# VI. THE LEGITIMACY OF ASYMMETRICAL ARBITRATION CLAUSES IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

Despite the contrast in the parties' positions, unilateral dispute settlement provisions have garnered widespread recognition from judicial tribunals due to their consensual character. Nevertheless, due to specific flaws inherent in their one-sided character, similar provisions have been rejected in a few cases in the past. Apart from causing substantive imbalance, they foster procedural inequality by allowing one of the parties to choose the venue after the dispute has occurred. Their legitimacy, however, has never been challenged against the standard set out in Article 18 of UNCITRAL Model Law, which demands equal treatment of parties in arbitral proceedings.This paper aims to examine such asymmetrical arbitration clauses provisions under Article 18 of UNCITRAL Model Law, taking inspiration from the judicial handling of similar clauses under Article 6 of the European Convention on Human Rights, which is the basis of Europe's need for equitable treatment. Thus, the article's subsequent sections explore the nature and scope of Article 18 in order to determine if it may be used to challenge unilateral dispute settlement provisions. Finally, the paper suggests an objective three-step test that judicial courts and arbitral tribunals might use to resolve this majorly unresolved issue.



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## I. INTRODUCTION

International arbitration has always been based on the basic premise of party autonomy.[1] It enables parties to craft an arbitration agreement that is uniquely tailored to the circumstances of their relationship.[2] On this basis, business parties often engage in one-sided dispute resolution arrangements that favour one party, notably with respect to forum selection.[3]

Generally, such arrangements are made for the purpose of resolving disputes in connection with financing agreements in order to balance the risk that a lending party carries in such transactions. To provide a local illustration, a bank providing a line of credit, to an unsecured or partially secured debtor would include an asymmetrical arbitration clause to account for the additional risk assumed by them. It is feasible, and indeed extremely probable, that the borrower's assets, the guarantor's assets, and the borrower's place of business are situated in separate countries.[4] As a result, if the lending party is not allowed to start actions in any of the relevant jurisdictions, the borrowing party may successfully avoid any obligation.

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[1] Ahan Gadkari, 'Single-Party Arbitrator Nomination as a Ground of Annulment in India' *(American Review of International Arbitration*, 28 Mar. 2022) <http://blogs2.law.columbia.edu/aria/single-party-arbitrator-nomination-as-a-ground-of-annulment-in-india/> accessed 11 April 2022.

[2] Lauren D. Miller, 'Is the Unilateral Jurisdiction Clause No Longer an Option: Examining Courts' Justification for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses' (2016) 51 Tex. Int'l L.J 321.

[3] International Chamber of Commerce, 'Unilateral Jurisdiction Clauses in International Financial Contracts' (2015) Doc. No. 470/1248rev 1.

[4] ibid 4.

To address these special needs, parties include unilateral dispute resolution provisions (**"UDC"**) in their contracts. Under such terms, the beneficiary party has the option of beginning legal procedures before any of the forums available, whereas the opposing party is limited to initiating proceedings before a single forum. Such a provision considerably benefits the beneficiary party since it enables such party to examine the facts of a particular dispute and choose the most appropriate venue.

Despite the seeming imbalance, business parties tolerate the inclusion of such one-sided terms in order to get some additional advantages deemed more significant than remedy parity. For example, during contractual discussions, party A insists on the inclusion of a UDC, which party B agrees subject to liability limitations. If A and B accept each other's considerations, their exchange of advantages leads to a mutually advantageous agreement that includes, among other provisions, a one-sided dispute resolution clause.

However, party autonomy must be constrained by legal obligations or public policy reasons. These provisions have been called into doubt in several cases as a result of the imbalances they generate between the parties, notwithstanding the parties' assent during contract completion.[5] Indeed, some academics, like Hans Smit,[6] have argued that such terms are obviously unjust and discriminatory towards the economically weaker party that is often coerced to engage into such agreements. In this respect, the doctrine of unconscionability,[7] the principle of mutuality of remedy,[8] the right of access

[5] Hans Smit, 'The Unilateral Arbitration Clause: A Comparative Analysis' (2009) 20(3) Am. Rev. Int'l Arb 391, 391.
[6] ibid 403.
[7] Alan Scott Rau, *Asymmetrical Arbitration Clauses – The United States, in Jurisdictional Choices in Times of Trouble* (Bachir Georges Affaki and Horacio Alberto Grigera Naón eds., Kluwer Law International 2015) 21, 26
[8] *Baron v. Sunderland Corp.* [1966] 1 All ER 349, 351; *Norris v. Fox* [1891] 45 F. 406, 407.

to court,[9] the potestative character,[10] and the general requirement of equality[11] have all been used to invalidate such provisions.

In the context of arbitration, the demand for equal treatment derives from Article 18 of the UNCITRAL Model Law,[12] which strives to harmonise national practises and has been adopted verbatim by states with a variety of legal, social, and economic systems. This will be discussed in detail in the next section.

This paper is divided into six sections. Section I introduces the subject and sets the scope of the paper. In Section II, the author examines the implementation of Article 18 of the UNCITRAL Model Law in assessing the validity of UDCs. The author begins by discussing some significant reasons for invalidating such provisions. Following that, Sections III and IV have defined the scope of Article 18 which emphasizes both parties being treated equally to illustrate whether it contains a claim for the invalidation of such terms. In Section V, the author suggests a three-step procedure for establishing the validity of UDCs according to Article 18 of the UNCITRAL Model Law. Finally, Section VI summaries the paper's findings and concludes.

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[9] *Golder v. The United Kingdom* [1975] 1 EHRR 524. (Golder)

[10] *Ms. X v. Banque Privee Edmond de Rothschild* [2012] 1e civ. 983. (French Cour. de Cassation) (Rothschild)

[11] *Russkaya Telefonnaya Kompaniya v. Sony Ericsson Mobile Communications* [2012] Case No. VAS – 1831/12 (Rus. LLC Supreme Arbitrazh Court). (Sony Ericson)

[12] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments* (2008) 14, <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (accessed 01 April 2020). (Model Law)

## II. VALIDITY OF CLAUSES RELATING TO UNILATERAL DISPUTE RESOLUTION

In general, common-law nations such as the United Kingdom,[13] the United States,[14] Hong Kong,[15] Singapore,[16] and others have accepted UDCs proceeding on the argument that the applicable norm of equality only applies to behaviour or treatment inside the forum or during the proceedings. However, the stance of civil law jurisdictions is not as fixed in this respect, as Bulgaria,[17] China,[18] and Russia[19] demonstrate have declared such provisions null and void due to the unequal nature of their treatment, whereas France,[20] and Germany[21] have maintained UDCs to be of a potestative nature on a case-to-case basis.

UDCs are fundamentally based on the notion of party autonomy. Despite the fact that this concept is the bedrock of contracts and arbitration, it is not without limitations. For example, in a football game, if team A and team B mutually agree to allow the former to score goals not only with their feet but also with their hands, such an agreement would violate the game's basic regulations. Similarly, if a UDC breaches some fundamental values, beyond the permissible thresholds of party autonomy, it cannot be justified. Several concepts for invalidating UDCs have been addressed in this section to expose the flaws in these provisions.

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[13] *Law Debenture Trust Corp. plc v. Elektrim Fin*. [1999] 1 WLR 1591 (EWHC).
[14] *Sablosky v. Edward S. Gordon Co*. [1989] 535 N.E.2d 643 (N.Y.) 646.
[15] *Anzen Ltd. v. Hermes One Ltd*. [2016] 1 UKPC. (Privy Council)
[16] *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd.* [2017] 1 Lloyd's Rep. 59 (Singapore HC).
[17] [2011] Commercial Case No. 1193/2010 (Bulgarian Supreme Court of Cassation).
[18] Zheng Sophia Tang, 'Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts: A Pragmatic Study' (2012) 61(2) Int'l & Comp. L.Q. 469, 469.
[19] *Sony Ericson* (n 10).
[20] *M.J.A. v. Apple Sales* [2015] Cass. civ., 1ère (French Cour. de Cassation) (Apple Sales).
[21] [2003] Case No. III ZB 06/02(German Bundesgerichtshof)

### A. Doctrine of Unconscionability

At times, arbitration agreements are one-sided simply because the negotiating abilities of the contractual parties are different. Arbitration agreements between employers and workers, vendors and customers, health maintenance organisations and patients, franchisors and franchisees, and others are impacted by unequal bargaining power.[22] UDCs that come from a discussion between two parties with such disparate interests are often accepted by the weaker party, despite the fact that the weaker party receives no advantages in return. Such provisions, which lack mutuality of remedy[23] have been declared unconscionable by courts, most notably in the United States.[24] Additionally, several basic principles of contract law preclude the enforcement of unconscionable agreements.[25] The Restatement of Contracts[26] and the UNIDROIT Principles[27] include two of the most significant rules in this respect. While the phrase "unconscionable" is used in the former, the latter refers to "gross discrepancy," which has been interpreted to be founded on the same premise.

#### *1. The Principle of "Gross Disparity"*

In accordance with Article 3.2.7 of the UNIDROIT Principles,

> A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract

[22]Uniform Arbitration Act 2000 (30 R.U.A.A.) s 6, Comment 7 (2000), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af>.
[23] *Richard Harp Homes, Inc. v. Van Wyck* [2007] 262 S.W.3d 189 (Ark. App) 192-193.
[24] Gary B. Born, *International Commercial Arbitration* (2014) 856 (Born); *Shroyer v. New Cingular Wireless Services Inc.* [2007] 498 F.3d 976 (9th Cir.) 981-82; *Armendariz v. Foundation Health Psychcare Services, Inc* [2000] 6 P.3d 669.
[25] Born (n 24) 856.
[26] Restatement (Second) of Contracts (Am. Law Inst. 1981) s 208.
[27] UNIDROIT Principles of International Commercial Contracts (Rome 2016) art 3.2.7 (UNIDROIT).

> or term unjustifiably gave the other party an excessive advantage.

According to the clause, it allows a party to abandon a contract term if there is a material gap between the parties, resulting in an "unjustifiably excessive advantage" for one side.[28] It is also worth noting here that the disproportionate and unreasonable benefit must exist at the moment the contract is concluded.[29] The clause specifically assigns major weight to the fact that a party took undue advantage of the other party's dependency, urgent requirements, inexperience, or lack of negotiating skill during contractual talks.[30]

It is not essential to study the contract in its entirety under this clause.[31] This is consistent with the provision's language, which also refers to a "term" of the contract. As a result, the author argues that when determining the validity of one-sided clauses, a court or tribunal applying the UNIDROIT Principles may not consider the bargain between the parties and may not permit the avoidance of these clauses if they unjustifiably provide a party with an "excessive advantage." This means that even if the entire transaction between the parties is fair, the unjust character of the arbitration clause may result in its avoidance if the prerequisites are satisfied.

### *2. Doctrine of Unconscionability in the United States*

As previously indicated, the idea of unconscionability has been used multiple times in the United States to invalidate one-sided terms. Mr. Gary

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[28] ibid.
[29] Jacques du Plessis, *Validity in Commentary on the UNIDROIT Principles of International Commercial Contracts* (Stefan Vogenauer ed., 2d ed. 2015) 511 para 12.
[30] UNIDROIT (n 27) art 3.2.7(1)(a).
[31] E.A. Kramer, 'Contractual Validity According to the UNIDROIT Principles' (1999) 1 Eur. J. L. Reform 269, 277.

Born emphasised[32] that such provisions have been declared unconstitutional for restricting the disadvantaged party's access to legal counsel,[33] granting the stronger party certain unreasonable procedural benefits. [34] Such a method leads to conferring a disproportionate ability to appoint arbitrators;[35] conferring substantial advantages in an egregious manner,[36] or where the contract was concluded in an unjustifiable manner.[37]

The Third Circuit Court of Appeals suggested a two-part test for unconscionability in the case of *Leibrand v. National Farmers*. First, the contractual conditions must be "unreasonably favourable to the drafter"; and second, the opposing party cannot have reasonably accepted the provisions.[38] In *Iwen v. US West Direct*, the Montana Supreme Court applied this test to a dispute resolution provision that permitted both parties to arbitrate but only one to commence court action. Because the favoured party was both the more powerful negotiation party and the agreement's drafter in that instance, the first component of the test was found to be fulfilled. Additionally, since the provision was handed to the weaker negotiation party "take it or leave it," the weaker bargaining party had "no real option."

Alternatively, the Court recommended in the Art's Flower Shop case,[39] that a judgement of unconscionability must be determined by the parties' relative positions, the strength of their negotiating position, the substantial alternatives accessible to the plaintiff, and the presence of unfair contract

[32] Gary B. Born, *International Commercial Arbitration* (2014) 862 – 863.
[33] In *re Am. Exp. Merchants' Litg*. [2012] 667 F.3d 204 (2d Cir.) 214.
[34] *Nino v. Jewelry Exch., Inc*. [2010] 609 F.3d 191 (3d Cir.) 204.
[35] *McMullen v. Meijer, Inc.* [2004] 355 F.3d 485 (6th Cir. 2004) 494.
[36] *Paladino v. Avnet Computer Tech., Inc*. [1998] 134 F.3d 1054 (11th Cir.).
[37] *Chavarria v. Ralphs Grocery Stores* [2013] WL 5779332 (9th Cir.).
[38] *Leibrand v. National Farmers Union Property & Casualty Co*. [1995] 898 P.2d 1220 (Mont.).
[39] *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co*. [1991] 413 S.E.2d 670 (W. Va.).

conditions.[40] In the case of *Arnold v. United Companies Lending Corporation* **("Arnold")** the West Virginia Supreme Court of Appeals resorted to this criterion. In that case, a major corporate lender and an old, naïve customer had engaged into a UDC, which allowed both parties to arbitrate and the former to sue. The provision was declared unconstitutional by the Court.

In the Arnold case, the nature of the two parties made their negotiating power unequal. This doctrine does not hold water when both parties are commercially competent and cognizant of the repercussions of their actions.[41] For example, in the China Res. Products case,[42] a tiny US corporation agreed to arbitrate against a Chinese state-owned entity before a Chinese state-regulated arbitral tribunal. Despite its apparent injustice, this agreement was upheld because the US corporation understood the implications of consenting to such a condition. As a result, if both parties are intelligent and almost equal in position, it would be difficult to invalidate a one-sided provision on the grounds of unconscionability.

### B. Potestative Nature

Courts in France[43] and Bulgaria[44] have nullified UDCs on the ground of their potestative nature. *Mme X v. Banque Privée Edmond de Rothschild* invalidated potestative UDCs by the virtue of French Civil Code.[45] The Code defines potestative as a circumstance in which "determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to

[40] ibid syllabus point 4.
[41] Christopher R. Drahozal, 'Non-Mutual Agreements to Arbitrate' (2002) 27 J. Corp. L. 537, 547 (Drahozal).
[42] *Chinese Res. Products v. Fayda International Inc.* [1990] 747 F.Supp. 1101 (D. Del.).
[43] *Rothchild* (n 9).
[44] [2011] Commercial Case No. 1193/2010 (Bulgarian Supreme Court of Cassation).
[45] *Mme X v. Banque Privée Edmond de Rothschild* [2013] I.L.Pr. 12.

the plaintiff, and the existence of unfair terms in the contract."[46] It has been noted that this basis may be effectively raised only if the UDC provides the beneficiary with a limitless choice of forum.[47] This is because, in the absence of an infinite option, the beneficiary cannot impose an unduly high degree of uncertainty on the disadvantaged party.[48] This also indicates that where the forum selection provision is objectively worded and sufficiently explicit to aid the judge in determining whether the court has jurisdiction, the argument of potestative nature fails.[49] Alternatively phrased, vague and thus, arbitrary power to select the forum attracts the principle of potestative nature to invalidate a UDC. A similar pattern has been followed by Indian courts in cases like *Bhartia Cutler Hammer v. AVN Tubes*,[50] *Emmsons International Ltd. v. Metal Distributors*,[51] etc. Delhi High Court in the preceding instances decided against UDC due to the absence of an explicit clause for *ad infinitum* recourses to the beneficiary.

Using this standard, the French Supreme Court nullified a UDC in the Rothschild case,[52] (49) for being potentiative potestative. A Spanish customer based in France entered into an arrangement with a Luxembourg-based bank. The UDC vested Luxembourg's courts with exclusive jurisdiction, subject to the bank's power to pursue cases in any other competent court. As a result, the clause created confusion for the client and was determined to be potent.

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[46] French Civ. Code 2016, art 1170.
[47] Maxi Scherer, 'Chapter 1: A Cross-Channel Divide Over Unilateral Dispute Resolution Clauses' *in Jurisdictional Choices in Times of Trouble* (Bachir Georges Affaki and Horacio Alberto Grigera Naón eds., Kluwer Law International 2015) 10, 12.
[48] Marie-Elodie Ancel, 'Chapter 4: A French Introspection' *in Jurisdictional Choices in Times of Trouble* (Bachir Georges Affaki and Horacio Alberto Grigera Naón eds., Kluwer Law International 2015) 64, 66.
[49] *Coreck Maritime GmbH v. Handelsveem BV and Ors.* [2000] Case C-387/98 (ECJ 2000) [15].
[50] *Bhartia Cutler Hammer v. AVN Tubes* 1995 (33) DRJ 672.
[51] *Emmsons International Ltd. v. Metal Distributors* 2005 (80) DRJ 256.
[52] *Rothschild* (n 9).

However, in a more recent ruling, the Court supported the legitimacy of a UDC in cases where the competent courts could be determined objectively.[53]

### C. European Convention on Human Rights (Article 6)

The European Convention on Human Rights **("ECHR")**,[54] Article 6, stresses the need of a fair hearing before an independent and impartial tribunal for all. This rule has been seen as the genesis of the demand of procedural fairness and equitable treatment of the parties in European courts.[55] Additionally, this rule has been cited in several instances, involving UDCs, like the Sony Ericson,[56] Mauritius Commercial Bank,[57] etc.

#### *1. Right to Equitable Access to Court*

The right to access justice is recognised as a human right in Article 6 of the ECHR and some other international treaties.[58] It has been proclaimed by domestic legislation as well.[59] This right is jeopardised when UDCs limit a party's ability to litigate, which has been seen as a component of this broad right.[60] For the purposes of this section, unilateral litigation clauses (hereafter

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[53] *Apple Sales* (n 19).
[54] *Golder* (n 8); European Convention on Human Rights (1 June 2010) E. T. S. No. 5 (ECHR) art 6; Janneke Gerards and R. Lizep Glas, 'Access to Justice in the European Convention on Human Rights System' (2017) 25 Neth. Q. Hum. Rights 11, 13; European Agency for Fundamental Rights, *Handbook on European LawRelating to Access to Justice* (2016) 14.
[55] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Limb)* (2015) 72, <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> (accessed March 22, 2023).
[56] *Sony Ericson* (n 10).
[57] *Mauritius Commercial Bank Limited v. Hestia Holdings Limited and Sujana Universal Industries Ltd.* [2013] EWHC 1328 (Comm.) (HC).
[58] United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (2005) 5.
[59] American Bar Association, *Human Rights and Access to Justice* (2020), <https://www.americanbar.org/advocacy/rule_of_law/what-we-do/human-rights-access-to-justice/?q&wt=json&start=0>; *Re Keshav Singh* AIR 1965 SC 745 (India).
[60] W. Shill Stephan, *Developing a Framework for the Legitimacy of International Arbitration Legitimacy: Myths, Realities, Challenges* (2015) 825.

referred to as 'ULCs') and unilateral arbitration provisions (hence referred to as 'UACs') have been discussed separately due to their distinct influence on the disadvantaged party's ability to access the courts.

To begin with, it's worth noting that a ULC gives the party at benefit the option of litigation or arbitration, while the disadvantaged party is limited to initiating arbitration procedures.

These provisions imply an infringement of the party's right to sue. Having said that, it's worth noting that all typical arbitration agreements are legal waivers of the right to sue. However, in the case of ULCs, the "unequal" limitation on both parties' ability to sue becomes a source of worry, casting doubt on the legitimacy of such a waiver.

In the Sony Ericson case,[61] the Russian Supreme Court nullified a ULC due to the imbalance it generated between the parties. Among other reasons, the provision was declared unconstitutional because it limited the disadvantaged party's ability to sue. The Court stressed in this case that the ECHR ensures equal protection under procedural safeguards and a party's right to be on an equal footing with the opposing party.[62]

In the case of UACs, only the beneficiary has the right to commence arbitration, while both parties retain the right to file a lawsuit. Unlike the right to litigate, the right to arbitrate is not a party's inherent right. Rather than that, it is the result of the parties' consent. As a result, a party's refusal to submit to arbitration should not be the reason for alarm. However, UACs are typically intended to subordinate the parties' power to commence judicial actions to the

[61] *Sony Ericson* (n 10).
[62] Ibid; Pavlo Malyuta, 'Compatibility of Unilateral Option Clauses with the European Convention on Human Rights' (2019) 8(1) UCL J. L. & Jurisprudence 1, 15 (Malyuta).

beneficiary's choice to go to arbitration. A provision resolving disputes in this manner would read as follows:

"The courts in India would have exclusive jurisdiction over any dispute arising out of the Sales Agreement, subject to the First Party's right to go to arbitration."

Such provisions would have the effect of excluding the disadvantaged party from continuing court actions launched by the "First Party" if the First Party elects to go to arbitration. As a result, the First Party is entitled to halt the disadvantaged party's proceedings by using its right to arbitrate the issue. In this case, despite of their equal ability to commence court actions, the parties would not have equal access to the courts, since the disadvantaged party would really lack an equal right to sue. Finally, a right is only valuable if it is properly enforced.[63] Thus, one may claim that even UACs are unlawful on the grounds that they violate the disadvantaged party's right to enter the court.

### *2. Divergent Viewpoints in the United Kingdom and Russia*

The validity of UDCs under Article 6 of the ECHR has been widely addressed in legal jurisprudence.[64] However, the viewpoint is not constant across countries, with judicial courts in England and Russia, expressing divergent views.

[63] Susan James, 'Rights as Enforceable Claims' (2003) 103(2) Proceedings of the Aristotelian Society 133, 133-147; Siobhán McInerney Lankford, 'Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1(1) J. Hum. Rights Practice 51, 51 – 81.
[64] Bas Van Zelst, 'Unilateral Option Arbitration clauses: An unequivocal choice for arbitration under the ECHR?' (2018) 25(1) Maastrcht Journal of European and Comparative Law 77.

The English Commercial Court said in the Mauritius Commercial Bank case that "Article 6 (of the ECHR) is directed to(wards) access to justice within the forum chosen by the parties, not the choice of forum".[65] This means that even if a disadvantaged party is denied a forum selection, its access to justice in the forum selected by the beneficiary is equal. The Court indicated therein a preference for procedural equality for both parties throughout the course of the proceedings, regardless of the venue. In contrast, depending on the same rule, the Russian Supreme Court dismissed a UDC in the previously described Sony Ericson case for not treating the parties equally in terms of forum selection.[66]

This discrepancy in the two courts' view results in a compelling issue that forms the crux of this discussion: can the principle of equal treatment be extended to stage forum selection? This topic would have to be evaluated in the context of arbitration in light of Article 18 of the UNCITRAL Model Law, which serves as the arbitration equivalent to Article 6 of the ECHR and establishes the parties' entitlement to equal treatment in arbitration.

## III. ARTICLE 18'S REQUIREMENT FOR EQUAL TREATMENT

To assess whether Article 18 of the Model Law may be used to invalidate UDCs, it is necessary to ascertain if the issue of forum selection is covered by this provision. This may be accomplished by examining the wording of the Model Law, the purpose of its drafters, and the implementation of the provision in case law, among other things.

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[65] *Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Ltd.* [2013] EWHC 1328 (Comm.) (HC).
[66] *Sony Ericson* (n 10).

### A. Interpreting Article 18

According to Article 18 of the Model Law, "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[67] The language of this article implies that it is the tribunal's obligation to treat the parties equally, and not that the parties are obligated to treat each-other equally. Indeed, the UNCITRAL Digest supports this, stating that the provision's objective is to protect a party from "egregious and injudicious" behaviour on the part of a tribunal.[68] As a result, one may claim that Article 18 does not apply to the step of forum selection, which is unrelated to the tribunal's action.

Additionally, this clause has been included in Chapter V of the Model Law, which has the headline "Conduct of Arbitral Proceedings". This also implies that the tribunal's handling of the parties throughout the pendency of the proceedings is being discussed herein. In general, the date on which the institution receives the notice of arbitration is understood to be the day on which the arbitral proceedings begin.[69] As a result of this interpretation, the step of forum selection falls beyond the scope of Article 18 since it occurs prior to the initiation of proceedings.

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[67] Model Law (n 11) art 18.

[68] UNCITRAL, *2012 Digest of Case Lawon the Model Lawon International Commercial Arbitration* (2012) 98 para 7, <www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> (accessed 29 March 2020) (Digest).

[69] London Chamber of International Arbitration, LCIA Rules (as revised in 2014), rule 1.4, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%201 (accessed 30 March 2020); International Chamber of Commerce, ICC Rules of Arbitration (as revised in 2017), rule 4.2, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of- arbitration/#article_4 (accessed 30 March 2020); Hong Kong International Arbitration Centre, HKIAC Administered Arbitration Rules (as revised in 2018), rule 4.2 (accessed 30 March 2020); Singapore International Arbitration Centre, SIAC Rules (as revised in 2016), rule 3.3 (accessed 30 March 2020).

Another noteworthy point to note is that the parties to a UDC become "parties" to an arbitration for the purposes of Art. 18 only when the beneficiary elects for arbitration. As a result of the aforementioned and other indicators obtained from the provision's language, it is concluded that the obligation of equal treatment under Art. 18 of the Model Law cannot be extended to the stage of forum selection. As a result, according to the provision's language, UDCs would be excluded from its scope.

### B. The Intention of the Drafters

After examining the limitations of Article 18 as expressed in its phrasing, in this section, the author would explore whether the drafters intended to extend this obligation to: first, stages other than the current arbitration procedures, and second, issues unrelated to the tribunal's behaviour.

With reference to extension of this need of equal treatment beyond the arbitration processes, reliance might be put on the United Nations General Assembly's Analytical Commentary. Therein, it has been declared unequivocally that the need of equal treatment under Article 18 incorporates all procedural situations.[70] As a jurisdictional clause is a procedural agreement,[71] it should be included in the scope of this expanded need.

Prof. Holtzmann and Prof. Neuhaus make an intriguing point in their Guide to the Model Law about issues unrelated to the tribunal's activity. They

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[70] UNCITRAL, 'Analytical Commentary of Draft Text of a Model Lawon International Commercial Arbitration' (25 Mar. 1985), Doc No A/CN.9/264, 46, para 7 (Analytical Commentary).

[71] Abdul Hamid El Ahdab, 'The Lebanese Arbitration Act' (1996) 13(3) J. Int'l Arb. 39, 39 - 115; Nadezda Rozehnalova, *Arbitration in International and National Commerce* (2008) 64; *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd*. [1999] EWCA Civ.1401 (Eng. & Wal. Ct. of App.)

emphasised that the drafters' intention, as shown by previous versions, was to use Article 18 exclusively as a "limitation only on the discretion of the arbitral tribunal and not on the parties."[72] However, subsequent versions make it abundantly apparent that the clause is meant to apply to both tribunal proceedings and parties' procedural agreements.[73] One may also rely on this understanding to argue that a jurisdictional phrase is within the scope of the provision.

However, the author asserts that a counterargument to the above argument may be found in the Analytical Commentary itself. It was stated there that Article 18 is a general rule that is further defined by illustrative provisions such as Articles 24(3), 24(4), 26(2), 16(2), 23(2), and 25(3).[74] All of these rules address issues pertaining to phases of an arbitral tribunal's ongoing procedures. This means that Article 18 was meant to apply solely to pending actions, not to the stage of forum selection.

After considering the drafters' intentions, as reflected in the numerous sources cited, it is obvious that the clause may be expanded to include matters unrelated to the tribunal's activity. Nonetheless, owing to different conclusions formed, the topic of extending the scope to stages beyond the proceedings remains unresolved. To address this point, the manner in which this clause has been applied by various courts may be explored.

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[72] Howard M. Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Lawon International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 550 (*UNCITRAL Commentary*); *See* Second Draft, Doc No A/CN.9/WG.II/WP.40, art XV, at 555; Fourth Draft, Doc No A/CN.9/WG.II/WP.48, art 19, at 556.

[73] *UNCITRAL Commentary* (n 65); Fifth Working Group Report, Doc No A/CN.9/246, para 62, at 556

[74] Analytical Commentary (n 63) para 8.

### C. Judicial Courts' Application of the Provision

While Article 18 has not been extended to the parties' strategic decisions,[75] provisions of arbitration agreements that violate the principle of equal treatment have previously been determined to be in violation of Article 18 and hence illegal. In *Iwona G. v. A. Starosta I Wspolnicy*,[76] the Court nullified the arbitration agreement for breaching the principle of equal treatment by allowing the claimant to name just one of the seven arbitrators.

One may argue that in that instance, the stage was that of nominating arbitrators, which is included in the arbitration process. However, it should be emphasised that the clause has already been expanded to include stages other than the proceedings of an arbitral tribunal. In *Methanex Motunui v. Spellman* ("**Methanex Motunui**"), the New Zealand Court of Appeal highlighted that equal treatment must be extended to the stage of appeal against an arbitral award, which is obviously distinct from the arbitral tribunal's continuing proceedings.[77] In that instance, the Court overturned a clause in the parties' agreement that precluded reconsideration of the tribunal's verdict on certain grounds of natural justice.

It should be noted that the provisions invalidated in both instances referred to issues affecting the parties' procedural equality. This is true even in the Methanex Motunui case when conduct beyond the scope of the arbitration procedures was examined. This is because a review of a tribunal's ruling on natural justice grounds would ultimately involve procedural injustice throughout the procedures. As a result, the author believes that any uneven

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[75] *Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al*., CanLII 14819 (Ont. Sup. Ct. of Justice 1999) (Corporacion).
[76] *Iwona G. v. A. Starosta i Wspólnicy spółka jawna w B*. [2011] A/CN.9/SER.C/ABSTRACTS/157 (Pol. Ct. of App.).
[77] *Methanex Motunui v. Spellman* [2004] 3 NZLR 454 (NZ Ct. of App.).

treatment at a stage subsequent to the proceedings that have an effect on the proceedings' fairness would likewise fall within the meaning of Article 18. This interpretation of Article 18 permits an examination of the legality of UDCs under the provision, since UDCs primarily concern the stage of forum selection before the arbitration procedures.

## IV. IS IT POSSIBLE TO RELY ON ARTICLE 18 TO INVALIDATE UDCS?

An examination of the legitimacy of UDCs under the rubric of Article 18 would largely rely on their influence on the fairness of the proceedings. The provision will be in conflict with Article 18 only if the disadvantaged party is denied a fair hearing throughout the proceedings as a result of the inequity caused by a UDC. In this respect, researchers and academicians have claimed that UDCs do not, in and of themselves, result in procedural injustice since the non-beneficiary has no disadvantage once the processes have begun in a fair venue.[78] Contrary to this notion, the author argues that UDCs often have the effect of increasing discrepancy in the positions of the parties throughout the course of the procedure, so becoming incompatible with Article 18. Three fictitious scenarios have been envisioned to bolster this point by demonstrating that UDCs may have an effect on arbitration processes on their own.

In each of these circumstances, the clause is a UAC that allows 'X' to choose between arbitration and litigation, while 'Y' is the non-beneficiary party that may only commence court actions.

Scenario 1: When a legal topic is well decided and a scholar expresses disagreement from the established legal stance. In such a case, X would have

[78] Drahozal (n 40) 565.

the option of proceeding to arbitration and benefiting from the scholar's views by selecting them as an arbitrator or opting for litigation to guarantee that Y does not profit from the scholar's views by nominating them as an arbitrator. Such a decision by X would result in discord between the parties throughout the proceedings.

Scenario 2: Where the items in issue are believed to have certain faults. If X is the seller of the products in this circumstance, it may choose arbitration to protect the secrecy of its flaws. X, on the other hand, would commence legal procedures if Y is the seller. Such a decision would deprive Y of a fair hearing since it would be unable to present all of its arguments owing to the forum's public character. Here, it may be highlighted that the imbalance is caused by the selection of X, rendering the UDC procedurally unjust.

Scenario 3: Where the provision empowers X to choose between arbitral procedures in Y's country and judicial proceedings in X's country, and X's nation's public policy prohibits UDCs but Y's country permits them. In this circumstance, X may commence arbitration in Y's country. This option ensures that X can enforce the award against Y in the event that Y is unable to enforce the award against X, providing that their respective nations' assets are located only in their respective countries.[79] This puts X in an advantageous position throughout the proceedings, since it may leverage public policy issues to its favour.

Taken together, the three possibilities demonstrate the prospect of UDCs having a practical effect on procedural equality, even when the step of forum selection is not included in the arbitral processes. As a result, the author

[79] Matti S. Kurkela et. al., 'Certain Procedural Issues in Arbitrating Competition Cases' (2007) 24(2) J. Int.l Arb. 189, 189 – 209.

has established objective rules for establishing the legality of such provisions under Article 18 of the Model Law in the following section.

## V. USE OF A THREE STEP TEST FOR TREATING UDCS UNDER ARTICLE 18

The author offers a three-step test in this section after taking into account all of the previously described peculiarities. This objective criterion is intended to aid courts and tribunals in evaluating UDCs according to Model Law Article 18. To begin with, it is necessary to determine if the agreement was a strategic decision made by the non-beneficiary side. It is worth noting here that Article 18 does not apply to a party's strategic decisions.[80] As a result, if a non-beneficiary party accepts a UDC in exchange for getting certain additional advantages, the provision cannot be declared unlawful for violating the equal treatment requirement. In this respect, the Singapore Court of Appeal's comment in the Soh Beng Tee case may be instructive.[81] The Court said that "only when the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety can or should a remedy be made."[82] As a result, a UDC between two commercially savvy parties that is a manifestation of party autonomy may not be covered by the clause, as the parties would be cognizant of the repercussions of their strategic decisions.

Second, if the UDC was not included due to a strategic decision, the clause's influence on the proceedings should be considered. Despite the fact that the UDC relates to a step of forum selection that is not included in the "proceedings" of arbitration, the UDC may breach the need for procedural

[80] *Corporacion* (n 68).
[81] *Soh Beng Tee & Co. Pte. Ltd. v. Fairmount Development Pte. Ltd.* [2007] 3 SLR (4) 86 (Sing. Ct. of App.).
[82] *Digest* (n 61) 99, para 9.

equality, as established in the preceding segment via various situations. If this is the case, Article 18 may be used to invalidate the provision.

Third, if the court or tribunal finds that the UDC before consideration of the tribunal violates Article 18, the provision may be modified into a bilateral one, granting both parties identical rights with respect to venue selection. In this sense, one may allude to the Sony Ericsson case, which was previously explored. Although the phrase was declared unlawful in that instance, it is the Russian Supreme Court's judgement, as stated in its Digest,[83] that is critical in this issue. The Digest highlighted that the phrase should have been modified to a bilateral arrangement. This has also been the remedy under UNIDROIT Principles Article 3.2.7, which allows for the modification of conditions that unjustifiably provide an excessive benefit to one of the parties.

However, one must bear in mind that the remedy of contract adaptation, which has been favoured over termination, may not always be within an arbitral tribunal's jurisdiction. Contradictory views have been stated in this regard, and it cannot be inferred categorically that the remedy of adaptation of a UDC may be provided in all circumstances.[84] Nonetheless, the author advises that the provision be adapted as the preferable remedy if the tribunal has the authority to do so.

## VI. CONCLUDING REMARKS

UDCs are nearly commonly recognised, especially in finance and commercial agreements, where they are based on sound business rationale. Thus, the essence of the legitimacy debate over UDCs is a clash between party

[83] *Sony Ericson* (n 10).
[84] *Sony Ericson* (n 10); *See Mauritius Commercial Bank Limited v Hestia Holdings Limited and Sujana Universal Industries Ltd.* [2013] EWHC 1328 (Comm.) (HC); *Mme X v Banque Privée Edmond de Rothschild* [2013] I.L.Pr. 12.

autonomy on the one hand and their essentially unbalanced character on the other. As a result, such sentences are often described with several flaws that have been previously disclosed. Additionally, these provisions are intrinsically susceptible to generating procedural disparity between the parties in certain instances.

Hence, the author recommends that, in addition to being assessed on grounds such as unconscionability, potestative nature, and infringement of the right to access the courts, UDCs must also pass the test set out in Article 18 of the Model Law when arbitration proceedings are commenced.