the other party has the right to choose between arbitration or litigation. There are certain other types of dispute settlement agreements that offer the choice between adjudication in courts of specific jurisdiction and arbitration (Alvaro López de et al., 2013). Depending on the parties' commercial disparity at the time the contract was signed, one party may insist on an 'asymmetric' or 'unilateral' jurisdiction dispute settlement clause, which gives that party the right to initiate the proceedings but does not provide a similar choice to the other party (Annet van Hooft, 2016).

The asymmetrical arbitration clauses, also known as hybrid, split, or optional dispute resolution clauses, allow one party to the arbitration agreement to initiate the arbitration proceedings, and the opposite party has no such right. The asymmetrical arbitration clauses are generally used in financing transactions to enable the lender flexibility to sue the assets of the unpaid debtor wherever it is possible; such clauses are also common in film licensing, construction contracts, software solution (Raluca papadima, 2019), distribution and license agreements (Alvaro López de et al., 2013).

Asymmetric clauses are viewed with suspicion, and the courts refuse to give effect to asymmetric clauses on the grounds that they are not reciprocal, not having the consent from both parties, which is a pre-requisite in arbitration, and submission of a dispute to arbitration contains a condition of compliance (Alvaro López de et al., 2013). Asymmetrical clauses are held unenforceable in some jurisdictions because the promise to arbitrate is illusory (Raluca papadima, 2019).

In respect of enforceability of asymmetric arbitration clauses, the approach of the courts is conflicting, which is presented in the following paragraphs:

## Australia

In *PMT Partners Pty Ltd (In Liq) v. Australian National Parks & Wildlife Service* (1995), the Australian High Court affirmed the legality of asymmetric arbitration clauses, which require parties to submit their dispute to arbitration upon meeting specific requirements. Similarly, in *Mulgrave v. Hagglunds* (2001), the Queensland Court of Appeal upheld the legality of an hybrid or asymmetric clause that allows arbitration on the happening of a certain event.

## People's Republic of China (PRC)

Article 7 of the PRC Interpretation of Arbitration Law 2005, provides that asymmetrical arbitration agreements are invalid. In *Geox Trading Limited v. Riqing Group-Ricco Rachel Trading Co., Ltd.* (2015), the asymmetrical arbitration clause provided both seller and buyer the choice of arbitration; additionally, the seller is permitted to approach the court at the place of the buyer. The court held that this agreement is invalid under Article 7 of the PRC law. The similar decision was followed in *Chen v. DBS Bank* (2016) and *Kangda v. Xinyangguang* (2020).

In *Jiangmen Jiangci Electrician Co., Ltd. v. Yunnan Copper Co., Ltd.* (2013), the Supreme People's Court of China ruled that under the asymmetrical clause, the choice of court jurisdiction remains valid even though the optional arbitration agreement is invalid. Similarly, in the *Fiber Optic Communication Network Company Limited v. China Development Bank* (2022), the Beijing Financial Court held that an asymmetrical arbitration agreement is valid provided the other party did not object to the arbitration.

## Hong Kong

In Hong Kong, the asymmetric arbitration clauses are enforceable (Supreme Federal Court of Germany, 1998). In *China Merchants Heavy Industry v. JGC Corporation* (2001), the party who approached the court first has not followed the conditions stated in the asymmetrical clause; therefore, the other party pleaded the court to stay the proceedings in the court. The court applied article 8 clause (1) of the UNCITRAL Model law, and held that the counter party has the legal right to submit the dispute to arbitration since there is an enforceable arbitration agreement.

## Singapore

In *Dyna-Jet Pte. Limited. v. Wilson Taylor Asia Pacific Pte. Limited* (2017), the court upheld the validity of the asymmetrical arbitration clause.

## Russia

In *Sony Ericsson Communication Rus Limited Liability Company v. Russian Telephone Comp. CJSC* (2012), the court held that an asymmetric clause that gives an unfair advantage to one party over the other party is against Russian law (Article 18). Similarly, in the *Emerging Markets Structured Products B.V. v. Zhilindustriya Limited Liability Company* (2016), the court referred to the Sony Ericsson case (2012), and held that the asymmetrical clause is not enforceable.

In *Red Burn Capital v. Zao Factoring Comp, Eurocommerz* (2009), the Russian Federal Court of Arbitration confirmed the validity of the asymmetrical arbitration clause. In *Piramida LLC v. BOT LLC* (2015), both parties have an option to choose between a court or arbitration; the court held that such a clause is valid and enforceable.

## India

In India, due to inconsistent decisions, the validity of an asymmetrical arbitration clauses is not clear. In

Union of India v. Bharat Engineering Corpo. (1977), the High Court of Delhi held that asymmetrical arbitration agreement is invalid. However, in New India Assurance Company Limited v. Central Bank of India & Others (1984), the High Court of Calcutta held that an asymmetrical arbitration clause constitutes an enforceable arbitration agreement. Similarly, in TRF Limited v. Energy Engineering Projects Limited (2017), the Indian Supreme Court upheld the validity of an asymmetrical arbitration clause that allows one party to nominate the sole arbitrator without the consent of the other party.

## **United Arab Emirates**

In Dubai the approach is not clear due to the following conflicting decisions. In Appeal No. 116 of 2018, Commercial Appeal, the creditor (Bank) filed a case before the Dubai courts as the dispute settlement clause permits the creditor to choose between arbitration and litigation in courts. The Dubai Court of Cassation (COC) upheld the legality of the proceedings. Similarly, in In Appeal No. 1522 of 2023, the Dubai COC upheld the validity of asymmetrical arbitration clause. However, in Appeal No. 735 of 2024, the court refused to enforce the asymmetrical arbitration clause.

## **United Kingdom**

In Baron v. Sunderland Corporation (1966), the court held that an arbitration agreement would only be enforceable if both parties were entitled for mutual rights to refer disputes to the arbitral tribunal; consequently, agreement giving advantage to one party and not to the other is invalid. In Pittalis v. Sherefettin (1986), the English court rejected the argument of mutual or symmetrical rule and held that a hybrid dispute settlement clause is valid as it suits both parties.

In NB Three Shipping Limited v. Herebell Shipping Limited (2004), the dispute settlement clause contained both parties having the option of litigation in courts; in addition, one of the parties is empowered with the option to resort to arbitration. The court upheld the validity of the asymmetrical clause.

In Law Debenture Trust Corporation Public Limited Company Vs. Elektrum Finance BV & Others (2005), the agreement contained both parties having the option to resort to arbitration, and further particular parties had the option to resort to the English Court; the court upheld the legality of the hybrid arbitration clause. Similarly, in Deutsche Bank AG v. Tungkum Limited (2011), the court held that asymmetrical dispute settlement clauses are perfectly valid.

In Mauritius Commercial Bank Ltd., v. Hestia Holdings Ltd., Sujana Universal Indus (2013), the dispute settlement clause allowed one of the parties to resort to English courts and also the courts of any other jurisdiction; the court upheld the validity of the hybrid clause. In Etihad Airways Public Joint Stock Company v Lucas Flother (2020), the English Court of Appeal upheld the validity of the asymmetric arbitration clause under Article 25 of the (recast) Brussels Regulation ( JIBFL, 2025). Similarly, in Barclays Bank PLC v PJSC Sovcombank (2004), the court enforced the asymmetrical arbitration clause, which enabled the claimant to initiate arbitration and restrained the respondent from continuing proceedings in the Russian courts.

## **United States**

The courts in the United States applied the principle of unconscionability or non-mutuality to invalidate the asymmetrical arbitration clauses. In Martinez v. Master Protection Corporation (2004), the agreement requires the employees to submit all claims to arbitration, but secure the employer's right to obtain injunctive relief from the court for particular causes of action lacks equality or mutuality; therefore, the court rules that the asymmetrical arbitration section was not enforceable. Similarly, in Armendariz v. Foundation Health Psychcare Services, Incorporation (2019), the court ruled that asymmetrical arbitration clauses are a lack of mutuality and therefore not enforceable unless there is a "legitimate commercial need" or a "reasonable excuse for this

“absence of mutuality.

In following cases, courts upheld the validity of an asymmetrical clauses: In Nghiem v. NEC Elecs., Inc. (1994), the court held that asymmetrical arbitration clause is not unfair; therefore, it is binding on the parties. Similarly, in Moskalenko v. Carnival plc (2019), the court held that there is no reason why justice should require a perfectly equal remedy and upheld the validity of the asymmetrical arbitration clause. In M.A. Mortenson Company v. Saunders Concrete Company Incorporation (2012), the court rejected the argument of unconscionability and upheld the validity of the asymmetrical arbitration agreement.

## Australia

In PMT Partners Pty Limited v. Australian National Parks & Wildlife Service (1995), the High Court of Australia upheld the validity of an asymmetrical arbitral clause.

## Ukraine

The Ukrainian courts held that the dispute settlement clause offers a choice between litigation and arbitration or between two or more jurisdictions held as valid (Raluca Papadima, 2019).

## Asymmetric Clauses in Europe

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

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

In Societa Italiana Lastre SpA (SIL) v Agora Limited Liability Company (2025), the Court of Justice of the European Union (CJEU) upheld the legality of the asymmetrical jurisdiction clause under Article 25 of the Brussels Regulations (recast).

## Italy

In Sportal Italia v. Microsoft Corporation (2011), the Milan Court of Appeal ruled that the asymmetrical arbitration clauses are valid under Article 1331 of the Italian Civil Code, 1942.

In Grinka in liquidazione v. Intesa San Paolo, Simest (2012), one party is under obligation to refer the dispute to the jurisdiction of English Courts while the other party has an option to choose between Italian courts or any other appropriate jurisdiction. The Supreme Court of Italy, by applying Art. 23 of the Brussels Regulation, upheld the validity of the asymmetrical dispute settlement clause. Similarly, in Simest HSBC and Sport Italia v. Microsoft Corporation (2011), the court held that asymmetrical clause was valid according to the Brussels Regulation 44 of 2001.

## France

In Madame X . c. société Dubus case (2012), the French Supreme Court rejected the enforcement of the asymmetric clause that allowed one party to choose jurisdiction and not the other party.

In SCI ICH v. Crédit Suisse (2015), the money lender has the option to choose any appropriate jurisdiction, whereas the debtor is limited to a single jurisdiction (Zurich, Switzerland). The French Supreme Court held that

the asymmetrical arbitration clause is invalid since it contains a potestative condition. Similarly, in the case of X v. Banque Privée Edmond de Rothschild (2012), the dispute settlement clause contains no option for the non-choosing party to determine the court in which it could be sued, due to the arbitrary character of the clause, the Supreme Court of France held that the asymmetric clause was invalid.

In order to justify asymmetric clauses, parties must have an equal bargaining power (Luxembourg Tribunal Case No. 153 636, 2014). In Danne case (2015), the French Court of Cassation held that the right to bring proceedings before “any other competent tribunal” was not enforceable. When both parties to the asymmetrical arbitration clause are on equal footing with equal bargaining power, this may be considered as just and reasonable, but when one party is strong and the other is weak, for example, employer and employee or seller and consumer, the asymmetrical clauses lead to unequal treatment between the parties.

**In following cases, the courts in France approved the validity of asymmetric arbitration clauses:**

In Sicaly v. Grasso Stacon NV. and Grasso Stacon Koninklijke Machine Fabrieken NV (1974), the French Supreme Court upheld the validity of asymmetrical arbitration clauses according to Article 14 of the French Civil Code. In Apple Sales International v eBizcuss (2015), the French Supreme Court upheld the validity of the asymmetric clause since it clearly identified the courts in which the non-choosing party could initiate the legal proceedings. In another case, the dispute settlement clause offers each party entitled for two options: arbitration or judicial proceedings before the competent court at the location where the buyer is residing; therefore, the court held that the asymmetrical arbitration clause provides equal opportunity to both parties, hence it is valid (Cass. Iere Civl., 2013).

The decisions from France suggest that the asymmetrical clauses are not invalid unless they provide unlimited options to the party benefitting from them, in other words, when they are arbitrary in nature (Alvaro Lopez et al., 2015). Accordingly, the French Cassation court accepted the legality of the hybrid clause (Judgement of Cour de Cassation, Chambre Civile 1, 1990).

### **Bulgaria**

The Supreme Court of Bulgaria refused to enforce the asymmetric jurisdiction clause (Alvaro López de et al., 2014), since asymmetrical arbitration clauses are invalid under Bulgarian law as they are potestative in nature (Raluca papadima, 2019).

### **Spain**

There are contradictory decisions in Spain with regard to the validity of asymmetrical clauses. In Case No. 147 (2013), the dispute resolution clause provides the parties choice between courts of Holland jurisdiction or and arbitration under the Netherlands Institutional Arbitration, however, a party ignoring the clause filed a claim, before the court of Madrid. The Commercial court of Madrid dismissed the claim stating that Spanish courts lacked jurisdiction based on the agreement between the parties. On appeal, the Appeal Court of Madrid, Spain, upheld the validity of the asymmetrical clause under Spanish law (Alvaro López de et al., 2014).

### **Germany**

In Germany, asymmetrical arbitration clauses are *per se* not invalid unless they violate German public policy (Raluca papadima, 2019). In one case the German Supreme Court held that an asymmetric clause that gives only the option of choosing between arbitration and jurisdiction is abusive in nature (OLG Bremen, 2006). Similarly, in another case the court rules that an asymmetrical arbitration clause is unfair as it imposes an unnecessary burden on the non-beneficiary party of the asymmetrical clause (Federal Supreme Court of Germany III ZR 133/97, 1998).

In a subsequent decision, the court held that asymmetrical clauses are valid if the predisposing party exhibits a justified interest in the choice between arbitration and courts and the exercise of such right is clearly regulated (Streitbeilegungsklauseln, 2017).

The early national court decisions demonstrate that asymmetric arbitration clauses are invalid, unless both

parties were entitled for mutual rights to submit disputes to arbitration. In recent decisions rejected the claim of mutual consent argument and upheld the validity of asymmetrical arbitration agreements based on the substantive validity of the agreement (Gary B Born, 2025). In *Sablosky v. Edward S. Gordon Company* (1989), the US Court rejected the doctrine of mutuality and upheld as valid considering these agreements like any other contract.

Most of the national courts, as cited above, upheld the substantive validity of the asymmetrical arbitration clauses provided the asymmetric clauses are not ambiguous; while drafting such a clause, the party drafting must properly organize the choice of court and also clearly identify the jurisdiction of specific courts instead of unlimited judicial access.

The parties, while agreeing on a dispute resolution clause, must take into consideration of the enforcement of the award or judgement. If it is a judgement of the court, it may not be enforceable in another country unless there is an existing treaty between the states. Whereas an arbitral award is enforceable under 172 jurisdictions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (Uncitral, 2005). The arbitration mechanism is a preferable option over adjudication in courts, but on many occasions the suitability of one mechanism or another cannot be decided until the time at which the dispute arises (Alvaro López de et al., 2014).

## CONCLUSION AND RECOMMENDATION

The overwhelming increase in customer loyalty schemes since the 1990s has contributed in customer relationship management and encouragement of loyalty among customers of different businesses. Customer loyalty is crucial to the life of a business, and has caused the rise and fall of many businesses around the world. More than ever, businesses are in a stiff competition to get and retain loyal customers mostly because of the breakdown of geographical borders by digital technologies that once limited their customer reach.

This increasing stiff competition has compelled businesses to design strategies and programmes aimed at building loyalty in customers. Among these, loyalty card schemes are the most used. Hence, since 1990 when the scheme became deeply rooted in the business world following the success of the AAdvantage loyalty programme, its growth has been explosive. Nonetheless, scholars have contrasting dispositions toward the scheme: some are of the opinion that loyalty programmes do not lead to customer retention and loyalty, some strongly opine that it leads to customer retention and loyalty while others have decided to sit on the fence. To this end, this study deigned to analysis the use of LCS as a strategic tool for customer loyalty. And based on thorough analysis of available literature, reports and surveys, this study concludes that indeed LCS is a strategic tool in building customer loyalty and that local businesses in Nigeria should adopt it. The following recommendations are therefore given:

- Businesses should avoid imitating the LCS of their competitors and instead focus on designing their own unique schemes that fit the individual profiles of customers and raises the cost of switching to a competitor
- Businesses should invest in technologies that make it easy for customers to join and use loyalty cards
- Since customers have issues with the redemption of rewards, businesses should create a flexible reward redemption plan
- The data collected from customers should be optimally to create marketing and advertising campaigns that are in line with customers' preferences
- Businesses in developing countries such as Nigeria should learn from the successes and failures of brands in developed countries that use LCS

## Implication for Managers

The study analyzed LCS and its relationship with customer loyalty, and its findings have implications for managers generally, and in particular, those in the area of CRM. Managers can design LCS in line with the findings of this study as it demonstrates important factors that drive LCS and customer loyalty and retention.

Managers should fuse LCS into their CRM portfolio as having a strong base of loyal customers has significant impact on organizational performance of companies. In doing this, they should encourage customers' complete involvement. Loyalty schemes can be made more potent by identifying the main pain-points of customers and subsequently creating pain relievers.

Having a good relationship with customers have the triple-fold benefit of improving the image of a business such that customers do referrals on its behalf to friends, families and colleagues, stimulating customer loyalty and retention for long-term benefits and ultimately, impacting profits positively. Hence, businesses must maintain a good relationship with customers by sticking to their promises, adding exciting features to loyalty schemes such as gamification and provide personalized treatment for customers. This is important for a business because as the study highlights, it costs business 5-7 times more to acquire a new customer than to retain existing ones.

The benefits of having loyal customers cannot be overemphasized. In lieu of this, managers should ensure that a great deal of market research is carried out before, during and after the design and implementation of a LCS in order for it to always reflect current business and customer realities.

## LIMITATION AND FURTHER RESEARCH

This study relied on secondary data and the experience of businesses and consumers in developed economies. Further studies can therefore use primary data and quantitative survey to find out the level of LCS awareness among Nigerians, Nigerian businesses and its impact on their organizational performance.

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**Received:** 25-Dec-2023, Manuscript No. AEJ-24-14362; **Editor assigned:** 28-Dec-2023, PreQC No. AEJ-24-14362 (PQ); **Reviewed:** 11-Jan-2024, QC No. AEJ-24-14362; **Revised:** 16-Jan-2024, Manuscript No. AEJ-24-14362 (R); **Published:** 22-Jan-2024

