0205069110000000576



# THE FORMATION OF ARBITRATION CLAUSE IN INTERNATIONAL CONTRACT

Oleh :
**Meria Utama**[1]

**Abstrak :** *Klausula arbitrase adalah suatu klausula yang penting karena akan menjadi dasar bagi para pihak dalam beracara di arbitrase. Para pihak dalam sebuah kontrak apabila sepakat untuk menyelesaikan kasus mereka melalui cara ini haruslah mencantumkan klausula arbitrase dikarenakan tidak akan ada arbitrase tanpa kesepakatan arbitrase, dan hal ini sudah merupakan hal yang mutlak. Klausula arbitrase juga harus tertulis, para pembuat kontrak dapat menkutip langsung klausula yang direkomendasikan oleh sebuah institusi misalnya ICC Paris, BANI Indonesia atau SIAC Singapura, atau klausula ini dapat dibuat dengan merujuk kepada peraturan tertentu misalnya UNCITRAL. Akan tetapi walaupun bisa langsung mengambil klausula yang direkomendasikan, para pembuat kontrak sebaiknya benar-benar melihat apakah klausula yang mereka buat memang baik dan tidak akan menimbulkan sengketa lainnya dikemudian hari. Misalnya tidak dicantumkannya pilihan hukum atau tempat beracara dapat menimbulkan konsekwensi hukum tertentu. Oleh karena itu klausula ini sebaiknya dibuat dengan sangat hati-hati karena Kealpaan dalam membuat suatu klausula yang baik bisa berakibat fatal bahkan mungkin saja dapat mengakibatkan suatu hasil putusan yang berbeda.*

**Keywords :** *arbitration, arbitration clause, international contract, tailor made clause, business disputes.*

## A. Introduction

The development of business transaction has highly increased recently. The people do their business transaction not only in one country but also do it across the border of their countries. The partners of the business do not only come from the same country but sometimes also with the people that come from different countries. Usually, whenever they want to have a business activity with their partner, they express what ever they want to do dealing with their business in a contract. In contract, the parties determine what their rights and duties are, how a particular transaction is dealt with, how the obligation will be performed, and how the contract will be terminated, etcetera.

In a contract the parties also put the clause how they will solve the problems that may arise between them. So if the parties have a different opinion regarding their business, or one of the party the state party they are afraid that national breaches the contract that they made, and finally there is a dispute between them.[2] The dispute also may arise if the terms of the contract itself are not so clear. If such situation happen, then the clause that determines how the parties will solve their problems is very important. There are many ways to settle commercial disputes, such as negotiation, mediation, conciliation, inquiry, good offices, arbitration and court litigation. So, it depends on the parties that have disputes to choose what kind of ways that they like to settle the case. Nowadays, the settlement of dispute through ADR and Arbitration is getting more popular than settlement of the dispute in court litigation. Especially in commercial dispute, the parties chose arbitration rather then court litigation. This is because of many reasons. For example the private party to the contract will be reluctant to have its dispute submitted to the national court of determining the place of arbiration and the law the state party they are afraid that national court of state country will not be professionally settling their case. Then, they think that arbitration is the convenient and neutral

[1] Penulis adalah Dosen Tetap Fakultas Hukum UNSRI dan Sekretaris Eksekutif BANI Perwakilan Palembang.

[2] Ibra, *Arbitrase, PilihanTanpa Kepastian*, see http://www.gotha.com/viewart.asp.

[3] Collier, John and Vaughan Lowe, *The Settlement of Disputes in International Law, Institutions and Procedure*, Oxford University Press inc, New York, 2000, p.19-20.

forum to settle their case. The increase of using the arbitration can be seen from the number of commercial cases that has been settled by arbitration.[4] Although the parties realize that the arbitration is not as simple as before anymore but it is now become more complex, more legalistic, and more institutionalized like a court.[5] In Indonesia, settling the dispute by using alternative dispute resolution (ADR) is getting popular also, especially by using arbitration. This is because settlement of dispute through litigation in national court could be very long time and not effective. This situation is also supported by Indonesian Laws such as:bIndonesian regulation on Arbitration on First Title of Book III of the Code of Civil Procedure, Law No.30 of 1999 Regarding Arbitration and Alternative Dispute Resolution, Law No.8 of 1999 regarding The Consumer Protection,and Court of Justice regulation No.2 of 2003 regarding Alternative Dispute ResolutionThese laws support that if there is a conflict or dispute, the parties can choose arbitration as one of the alternative to settle their dispute. The fundament of the arbitration is the agreement of the parties. This agreement usually put in arbitration clause in a contract or submission agreement. The parties may agree on anything regarding the proceeding in arbitration. The freedom of the parties in arbitration can be seen in

determining the place of arbitration and the law applicable in arbitration or any kind of obligations regarding the arbitration procedure. The choices of the parties will be stated in arbitration clause or arbitration agreement. The problem then will arise if the parties do not drafted a compete arbitration clause.

Therefore this article is examine how to drafted a well arbitration clause? And what measures must consider in drafted a good arbitration agreement?

**A. General overview of Arbitration and Contract**

**1. Arbitration**

The word of arbitration is derived from Latin word *arbitrare*. In Indonesia, arbitration is mention as *arbitrase*, and in Dutch, arbitration is mentioned as *arbitrage*. There are many definitions of arbitration. Okezie Chukwumerije, a legal expert defined arbitration as 'A mechanism for the settlement of disputes between the parties, either by a person appointed by them selves or by relying upon procedures or institution chosen by the parties'.[6]

Sudargo Gautama, a great Indonesian Lawyer, gives another definition of arbitration. He said that 'Arbitration is the way of settlement by private judge who is not bound to any formalities, fast in giving decision because in the last stage and binding, which are easy to do because will be obeyed by the parties.[7]

From those definitions, we can see the same element of arbitration, that there are two parties that but can not solve the dispute by them selves, agree to ask another parties to help them to settle their case, and it has a binding decision. So these are simple figures of arbitration that still exist until now.

**2. General Overview on International Contract**

Contract is very important for people because contract govern a wide range of human activity such as purchase and sale of good, employment, insurance, furnishing of services and etcetera.1 The

[4] In Asia the number of caseload that submits in HKIAC in 1996 there are 699 cases, in 2000 it's about 633. CIETAC also get quite a lot of number of cases, 257 cases in 1999 and 298 cases in 2000. Also the number of cases in ICC in 2003 is about 580 cases. See. http://www.iccwbo.org/court/english .

[5] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Thomson Sweet and Maxwell, London, 2003, p.3.

[6] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration*, Westport, An Imprint of Greenwood Publishing group, Inc, 1994 p.2.

[7] Prof. Sudargo Gautama, *Indonesia Business Law, Citra* Aditya Bhakti, 1979, p. 5.

people also need contract if they want to have a business with someone. This contract is used to make sure their business activity will run well and make them safe, because if one of the party breach the contract, they can sue him based on the agreement that they have performed in their contract. The parties put all the clauses that they want in their contract, about what their contract is, the right and duties of the parties, and how about the settlement of the dispute that may be arise while the business is done.

### a. Definition of Contract and International Contract

Article 1313 of Indonesian Civil Code (Burgerlijk Wetboek voor Indonesie) gives the definition of contract 34 '*An agreement is an act of two or more persons binding themselves to one or more other persons*'. This is a general definition only because this definition has no distinction between Civil and Commercial Contract.[9]

Daniel V. Davidson gives the definition of contract, he said that '*A contract is a legally binding and legally enforceable promise, or set of promise, between two or more competent parties, or a contract is a promise or set promises for which the law gives a remedy, or the performance of which the law in some way recognizes as a duty*''[10]

Those are some definitions of a contract. International Contract it self have another element. Sudargo Gautama, give another definition of international contract. He said that '*International Contract is contract that has foreign element*'.[11] Another definition of international contract is given by M.Simampau, an Indonesian lawyer, he said that '*a contract is an international contract if that contract is consist of more than one law systems from different countries*'[12]. From all those definitions of contract and international contract, we may say that a contract is a document contains a promise or a set of promises where the parties are bound to, and if that contract has international elements then we may say it is an international contract. The determination whether a contract is international contract or domestic contract is very important because it will relate to the autonomy concept of the parties. Then, if the contract is international contract, the parties are free to choose whatever the law and the forum that they want regarding their contract. United Nations Convention on the Uniform law for International Sales 1980 article 1.paragraphs 1 gives the criteria of an international contract. This article mention that a contract between the parties with places of business n different States has an international character even if it is wholly concluded and to be performed within the borders one states.[13] And there are some other criteria for international character such as the different nationalities of the parties[14], different domiciles or habitual residents of the parties, the place of contracting parties is abroad, the place of performance is abroad, payment in foreign currency or in a foreign place, and the property which is the subject of the contract is situated abroad.[15]

---

[8] Furnishing of services are legal, engineering, architecture, software licensing, education, and etcetera See. http:// www.canadianlawsite.com/contracts.htm .

[9] Indonesian Civil Code is an old codification in the private field. Actually this code id derived from Dutch commercial Code, and Dutch Commercial code it self derived from the French Code the Commerce. So from these two reasons, Indonesian code contains the elements of French and Dutch Commercial Law. Sudargo Gautama., Essays in Indonesia Law, Second edition, Citra Aditya Bakti, 1995. p179.

[10] Daniel V Davidson., Comprehensive Business Law Principles and Cases .lexis and nexis 1992.p138.

[11] *Supra*, note 20, at p. 179-180.

[12] M. Simampou, *International Commercial Contract*, Bandung Aksara, 1994, at p.5.

[13] Uniform Law on the International Sale of Good, art

[14] The criterion of different nationalities sometimes has a little significance, for instance we may not say that a person is in international contract whenever he buy something with someone that have different nationality from him. See. *Supra*, note 28, at p.49.

**b. General Concept of Party Autonomy in a Contract**

Parties in international contract are free to settle the contents of their contract, such terms and conditions of their contract. The principle of party autonomy could be said to be supported by the parties' rightful wish to establish in advance not only to extend of their agreement, but also the legal system by which their right and duty will be gauged in case of dispute. The notion of party autonomy has waxed at the time when the importance of territorial sovereign has decline. The power of the state to impose its will on those engaged in international transaction has weakened, although though its court the modern state can still enforce or withhold the local remedies. But today, it is true that 'concern for the interest of individual as opposed to those of the state is the main preoccupation and justification of private international law'.[16]

This autonomy of the parties is a part of broader power in international transaction to select not only the law but also the forum, which will determine the dispute arising out of the transaction. So it is again the autonomy of the parties to accept or refuse the law in some countries and to choice the forum that they want to settle their conflict regarding their contract dispute. There are Two reasons are normally given why parties have a right to choose whatever they want in international contract because of the first is the freedom of contract and the second is certainty and economic efficiency.[17]

**c. Freedom of Contract**

In International contract, we recognize the freedom of contract. The freedom of contract is the essential part in market economy because this freedom means that the parties are free to enter to any kind of contract, free to have a contract to whomever that they want and the parties also have freedom to determine whatever they want in their contract. In international contract the freedom of parties is bigger than just a domestic contract.[18] It is true that the state must regulate the freedom to provide the framework within which the parties can operate, and secondly to protect certain interest, either of the state it self or of the parties who need protection from abuse of economic power, such as consumer and employee, but no state can hope effectively to control international contract.[19] But the freedom of contract is not unlimited,[20] because even the parties have a. freedom to determine everything in their contract, they should consider that is not against the public policy and mandatory rules in some states.

**d. Certainty and efficiency**

The autonomy of the parties to put whatever they will in their contract including the choice of forum and choice of law can create a certainty in a contract. International contract, like any other contract, requires certainty to make sure suppose there is a dispute that may be arise regarding a contract it self.[21] Then its going to efficient as well if the parties put all the clauses that they have agreed in their contract clearly, that might be make the settlement of the dispute it self even faster.

---

[15] *Supra*, note 24, at p. 48-51.
[16] Nygh, Peter, *Autonomy in international contract*, Clarendon Press, Oxford, 1999, p.13.
[17] *Supra*, note 24. at p. 2.
[18] *Supra*, note 24, at p. 2.
[19] *Supra*, Note 24 at p. 13.
[20] De Boer, *Choice of Law in Contracts and Tort in the Netherlands, a Methodological Perspective*, p. 36.
[21] *Supra*, note 24 at. p. 2-3.

**e. Drafted Arbitration Clause and Arbitration Agreement**

Arbitration is based on agreement between the parties to submit an existing or future dispute to arbitration. The old distinction between the *compromis* under which the parties submit an existing dispute to arbitration and the *clause compromissoire* under which the parties in a contract agree to submit future disputes, which may arise under the contract to arbitration, in most jurisdictions, has lost most of its significance. Most agreements to arbitrate relate to arbitral clauses contained in contracts regarding future disputes. Also, most model clauses, which will be cited below and have been developed by arbitration institutions relate to future disputes. An exception is WIPO, which has developed the following model *compromis:*

'*We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules:*
*[brief description of the dispute]*

*The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language].*
*The dispute shall be decided in accordance with the law of [specify jurisdiction].*'

**1. Simple Agreements to Arbitrate**

Agreements to arbitrate tend generally to be of a boilerplate nature, being copied from one contract to another. In this respect, there is a clear impact of model clauses developed by arbitration institutions, which will be discussed below. However, a analysis will show, there are also highly sophisti clauses, sometimes covering several pages. C other side of the spectrum, one also notes very s arbitration clauses in sectors where contract are fairly standardized such as in the commo and maritime sectors. The following example o a simple clause may be cited: '*Arbitration, if a be settled in Paris by Chambre Arbitrale Mar and French Law to apply. General Average. to be settled in Paris.*'[23]

**2. No Need for further Arbitration Agree**

Modern arbitration statutes do not requir the commitment to go for arbitration contain an arbitral clause be renewed once a dispu arisen. However, some Latin American countr impose any such obligation. The following reflects the principle that no such further agree is required: '

*Any difference, dispute or disagree arising between the State and Concessionaire as to the application of Agreement and relative to the interpreta the terms and conditions thereof and the of the rights and obligations deriving there shall be resolved exclusively by arbitrat three arbitrators according to the follo procedure, no other arbitration agreement required.*'

**3. Pathological Clauses**

Agreements to arbitrate are, of course, inte to be effective when they are to be relied u However, badly drafted clauses may create prob

[22] Cited in Usinor Steel Corp. v. M/V Koningsborg, C.V. Scheepvaartonderneming Koningborg, 03 Civ. 4301 (AKH) (SDNY 200- U.S. Dist. Lexis 1615.
[23] Fontaine, M. and De Ly, F., o.c., 5-69 and specifically 54.

at the stage when they are to be put into operation. Frédéric Eisemann has labeled any such clauses *pathological arbitration clauses*. Different pathological clauses may be distinguished. The first category relates to clauses where parties choose for institutional arbitration, administered by an arbitration institute but where any such institute does not exist or no longer exists. Examples are clauses, which choose for the International Chamber of Commerce of Geneva where only a Chamber of Commerce exists in Geneva. Are such clauses unenforceable or are they to be interpreted either as ICC arbitration with a seat in Geneva or as arbitration under the Chamber of Commerce of Geneva Rules (now the Swiss Rules)? Another example is the situation where the parties chose for no longer existing arbitration institutes in Eastern Germany (dissolved after German reunification) or in China. Case law has taken different approaches to such problems either opting for a repudiation of the arbitration clause because the institute no longer exists and no longer offers administrative services or for interpretation in favor of arbitration and converting the arbitration clause into one for successor or similar arbitration institutes.Other categories of pathological clauses may be mentioned. The most extreme clause, reported by one of the members of the *Groupe de Travail* is one where a model clause offering parties a choice between dispute adjudication according to rules of law or *amiable composition* and invited the parties to delete as appropriate, was converted into the following clause:*Les arbitres appliqueront les règles de droit ou décideront en tant qu'amiables compositeurs et bifferont les mentions inutiles.*'

**4. Exhaustion of Local Remedies**

Agreements to arbitrate may contain preconditions for instituting arbitral proceedings, which may amount to admissibility of the request for arbitration. One example has already been mentioned in relation to conciliation clauses combined with arbitration clauses where, absent specific language, case law has held that the parties first must resort to conciliation before arbitration can be instituted. Another example relates to foreign investment arbitration where, depending on the BIT involved, parties may be obliged first to exhaust local remedies regarding the contractual disputes and/or the dispute with the government whose State Responsibility is involved before the BIT arbitration may be instituted. Similarly, BITs often involve cooling off periods in which no arbitration can be started.

**5. Optional Arbitration Agreements**

Agreements to arbitrate by and large give exclusive jurisdiction to an arbitral tribunal to decide upon disputes falling within the scope of the arbitration agreement. Sometimes, optional clauses may be found, some of which, however, are subject to interpretation A second example may be given regarding a clause combining arbitration with forum selection:

> "*22. Arbitration and Jurisdiction22.1 Any dispute, controversy or claim arising out of or relating to this Deed, the rights of pledge created hereby, or the breach, termination or invalidity of this Deed shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. There shall be one arbitrator and the appointing authority shall be the London Court of International Arbitration. The seat and place of arbitration shall be London, England and the English language shall be used throughout the arbitral proceedings. The arbitral*

*tribunal shall have authority to consider and include in any proceeding, decision or award any further dispute arises out of this Deed or any other Financing Agreement, but, subject to the foregoing, no other parties or other disputes shall be included in, or consolidated with, the arbitral proceedings. In any arbitral proceeding, the certificate of the Pledgee as to any amount due to it under any Financing Agreement shall be prima facie evidence of such amount except in the event of manifest error.*

*22.2 Notwithstanding paragraph 1 of this Article (Arbitration and Jurisdiction), this Deed and the other Financing Agreements and any rights of the Pledgee arising out of or relating to this Deed or any other Financing Agreement may, at the option of the Pledgee be enforced by it in the courts of England, in the courts of the Netherlands or in any other courts having jurisdiction. For the benefit of the Pledgee, the Pledgor hereby irrevocably submits to the non-exclusive jurisdiction of the courts of England and the Netherlands with respect to any dispute, controversy or claim arising out of or relating to this Deed, or the rights of pledge created hereby, or any other Financing Agreement, or the breach, termination or invalidity hereof or thereof. ... Nothing herein shall affect the right of the Pledgee to commence legal actions or proceedings against the Pledgor and the Company in any matter authorized by the laws of any relevant jurisdiction. Each of the Pledgor and the Company irrevocable waives any objection it may now or hereafter have on any grounds whatsoever to the laying of venue of any legal action or proceeding and any claim it may now or hereafter have that any such legal action or proceeding has been brought in an inconvenient forum."*

## 6. Scope of the Arbitration Agreement

Arbitral tribunals have jurisdiction if there is an agreement to arbitrate and to the extent that the dispute falls within the scope of that agreement. Most disputes that are the subject of an arbitration agreement are contractual disputes. Contract clauses have various provisions regarding the contract disputes that are submitted or are to be submitted to arbitration. Also, some clauses refer situations to arbitration where one party considers that there is a dispute while the other party disputes that there is a disagreement. Finally, the scope of the agreement to arbitrate is sometimes extended to disputes other than contract disputes or disputes stemming from the legal relationship in which the arbitration agreement is embedded. Many agreements to arbitrate contain a broad definition of the contract disputes that are submitted to arbitration to concentrate all contract disputes in one arbitral dispute settlement process and, thus, for reasons of costs and efficiency, to avoid dispersion of contract disputes over various adjudicating bodies. In this respect, reference is made to the model arbitration clauses of arbitral institutions discussed below which frequently refer all disputes arising under or in relation to the contract to arbitration. Some clauses go further (such as the NAI standard clause) and submit to arbitration also disputes stemming from subsequent contracts.

### a. Existence of a Dispute

In some situations, there may be a problem to determine whether there is (already) a dispute between the parties. A debtor may not dispute a claim or its amount and argue that there is no dispute to be submitted to arbitration. However, the creditor may have an interest to obtain an enforceable title if the debtor fails to perform voluntarily. One may argue that the disagreement between the parties as to the existence of a dispute constitutes already a dispute, which can be submitted to arbitration. The following clause addresses this situation spelling out clearly that the perception by one party that there is a dispute is sufficient to file a request for arbitration:

*'Article 11*

*Disputes and claims, including such claims and*

*disputes as are considered as such by one of the parties, arising under this Agreement or under any further agreement between the Owner and the Builder with respect to the Yacht shall be referred to arbitrators of whom each of the parties shall nominate one arbitrator and the third shall be appointed by the arbitrators chosen by the parties. ...'*

**b. Precontractual relationships**

Disputes arising from or in relation to precontractual relationships may specifically be submitted to arbitration by virtue of precontractual documents such as letters of intent or memoranda of understanding where generally parties in relation thereto are intending to create rights and obligations (as opposed to other clauses which may be subject to contract). In this respect, reference is made to the work of the *Groupe de Travail* regarding letters of intent[1]. Sometimes, submissions to arbitration are made in softer documents.

***c. Tort Claims***

Arbitration clauses sometimes also attempt to bring tort claims, which may arise between the contracting parties within the scope of the agreement to arbitrate as the following example shows:

*"Any dispute, controversy or claim arising out of, or relating to this Agreement in particular as to its existence, validity, interpretation, performance or non-performance, including tort claims, whether arising before or after the expiration of this Agreement, shall be finally and exclusively settled by arbitration according to the provisions of the Swiss Federal Private International Law Act of December 18, 1987, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) as then in force..."*

The standard WIPO arbitration clause also seems to cover tort claims and one may wonder whether it also does not cover unjust enrichment and other restitution claims.

*'Any dispute controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules....'*

**1. Ad Hoc Arbitration**

Parties may choose between arbitration administered by arbitration institutes under their rules and *ad hoc* arbitration. Institutional arbitration has the advantage of the support of the arbitration rules of the institute, which settle already many issues and may permit the parties only to adopt the model clause of the institute. Also, the institute offers professional administrative support services to the parties and the arbitrators. On the other hand, institutes generally charge for these services, which increases costs. Ad hoc arbitration does not imply payment of service fees to institutes and may, thus, be cheaper. On the other hand, parties, counsel and arbitrators then lack the support of the institute and of its institutional rules which may involve higher costs if a more extensive arbitral clause is to be drafted or when, once a request for arbitration is filed, a further arbitration agreement is to be prepared outlining procedural arrangements, payments of deposits for the fees and disbursements of the arbitrators and determination of remuneration of the arbitral tribunal. Furthermore, the support of an institute may well be needed if problems arise (e.g., challenges) or to give a quality (e.g., scrutiny of arbitral awards by the ICC

International Court of Arbitration) or status stamp to the arbitral award. Arbitrators sometimes prefer ad hoc arbitration in order not to be bound by the fee structures of institutes.Mixed forms between ad hoc and institutional arbitration exist. Sometimes, parties prefer ad hoc arbitration but refer to institutional rules as procedural rules taking a free ride on institutes and creating risks that rules that are to operate in an administrative setting may not work in an ad hoc setting. Another mixed form is the Uncitral Arbitration Rules 1976 which are made for ad hoc proceedings but with a role for an appointing authority to play. In the past decade, Uncitral arbitration has become more popular, including BIT arbitrations under the Uncitral Arbitration Rules. The model Uncitral arbitration clause reads as follows:

> *'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.*

*Note – Parties may wish to consider adding:*

*(a) The appointing authority shall be ... (name of institution or person);*

*(b) The number of arbitrators shall be ... (one or three);*

*(c) The place of arbitration shall be ... (town or country);*

*(d) The language(s) to be used in the arbitral proceeding shall be ...'*

**b. Application of Institutional Rules**

As an alternative to ad hoc arbitration, parties may consider institutional arbitration. This section will first cite some model clauses and then proceed to their analysis and their use in international contract practice. *Model Clauses of Arbitration Institutes:*

*1. International Chamber of Commerce*

> *'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'*

The comment to the clause also points to the importance to indicate the law governing the contract, the number of arbitrators and the place and language of the arbitration. The model clause is available in some 16 different languages. Finally, it may be noted that the ICC Model Contracts on Agency, Distributorship, Selective Distributorship, Franchising, Occasional Intermediary, Sale of Manufactured Goods for Resale and Mergers & Acquisitions all contain the standard ICC arbitration clause at least as one of the dispute resolution options. WIPO clause can be seen below :

> *'Any dispute controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].'*

2. The example of Cepani clause

> *'All disputes arising out of or in relation with this Agreement shall be finally settled under the CEPANI Rules of Arbitration by one or more arbitrators appointed in accordance with those Rules. The following provisions may be added to this clause:The arbitral tribunal shall be composed of (one) or (three) arbitratorsThe seat of the arbitration shall be (town or city)The arbitration shall be conducted in the (...)*

*languageThe applicable rules of law are (...)'*

The comment states that the parties, if they so wish, may provide that arbitration necessarily be preceded by mini-trial or by an attempt to conciliate. Also, a model clause excluding setting aside review by Belgian courts is added (see below). The model clause is available in four languages (French, Dutch, English and German).

3. Netherlands Arbitration Institute (NAI)

   *'All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut).*
   *Additionally, various matters may be provided for:The arbitral tribunal shall be composed of one arbitrator/three arbitrators.The place of arbitration shall be ... (city).The arbitral procedure shall be conducted in the ... language.The arbitral tribunal shall decide as amiable compositeur.Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in art. 1046 of the Netherlands Code of Civil Procedure, is excluded.'*The model clause is available in four languages (Dutch, French, English and German). No reference is made to the NAI mini-trial rules.

2. *BANI ARBITRATION CLAUSE*

The BANI recommends all parties wishing to make reference to BANI arbitration, to use the following standard clause in their contracts:[1]

*"All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules"*

The overview of some model institutional clauses shows striking similarities. In most clauses, the scope of the arbitration clause is defined broadly (*arising out of or in relation to* and similar language). Only the NAI clause goes further and provides that disputes arising out of further contracts between the parties resulting from the contract in which the arbitration clause is contained are also covered by the arbitration clause. Also, the optional clauses all refer to the number of arbitrators to be nominated, the language of the proceedings and the place of arbitration. Some clauses also refer to applicable law. From time to time, arbitration institutes change their rules. Often, the new rules provide transitory provisions. The Uncitral Arbitration model clause provides that the rules applicable at the time of contracting apply. Under most schemes, new enacted rules will apply to new arbitration cases (i.e., cases where the request for arbitration has been filed after the new rules come into effect) by virtue of an explicit provision in new rules or application of general principles of procedural transitory law. The Swiss Rules explicitly provide so in the model clause as well as the LMAA model clause.

## D. Contractual Adaptations of Institutional Model Clauses

There are clear contract negotiation advantages in terms of costs and efficiency if the parties simply incorporate institutional model clauses. This is very often done in practice. However, parties may also want to adapt the model clause according to their needs. This may lead to more sophisticated clause such as the following:

*'20.1 Any dispute, controversy or claim arising out of, or relating to this Agreement in particular as to its existence, validity, interpretation,*

---

[24] Priyatna Abdurrasyid, *Arbitrase & Alternatif Penyelesaian Sengketa Suatu Pengantar* (Jakarta: PT. Fikahati Aneska, 2002), p.148.

*performance or non-performance, including tort claims, whether arising before or after the expiration of this Agreement, shall be finally and exclusively settled by arbitration according to the provisions of the Swiss Federal Private International Law Act of December 18, 1987, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) as then in force.20.2 The place of the Arbitral Tribunal shall be Geneva, Switzerland.The number of arbitrators shall be three (3) appointed in accordance with the said rules. The Parties shall each designate an arbitrator and the arbitrators thus appointed shall designate the Chairman of the arbitral tribunal by agreement. Failing such agreement, the Chairman of the arbitral tribunal shall be designated by the Court of the International Chamber of Commerce.The language of the arbitration shall be English.20.3 Should one of the parties voluntarily fail to comply with the provisions of the award and should the winning party therefore have to enforce the award, then all costs, taxes, fees and expenses involved with such enforcement shall be exclusively borne by the party which has failed to comply with the award.20.4 The enforceability of the arbitral award may be declared by any court having jurisdiction.'*

Adaptations may relate to various procedural issues and will be discussed below. A general observations must, however, be made at this stage. Contractual adaptations at some point may frustrate the overall institutional scheme and may lead the arbitration institution to question whether in view of the changes made by the parties it is still prepared to characterize the arbitration as falling within its rules. This is particularly relevant where some basic tenets of the institution's scheme are involved such as rules regarding terms of reference, challenge or scrutiny of awards.

## D. Effects of a Request for Arbitration on the Performance of the Contract

Arbitration clauses may have provisions regarding the performance of the contract pending arbitration proceedings, as the following provisions shows:

*'Resolution of disputes If any dispute or difference of any kind whatsoever shall arise between the Purchaser and the Supplier in connection with or arising out of the PC, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.Should, after 30 (thirty) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either party may give notice to the other party of its intention to commence arbitration as hereinafter provided, and no arbitration in respect of this matter may be commenced unless such notice is given. The dispute, difference or claim arising out of relating to this PC or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the United National commission on Trade Law (UNCITRAL) Arbitration Rules. The Arbitration shall be held in Amsterdam, The Netherlands and conducted in the English language. Notwithstanding, any reference to the arbitration herein, the parties shall continue to perform their respective obligations under the PC.'*

### 1. Qualifications of Arbitrators

An arbitration clause seldom contains specific requirements as to arbitrators' qualifications in terms of nationality, domicile, expertise and the like. One example of such a clause may be cited:

*'Article 11Disputes and claims, including such claims and disputes as are considered as such by one of the parties, arising under this Agreement or under any further agreement between the Owner and the Builder with respect to the Yacht shall be referred to arbitrators of whom each of the parties shall nominate one*

*arbitrator and the third shall be appointed by the arbitrators chosen by the parties.*
*At the moment of their appointment, the arbitrators shall be domiciled in The Netherlands. ...'*

**2. Applicable Law**

Clauses regarding the law applicable to the contract (which contains an arbitral clause) have been discussed in the first part of this report. The question that arises here is whether the arbitral clause itself contains a choice of law provision to tackle a debated question whether the arbitral clause is also subject to the law governing the contract or whether, by virtue of the principle of severability it is to be governed by the law of the place of arbitration. No clauses to that effect have yet been found in the sample arbitration clauses.Also, arbitral clauses seldom contain a reference to the law applicable to the arbitral proceedings. An exception is the following clause:

*'20.1 Any dispute, controversy or claim arising out of, or relating to this Agreement in particular as to its existence, validity, interpretation, performance or non-performance, including tort claims, whether arising before or after the expiration of this Agreement, shall be finally and exclusively settled by arbitration according to the provisions of the Swiss Federal Private International Law Act of December 18, 1987, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) as then in force. ...'*

**3. (No) Resort to Domestic Courts**

Agreements to arbitrate intend to have disputes settled by final decision by means of arbitration and, thus, sometimes express language to the effect that domestic court interference is to be excluded in order not to frustrate the arbitral process. In countries with modern arbitration statutes, that same bjective will also be pursued by the arbitration statute and any such clause may be relevant in less modern arbitration countries and in countries with limited arbitration experience and as well regarding attitudes in some even sophisticated countries of some courts to be too interventionist.Any such language was already found in the model DIS arbitration clause· but more examples may be given:

*'The arbitration award shall be definite, final and irrevocable, and shall constitute an enforceable instrument requiring no further action for enforcement or any other formality. It shall be liable to no ordinary or extraordinary judicial remedies, nor shall it be subject to cancellation or suspension before ordinary courts of justice. The party failing to comply with the provisions of the arbitration award shall be obligated to make good any and all damage (damnum emergens or lucrum cessans) caused to the other party.'*

Some clauses reflect a different attitude. Rather than being somewhat hostile towards court intervention, they directly address court intervention and confirm that any such court intervention remains possible:

*'ArbitrationAll disputes arising in connection with the Agreement, or further agreements resulting thereof, shall be submitted to arbitration in accordance with the rules of the Netherlands Arbitration Institute. The arbitral tribunal shall be composed of three arbitrators. Each Party shall appoint one arbitrator and the arbitrators so appointed shall appoint jointly the third arbitrator. The place of arbitration shall be The Hague, the Netherlands and arbitral procedures shall be conducted in the English language. The arbitrators will also decide of the costs of the arbitral proceedings on the basis of the general principle that the costs shall be borne by the Party against whom judgement is given. The provisions of this clause do*

*not exclude the authority of the Dutch Courts in summary proceedings.'*

**4. Evidence**

Agreements to arbitrate did not often address questions of evidence, which were left more to applicable arbitration rules, Terms of Reference, Procedural Orders or, in ad hoc arbitrations, Further Arbitration Agreements. However, more recently, evidence issues are also being treated in arbitration clauses. The adoption by the International Bar Association of its *Rules on the Taking of Evidence in International Commercial Arbitration* in 1999 has certainly had a catalyzing effect on any such clauses because arbitration clause drafters are now more forced to take a position on evidence issues, albeit to possibly exclude the IBA Evidence Rules which reportedly is also taking place in some Share Purchase Agreements between parties from civil law countries. Another approach to the IBA Evidence Rules is not to incorporate them into agreements to arbitrate but to include more loose language to the effect that the arbitral tribunal may take the IBA Evidence Rules into account when dealing with evidence issues covered by those rules.

**5. Interim Measures of Protection**

In the past few years, interim measures of protection have received a lot of attention from arbitration practitioners. However, the drafting of arbitral clauses does not seem to reflect a similar attention on the part of contract drafters, which by and large ignore interim measures of protection leaving this to the applicable arbitration rules and law. An exception is the clause cited above which expressly stated that the arbitral clause did n[illegible] preempt the jurisdiction of Dutch courts regardin[illegible] summary proceedings (i.e., referring to the *réfé[illegible]* proceedings in The Netherlands).

In this respect, the *ICC Pre-Arbitral Refere[illegible] Procedure* is to be mentioned. These proceeding[illegible] were adopted in 1990 (ICC Publication No. 48[illegible] Paris, ICC Publishing) but only very recently ha[illegible] its first applications. The model clause of thes[illegible] proceedings reads as follows: *'Any party to thi[illegible] contract shall have the right to have recourse to an[illegible] shall be bound by the Pre-Arbitral Referee Procedur[illegible] of the International Chamber of Commerce i[illegible] accordance with its Rules.'*

**1. Confidentiality**

Confidentiality and privacy traditionally wer[illegible] seen as major advantages of arbitration. Jurisdiction[illegible] such as France and England still protec[illegible] confidentiality and privacy to a large extent[illegible] Australian and Swedish case law (respectively th[illegible] *Esso Australia* and *Bulbank* cases) have shed som[illegible] doubt as to whether confidentiality and privacy ar[illegible] essential features of arbitration. In view of thes[illegible] developments, a confidentiality and privacy claus[illegible] may well be advisable in arbitration clauses, certainl[illegible] in a boiler plate which may be used wherever in th[illegible] world or in relation to arbitrations to be conducte[illegible] in Australia and Sweden. Model arbitration clause[illegible] in these latter jurisdictions do not yet seem to hav[illegible] confidentiality clauses. Finally, a specific[illegible] confidentiality clause may well be needed becaus[illegible] general contractual confidentiality clauses may no[illegible] suffice[25].

[25] On these clauses, see the updated report on the *Groupe de Travail*'s confidentiality project in Fontaine, M. and De Ly, F., o.c., 259-329.

1. **Arbitration Costs**

Agreements to arbitrate also sometimes contain provisions in relation to the costs of the arbitration:

*'ArbitrationAll disputes arising in connection with the Agreement, or further agreements resulting thereof, shall be submitted to arbitration in accordance with the rules of the Netherlands Arbitration Institute. ... The arbitrators will also decide of the costs of the arbitral proceedings on the basis of the general principle that the costs shall be borne by the Party against whom judgement is given. ...'*

1. **Enforcement**

Not infrequently, arbitration clauses contain provisions dealing with the enforcement of the arbitral award:

*'The arbitration award shall be definite, final and irrevocable, and shall constitute an enforceable instrument requiring no further action for enforcement or any other formality. It shall be liable to no ordinary or extraordinary judicial remedies, nor shall it be subject to cancellation or suspension before ordinary courts of justice. The party failing to comply with the provisions of the arbitration award shall be obligated to make good any and all damage (damnum emergens or lucrum cessans) caused to the other party.'*

*' Should one of the parties voluntarily fail to comply with the provisions of the award and should the winning party therefore have to enforce the award, then all costs, taxes, fees and expenses involved with such enforcement shall be exclusively borne by the party which has failed to comply with the award.20.4 The enforceability of the arbitral award may be declared by any court having jurisdiction.'*

*' ARBITRATION..*

*The Proprietor and contractor shall have the right to institute suit against each other in any court of competent jurisdiction, to enforce any decision of award rendered in arbitration proceedings or to enforce the Governor of the Proprietor's decision in cases where the said decision is final and conclusive as above mentioned.'*

## D. CONCLUSION

The parties on a contract may agree on a certain arbitration clause recommended by some arbitration institution. Usually they insert a short model clause taken from their rules and procedure as a formality. But sometimes the boiler plate of that clause creates another side conflicts. If the parties are not drafted carefully, they may found it in the future on the meaning of the battle of form for a not clearly stated minds of the parties. In practice, the arbitration clause is drafted after a long negotiation of the main offer and condition of a contract, then insufficient thought sometimes happened on how disputes are tobe resolved. The clause often remain unclear such as absent of choice of law or choice the place of arbitration and etcetera. Therefore the clause can be tailored to fit precisely the substance of the case and provide all detail how the arbitration should proceed to avoid unnecessary conflict in future.

**Bibliography**

**A. Books**

Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Thomson Sweet and Maxwell, London, 2003.

Collier, John and Vaughan Lowe, *The Settlement of Disputes in International Law, Institutions and Procedure*, Oxford University Press inc, New York, 2000.

Daniel V Davidson., Comprehensive Business Law Principles and Cases .1992.

De Boer, *Choice of Law in Contracts and Tort in the Netherlands, a Methodological Perspective*, Kluwer Law International, 2005

M. Simampou, *International Commercial Contract*, Bandung Aksara, 1994.

Nygh, Peter, *Autonomy in international contract*, Clarendon Press, Oxford, 1999.

Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration*, Westport, An Imprint of Greenwood Publishing group, Inc, 1994.

Priyatna Abdurrasyid, *Arbitrase & Alternatif Penyelesaian Sengketa Suatu Pengantar* (Jakarta: PT. Fikahati Aneska, 2002.

Sudargo Gautama, *Indonesia Business Law, Citra* Aditya Bhakti, 1979.

Sudargo Gautama., Essays in Indonesia Law, Second edition, Citra Aditya Bakti, 1993.

**B. Legislations**

United Nations Convention On Contracts For The International Sale Of Goods (CISG) year 1980.

*Indonesian Civil Code* Burgerlijk Wetboek voor Indonesia (Kitab Undang-Undang Hukum Perdata).

Indonesian Law No.30 On Arbitration and Alternative Dispute Resolution year 1999.