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THE IMPORTANCE OF ARBITRATION AGREEMENT IN WRITING: INTERNATIONAL, INDONESIA, AND NEW ZEALAND

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ABSTRACT

International commercial arbitration has been one of the popular means to solve a dispute, including in Indonesia and New Zealand. In the event the cross-border commercial parties intend to utilize arbitration to solve its present or future dispute, the regarding parties need to provide the basis for international commercial arbitration: arbitration agreement. One of the matters that the parties need to pay attention in regards to the arbitration agreement is formal validity. Formal validity is ruled through Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; UNCITRAL Model Law on International Commercial Arbitration; as well as the majority of national arbitration laws. However, different instruments serve different definitions on "arbitration agreement in writing" as the valid form. There is still a conflicting stance on what is internationally agreed as the valid form of arbitration agreement. Consequently, the issue arises from how important it is for the parties to own arbitration agreement in writing based on the perspectives on international arbitration law, Indonesia, as well as New Zealand. This writing utilizes the comparative juridical research between international instruments (Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and UNCITRAL Model Law on International Commercial Arbitration) as well as the national arbitration law of Indonesia and New Zealand. As a result, the writer has concluded that according to international arbitration law as well as the national arbitration law of Indonesia and New Zealand, the arbitration agreement in writing, as a valid form, is important and highly valued.

Keywords: arbitration agreement in writing; international; importance.

I. INTRODUCTION

As global commerce maintains to grow, the volume of commercial cross-border disputes has considerably increased.[1] Moreover, alternative dispute resolutions, as the ways to solve such problem, are also majorly growing popular amongst the international business parties, especially after the occurrence of COVID-19.[2]

Alternative dispute resolution is broadly known as a mechanism that allows parties to dive their options in handling a dispute outside of traditional judicial intervention.[3] However, the precise definition of alternative dispute resolution may vary in many countries. For instance, in the United States, alternative dispute resolution is seen as the type of dispute resolution method excluding

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[1] Marc Jonas Block, "The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes", *Rutgers Law Record: The Digital Journal of Rutgers School of Law*, Vol. 44, 2016 – 2017, p. 1.

[2] International Business Magazine, "The Rise of Alternative Dispute Resolution Methods on the International Stage", https://intlbm.com/2022/05/18/the-rise-of-alternative-dispute-resolution-methods-on-the-international-stage/, downloaded on 21st of August 2024.

[3] Marc Jonas Block, "The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes", *Loc. Cit.*

litigation.[4] As an opposite, Europe and a large part of the international sphere see alternative dispute resolution as the method excluding litigation and arbitration.[5]

Among all methods, international commercial arbitration has been one of the top favored means to solve an international commercial dispute. This is proven from how the international commercial arbitration filings around the world have spiked more than 3% (three percent) a year from 2010 – 2019 and surprisingly, a significant 9.9% (nine-point-nine percent) in 2020.[6]

According to Gary Born, arbitration is understood as a process involving parties that consensually submit a dispute to a private adjudicator in order to generate a binding decision, resolving the regarding dispute.[7] This process is implemented by conforming with the neutral, adjudicatory procedures, giving every party an opportunity to maximally present its case.[8] Compared to other alternative dispute resolution mechanisms, arbitration is distinguished since its framework embodies 3 (three) unique elements: a) the adjudicatory power is given to the arbitrators, acting in their private capacity;[9] b) the arbitrators are nominated to generate a final and binding decision, assembling an enforceable arbitral award;[10] and c) the adjudicatory power given to the arbitrators are in accordance with the parties' consent.[11]

As a process of settling commercial disputes between cross-border commercial parties,[12] international commercial arbitration has given many advantages or benefits.[13] There are 5 (five) reasons that many parties rely on international commercial arbitration to settle their disputes: a) it is deemed to be a neutral forum, considering that each party is able to prevent its counter-party's national court; and b) there is a good prospect for either party to enforce the arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**Convention**"), which binds almost all countries around the world;[14] c) the rule of parties' confidentiality is very honored; d) it provides freedom for the parties to choose their arbitrators with peculiar expertise(s); and e) it is a shorter and less-costly process compared to a full scale litigation.[15]

To achieve the purpose of providing the basis for international commercial arbitration,[16] the parties shall employ arbitration agreement, an agreement to submit present, or even future disputes to

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[4] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge: Cambridge University Press, 2008, p. 13.
[5] *Ibid.*
[6] Kennedys, "The rise of international arbitration and a comparison of arbitration procedures in the USA, England and Wales, Bermuda and Canada", https://kennedyslaw.com/en/thought-leadership/article/the-rise-of-international-arbitration-and-a-comparison-of-arbitration-procedures-in-the-usa-england-and-wales-bermuda-and-canada/, downloaded on 21st of August 2024.
[7] Gary B. Born, *International Arbitration: Law and Practice*, the Netherlands: Kluwer Law International, 3rd Edition, 2012, Chapter 1.01[A].
[8] *Ibid.*
[9] Article I (2) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention 1958").
[10] Franco Ferrari, Friedrich Rosenfeld, and John Fellas, "Chapter 1: Introduction to International Commercial Arbitration" in International Commercial Arbitration: A Comparative Introduction, United Kingdom: Edward Elgar Publishing, 2021, p. 3; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, *Op.Cit.,* p. 1.
[11] Franco Ferrari, Friedrich Rosenfeld, and John Fellas, *Ibid,* p. 5.
[12] Sankalp Jain, "Principles of International Commercial Arbitration", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3895574, downloaded 21st of August 2024.
[13] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, *Op.Cit.,* p. 3.
[14] New York Convention 1958, "Contracting States", https://www.newyorkconvention.org/contracting-states, downloaded on 21st of August 2024; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, *Loc.Cit.,* p. 3-4.
[15] Margaret L. Moses, *Ibid.*
[16] Kastriote Vlahna (et.al.), "Arbitration and the Importance of the Arbitration Agreement", *European Journal of Educational & Social Sciences*, Vol. 5, Issue 2, October 2020, p. 162.

international commercial arbitration.[17] Jan van den Berg even exacerbates the importance of an arbitration agreement by essentially stipulating that there will be no arbitration without its basis, which is arbitration agreement.[18] Furthermore, one of the matters that the parties need to pay attention in regards to arbitration agreement is its formal validity (form requirement).[19] Together with substantive validity, formal validity of the arbitration agreement is fundamental to ascertain that such agreement is enforceable and achieves its intended objective.[20] The matter of formal validity is expressly governed in the Convention, UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 ("**UML**"), as well as the majority of national arbitration laws.[21] The issue concerning formal validity of the arbitration agreement may develop at different points throughout the arbitration lifecycle. *First,* the issue may develop before the arbitration begins, which conveys that it may arise in an application for stay or dismissal of court proceedings.[22] *Second*, the issue may develop during the arbitration, which conveys that it may arise in the circumstance of challenging the jurisdiction of the arbitral tribunal.[23] *Third*, the issue may even develop after the arbitration, which conveys that it may arise in the proceedings in regards to setting aside or enforcing the arbitral award.[24]

According to the Convention, the valid form of arbitration agreement is mainly divided into 2 (two) types: a) in the form of an arbitration clause inside a contract or a separate arbitration agreement, whereas the regarding contract or separate arbitration agreement has been signed by the parties; b) in the form of an arbitration clause inside a contract or separate arbitration agreement that is contained in an exchange of letters or telegrams, without requiring any of these documents to be signed by the parties.[25] However, many commercial parties have tried to implement this concept through different ways. In fact, the UML as well as many domestic arbitration laws in practice give less-strict approaches on what is deemed as a "written document" as an agreement to arbitrate.[26] Hence, there is still a conflicting stance on what is internationally agreed as a valid form of arbitration agreement.

As a matter of fact, in Indonesia, international commercial arbitration has also been popularly chosen to resolve disputes,[27] considering that many businesses do not agree that most Indonesian courts

[17] United Nations Conference on Trade and Development, "Dispute Settlement: International Commercial Arbitration – 5.2 the Arbitration Agreement", 2005, p. 3, https://unctad.org/system/files/official-document/edmmisc232add39_en.pdf
[18] Albert Jan van den Berg, A., *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation*, The Hague: Kluwer Law and Taxation Publishers, 1981.
[19] Law Notes, "Validity of Arbitration Agreement: Substantive vs. Formal Validity", https://lawnotes.co/validity-of-arbitration-agreements-substantive-vs-formalvalidity/#:~:text=For%20an%20arbitration%20agreement%20to,the%20implications%20of%20doing%20so, downloaded on 21st of August 2024.
[20] *Ibid.*
[21] Kiran Nasir Gore, "New White Paper Now Available – Checking the Boxes: Formal Validity of an Arbitration Agreement", https://arbitrationblog.kluwerarbitration.com/2023/09/07/new-white-paper-now-available-checking-the-boxes-formal-validity-of-an-arbitration-agreement/, downloaded on 22nd of August 2024.
[22] Guiditta Cordero-Moss, Kiran Nasir Gore, & Joshua Karton, "Checking the Boxes: Formal Validity of an Arbitration Agreement", https://www.wolterskluwer.com/en/solutions/kluwerarbitration/checking-the-boxes-formal-validity-of-an-arbitration-agreement accessed on 25th of August 2024
[23] *Ibid.*
[24] *Ibid.*
[25] United Nations Conference on Trade and Development, "Dispute Settlement: International Commercial Arbitration – 5.2 the Arbitration Agreement", 2005, p. 3, https://unctad.org/system/files/official-document/edmmisc232add39_en.pdf; Article II(1) New York Convention 1958.
[26] Saracho Aguirre Jesús, "Validity of the Arbitration Agreement", https://jusmundi.com/en/document/publication/en-validity-of-the-arbitration-agreement-ground-to-refuse-recognition-and-enforcement-of-non-icsid-awards, downloaded on 22nd of August 2024; Article 7 Option I and Option II Model Law 1985.
[27] Tony Budidjaja, ' Indonesia ', *The Asia-Pacific Arbitration Review 2016*, 2016, p. 58, https://budidjaja.law/2015/12/the-2016-edition-of-the-asia-pacific-arbitration-review/, accessed on 22nd of August 2024.

are able to settle the disputes in a professional manner.[28] To accommodate the regarding situation, Indonesia has Badan Arbitrase Nasional Indonesia ("**BANI Arbitration Centre**") to solve not only national, but also international commercial disputes, with 160 (a hundred and sixty) professional arbitrators in variety of expertise.[29]

Furthermore, arbitration is widely used in New Zealand.[30] In fact, this country is deemed as a pro-arbitration jurisdiction.[31] The usage of international arbitration has been increasing, which proceeds concurrently with the globalization of this country's economy.[32] In order to cater such need, New Zealand itself has New Zealand International Arbitration Centre ("**NZIAC**"), which is aimed to assist and support the international dispute settlement as well as to encourage the utilization of New Zealand as the seat or venue for the commencement of international commercial arbitration.[33] NZIAC itself even offers 4 (four) different Arbitration Rules which can be applied in accordance with the dispute value or where the claimant seeks declaratory relief only.[34]

Since there are significant utilizations of arbitration to solve international commercial disputes in both countries, the presence of arbitration agreement also plays a big role in the success of the commencement of arbitration. Consequently, based on the aforesaid background, the issue arises from how important it is for the parties to own a written arbitration agreement in international commercial dispute based on the perspectives of international arbitration law, Indonesia, as well as New Zealand. This comparative analysis will be made based on international and national arbitration law, considering the applicability of both the Convention and the UML as the parts of international arbitration law to each country: Indonesia and New Zealand.

II. RESEARCH METHOD

This qualitative research utilizes comparative and normative juridical approach.[35] Comparative juridical approach is carried out through the comparison between international instruments, which govern the formal validity of arbitration agreement (the Convention and the UML), as well as the national arbitration law of Indonesia and New Zealand to achieve the understanding regarding how important it is for the parties to own an arbitration agreement in writing based on each perspective. The

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[28] Simon Butt, "Arbitration in Indonesia: Largely Dependable Recognition and Enforcement", in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific, Sydney: Hart Publishing, 2020, p. 196.
[29] Badan Arbitrase Nasional Indonesia, "Sejarah", https://baniarbitration.org/about-bani/history, downloaded on 22nd of August 2024.
[30] Daniel Kalderimis, "Arbitration Guide: New Zealand", International Bar Association, 2018, p. 3, https://www.ibanet.org/document?id=New-zealand-country-guide-arbitration#:~:text=New%20Zealand%20generally%20adopts%20a,willing%20to%20set%20awards%20aside downloaded on 22nd of August 2024.
[31] Singapore Chamber of Maritime Arbitration, "New Zealand", 2021 Maritime Arbitration Enforcement Series, 2021, p. 1, https://scma.org.sg/SiteFolders/scma/387/Articles/A%20Guide%20to%20New%20Zealand%20Maritime%20Arbitration.pdf downloaded on 22nd of August 2024.
[32] Daniel Kalderimis, "New Zealand", Global Arbitration Review, 2015, https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2016/article/new-zealand.
[33] New Zealand International Arbitration Centre, "About Us", https://nziac.com/about-us/, downloaded on 22nd of August 2024.
[34] MinterEllisonRuddWatts, "Construction arbitration: Arbitral institutions in New Zealand", p. 1, https://merwprodblob.blob.core.windows.net/media/media/merw/merw_media/insights%20-%20content/minterellisonruddwatts-arbitral-institutions-in-new-zealand.pdf accessed on 25th of August 2024
[35] Christy (*et. al.*), "Hak Cipta Sebagai Jaminan Kredit Perbankan dalam Pembangunan Perekonomian Indonesia," *Jurnal Legislasi Indonesia*, Vol. 17, No.3, 2020, p. 2.

research is conducted by using available secondary data, which is comprised of primary, secondary, and tertiary legal resources.[36] Furthermore, every data involved is collected through literature studies.[37]

III. DISCUSSION

3.1 International Perspective on the Importance of Arbitration Agreement in Writing

The Convention is established in regards to the recognition and enforcement of foreign arbitral awards as well as the referral from the court to conduct arbitration.[38] The Convention is deemed to be one of the keys to the internationally harmonized and unified international trade law.[39] Per today, there are 172 (one hundred and seventy-two) parties and 24 (twenty-four) signatories of this convention around the world.[40]

Article II(1) and II(2) the Convention govern that:

"*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them…*"[41]

"*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*"[42]

Here, Article II(1) the Convention provides a general provision that the arbitration agreement has to be concluded in writing. On top of that, Article II(2) the Convention signifies the specific definition on what is deemed as "agreement in writing": a) taking the form of arbitration clause inside a contract or a separate arbitration agreement, whereas the regarding contract or separate arbitration agreement has been executed by the parties; b) taking the form of an arbitration clause inside a contract or separate arbitration agreement that is consisted in an exchange of letters or telegrams, without the parties having to execute any of these documents.[43] The second alternative was included in order to accommodate practices in international trade during that period (1958).[44]

The legislative background of Article II(2) the Convention substantiates that the regarding drafters intended to eliminate the oral or tacit acceptance of a written arbitration proposal. This was shown from how the proposal of the Dutch Delegate, Piet Sanders, to add "*confirmation in writing by one of the parties [which is kept] without contestation by the party*" in Article II(2) was not accepted. In the scope of sales or purchase confirmation matters, the delegates' votes eventually demonstrated that only the written acceptance of a proposal to arbitrate was accepted as the right form of arbitration agreement in writing.[45]

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[36] Ni Made Diana Kencana Putri, "Analysis of Recognition from the Perspective of International Law and Implementation of Public Policies in Indonesia and Myanmar", *Focus Journal Law Review*, Vol. 3, No. 2, 2023, p. 1; David Putra & Nadia Veronica, "Pancasila Law State As An Instrument Of Indonesian Legal Politics: Efforts To Achieve A Just Indonesian Legal State", Pancasila and Law Review, Vol. 3, Issue 2, p. 149
[37] *Ibid.*
[38] New York Convention, "In Brief", https://www.newyorkconvention.org/, downloaded on 22nd of August 2024.
[39] Annex II: Recommendation regarding interpretation of Article II Paragraph II and Article VII Paragraph I of New York Convention 1958
[40] New York Convention, "Contracting States", *Loc.Cit.*
[41] Article II(1) New York Convention 1958.
[42] Article II(2) New York Convention 1958.
[43] Albert Jan van den Berg, "When is an Arbitration Agreement in Writing Valid under Article II (2) of the New York Convention of 1958?" in Piet Sanders: een honderdjarige vernieuwer, the Netherland: Boom Juridische Uitgevers, 2012, p. 325.
[44] *Ibid.*
[45] *Ibid,* p. 326.

Article II(1) and II(2) of the Convention were crafted in order to provide a single international standard across the globe, which would be regarded as the most valuable in addressing requirements pertaining to formal validity of an arbitration agreement.[46] However, these provisions are somehow deemed to be very strict.[47] The strict requirements (arbitration agreement in writing) are aimed to gain protection for the parties, whereas the parties will be certainly aware that they have consented to resolve the dispute through arbitration, certainly by their own declaration. Furthermore, these requirements are deemed to be the remedy for the diverse national arbitration laws concerning the form of arbitration agreements.[48]

Regardless, there exists a law that is often preferred by international parties due to its flexibility in the practice of concluding such agreement: the UML.[49]

The UML is a designed law, adopted by the United Nations Commission on International Trade Law, available to aid States in reforming as well as modernizing their national laws on arbitral procedures to consider the specific characteristics and requirements of international commercial arbitration.[50] It was first adopted in 21 June 1985[51] and continued to be amended in 2006, giving changes to various articles.[52] One of the amended articles happened to be Article 7, with the title of "*Definition and form of arbitration agreement*".[53] The newest Article 7 introduces the international parties to 2 (two) different options of what is being considered as a valid form of arbitration agreement.

Article 7(1) Option I the UML essentially governs a general definition of arbitration agreement, which is primarily an agreement to submit to arbitration that has arisen or which may arise in the future. In a manner similar to Article II(1) the Convention, this specific paragraph also provides that the parties can create an arbitration agreement inside a contract or separate arbitration agreement.

Pursuant to Article 7(2) Option I the UML, an arbitration agreement has to be made in writing.[54] Beyond that, Article 7(3) Option I the UML gives a broader clarity of what constitutes as an arbitration agreement made in writing: the content is "*...recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*"[55] Article 7(4) Option I the UML further signifies that the writing requirement can be met by an electronic communication which the information is accessible and useable as reference.[56] It clarifies that the scope of electronic communication is the communication by means of data messages, which is "…*information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.*"[57]

Moreover, Article 7(5) Option I the UML stipulates that an arbitration agreement is deemed to be in writing in the event it is "…*contained in an exchange of statements of claim and defence*…"

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[46] S. I. Strong, "What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act", *Standford Journal of International Law*, Vol. 48, No. 1, 2012, p. 76.
[47] Albert Jan van den Berg, "When is an Arbitration Agreement in Writing Valid under Article II (2) of the New York Convention of 1958?", *Loc.Cit.*; Bojana Jankovic, "Formal Validity of Arbitration Agreements Entered into by Means of Electronic Communication", Short Thesis, Central European University, 2007, p. 7.
[48] Bojana Jankovic, "Formal Validity of Arbitration Agreements Entered into by Means of Electronic Communication", *Ibid.*
[49] Guiditta Cordero-Moss, "Practical Insights on Formal Validity of the Arbitration Agreement", Kluwer Law International, p. 1.
[50] United Nations, "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, downloaded on 22nd of August 2024.
[51] *Ibid*
[52] *Ibid.*
[53] *Ibid.*
[54] Article 7 (2) Option I Model Law.
[55] Article 7 (3) Option I Model Law.
[56] Article 7 (4) Option I Model Law.
[57] *Ibid.*

whereas one party asserts the existence of the agreement and the other party does not deny or refute it."[58] Lastly, Article 7(6) Option I the UML also rules that reference in a contract to other document that contains arbitration agreement is still considered to be an arbitration agreement in writing.[59]

After the discussion above, it can be asserted that Article 7 Option I the UML has stricter requirements than Article 7 Option II the UML in regards to what is deemed as a formally valid arbitration agreement. Article 7 Option II the UML merely regulates the definition of arbitration agreement.[60] The definition itself is exactly alike to what is governed in Article 7(1) Option I the UML, minus any explanation pertaining to the valid form of arbitration agreement. This encompasses that Article 7 Option II does not demand the international parties to create an arbitration agreement in writing. In essence, there are no formal requirements at all.[61]

This solution was submitted through a written proposal by the Mexico's Government for UNCITRAL Working Group to contemplate. The reasons this notion was pushed are, *inter alia*,: a) compared to when the Convention and the UML were being negotiated and established, the international commercial arbitration has been widely more accepted by nations in this era and therefore, the requirement to own an arbitration agreement in writing was only deemed as a formality that had become unwarranted; and b) the Mexico's Government sought to abolish the issue in regards to the legal validity of the arbitration, which equated to only leaving the issue of proving the conclusion of the arbitration agreement as well as its content.[62]

In regards to both options of Article 7, there are over 30 (thirty) enacting arbitration laws that conform with Option I.[63] On the other hand, only few nations, such as Belgium, New Zealand, Norway, and Florida, United States, follows the approach from Option II.[64]

As we return to the previous focus, the requirement of an exchange in writing based on Article II(2) the Convention, as explained above, has been seen to be no longer aligning with global trade practices, whereas contracts are often established through tacit acceptance. To add, various courts have been interpreting this specific article broadly, and growing number of States have also been relying on its own national arbitration law to establish whether the regarding arbitration agreement is formally valid.[65]

In order to adapt with today's international trade practices, there is a broader range of alternatives that the parties can utilize to comply with the valid form of arbitration agreement based on Article II(2) the Convention, for instance: a) contract which incorporates arbitration clause or a separate arbitration agreement which have been executed by the parties; b) contract which incorporates arbitration clause or a separate arbitration agreement contained in exchange in writing without the signatures (execution) of the parties; c) means of telecommunication to achieve the exchange in writing, such as telex,

[58] Article 7 (5) Option I Model Law.
[59] Article 7 (6) Option I Model Law.
[60] Article 7 Option II Model Law.
[61] Guiditta Cordero-Moss, "Practical Insights on Formal Validity of the Arbitration Agreement", *Kluwer Law International*, 2023, p. 2.
[62] Article 7 (2006 Version): Definition and Form of the Arbitration Agreement', in Peter Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, 4th edition, South Holland: Kluwer Law International, 2019, p. 8; A/CN.9/WG.II/WP.137, Settlement of commercial disputes: Preparation of uniform provisions on written form for arbitration agreements – Proposal by the Mexican Delegation.
[63] Article 7 (2006 version), *Ibid.*
[64] *Ibid.*
[65] Albert Jan van den Berg, "When is an Arbitration Agreement in Writing Valid under Article II (2) of the New York Convention of 1958?", *Op. Cit,* p. 327.

facsimile, teleprinter, and email;[66] d) arbitration clause contained in sales or purchase confirmation; e) arbitration clause contained in standard conditions; f) an arbitration agreement which is made through an agent and another party; as well as g) agreement renewal which contains an arbitration clause.[67] However, each of these examples also imposes different specific requirement(s) that has/have to be fulfilled in order to be deemed as conforming.[68]

The broader range of alternatives under Article II(2) the Convention has shown that the applicability of the Convention does not only rest with its literal, word-by-word, provision in regards to the valid form of arbitration agreement. Instead, similar to Article 7 Option I the UML, the Convention can be the less-strict medium which provides the needs of international commercial parties in conducting their contracts, in accordance with today's international trade practices.

Moreover, for the purpose of facilitating the enforcement of arbitral process, the parties shall also oblige to Article IV(1) the Convention. Pursuant to this provision, any party which intends to attain recognition and enforcement of the arbitral award, has to file an application before the competent court as well as supply the original or, at least, a duly certified copy of the arbitral award and the regarding arbitration agreement, which is in conformity with Article II the Convention.[69] These have been seen to show the spirit of "*in favorem arbitrandum*" (a presumption that a dispute can be resolved through arbitration), established under the Convention.[70]

Additionally, Article VII(1) the Convention essentially governs the more-favorable-right provision,[71] which indicates that the winning party to the arbitral award has the right to benefit from more lenient domestic law (the enforcing court national law) than the provisions given in the Convention.[72] The more-favorable-right provision at times can be utilized to relax the application of Article II(1), II(2), and IV(1) the Convention, which essentially mandates the arbitration agreement to be in writing.[73] When there only exists oral arbitration agreement as the "arbitration agreement", the winning party of the arbitral award has the right to benefit from the national law the enforcing court, which may govern that oral arbitration agreement can be considered as the valid form of arbitration agreement (for instance: through the adoption of Article 7 Option II the UML).

This solution can be applied at the time when the arbitral award is issued based on an oral arbitration agreement in a jurisdiction that mandates the arbitration agreement to be in writing, however the recognition and enforcement of the arbitral award was conducted in a jurisdiction where arbitration agreement does not have to be in writing. Despite the fact that there is a potential risk of the arbitral award being set aside in the seat of arbitration for failing to fulfill the written requirement (which the regarding party can utilize Article V(1)(b) the Convention), the enforcing court may still justify the recognition and enforcement of the arbitral award based on Article 7(1) the Convention.[74]

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[66] Emmanuel Gaillard & Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London: Cameron May Ltd, 2008, p. 48.
[67] Albert Jan van den Berg, "New York Convention of 1958: Annotated List of Topics", 2013, p. 17-20, https://www.newyorkconvention.org/media/uploads/pdf/9/7/97_list-of-topics-descriptions-29-sep-2013.pdf.
[68] *Ibid.*
[69] Giacomo Marchisio, "The Validity of the Arbitration Agreement in International Commercial Arbitration", LL.M. Thesis, Faculty of Law McGill University, 2014, p. 50, https://escholarship.mcgill.ca/downloads/js956j933?locale=en downloaded on 25th of August 2024.
[70] *Ibid.*
[71] Bojana Jankovic, "Formal Validity of Arbitration Agreements Entered into by Means of Electronic Communication", *Op.Cit.*, p. 9.
[72] Hong-Lin Yu, "Written Arbitration Agreements – What Written Arbitration Agreements?", *Civil Justice Quarterly*, Vol. 32, Issue 1, 2012, p. 84.
[73] *Ibid*, p. 88.
[74] Albert Jan van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation*, *Op. Cit.,* p.174.

On the other hand, this solution cannot be applied at the time when the arbitral award is issued based on an oral arbitration agreement in a jurisdiction that allows the arbitration agreement to be made orally, however the recognition and enforcement of the arbitral award are conducted in a jurisdiction where the arbitration agreement has to be in writing.

Hence, since the application or utilization of the more-favorable-right provision under Article VII(1) the Convention is very case-to-case basis, both parties are recommended to count on arbitration agreement in writing, instead of oral arbitration agreement.

The arbitration agreement in writing also provides many benefits to the commencement of international commercial arbitration involving the parties. *First*, the arbitration agreement in writing serves to clearly ensure the parties' intention to subject them to the jurisdiction of arbitration.[75] *Second*, the arbitration agreement in writing serves as the vital evidence in order to prove to the arbitral tribunal as well as the court that the parties have chosen their dispute to be submitted to arbitration, which shall be resolved by the arbitral tribunal, and not the court.[76] *Third*, the arbitration agreement in writing relieves the parties' burden to prove the existence as well as the contents of the arbitration agreement.[77] *Fourth*, the arbitration agreement in writing provides the parties certainty, clarity, and predictability during the arbitration proceeding as well as the enforcement and recognition of the arbitral award, which are the key objectives in the international commerce sphere.[78] To further add, most jurisdictions across the globe have been consistently upholding the written requirement as the valid form of arbitration agreement, in accordance with Article II of the Convention[79] and/or Article 7 Option I the UML.[80]

In accordance with the elucidation above, it can be reasonably inferred that under international arbitration law, which is supported by the national law of the majority of countries worldwide, the ownership of arbitration agreement in writing between the parties are important and will almost invariably be the reliable option to have the arbitration agreement deemed as formally valid.

3.2 Indonesia's Perspective on the Importance of Arbitration Agreement in Writing

According to the practice, arbitration in Indonesia has existed since mid-19th century.[81] Arbitration in Indonesia used to be governed by Articles 615 – 651 of *Reglement op 'de Rechtvordering* ("**RV**").[82] However, the whole process of national as well as international arbitration today is governed by a more recent law: Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Indonesian Arbitration Law**").[83]

Pursuant to Article 1(1) Indonesian Arbitration Law, arbitration is essentially defined as a civil dispute settlement method that is based on arbitration agreement in writing, made by the parties in dispute. Article 1(3) Indonesian Arbitration Law further defines arbitration agreement as an agreement

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[75] Hong-Lin Yu, "Written Arbitration Agreements – What Written Arbitration Agreements?", *Op.Cit.*, p. 71.
[76] *Ibid.*
[77] *Ibid.*
[78] S. I. Strong, "What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act", *Loc.Cit*; *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir. 2005); New Zealand International Arbitration Centre, "The Importance of Certainty in International Arbitration Agreements", 2022, https://nziac.com/the-importance-of-certainty-in-international-arbitration-agreements/ accessed on 24th of August 2024.
[79] Hong-Lin Yu, "Written Arbitration Agreements – What Written Arbitration Agreements?", *Op.Cit.*, p. 72.
[80] Article 7 (2006 Version): Definition and Form of the Arbitration Agreement', in Peter Binder, International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, *Loc.Cit*.
[81] Tony Budidjaja, "Country Update: Commercial Arbitration in Indonesia", *Asian Dispute Review*, October 2021, p. 1.
[82] *Ibid.*
[83] Article 34 of Indonesian Arbitration Law.

in the form of: a) arbitration clause inside the written agreement of the parties before the dispute emerges; or b) separate arbitration agreement concluded by the parties after the dispute has emerged.

According to Article 4(2) Indonesian Arbitration Law, in the event that the parties have agreed that the dispute will be settled through arbitration and the parties have delegated the authority, this agreement has to incorporated into a document signed (executed) by all the parties. Article 4(3) Indonesian Arbitration Law additionally elaborates that when the parties have concluded to settle the dispute through arbitration in the form of document exchanges, "*...the transmission of telex, telegram, facsimile, e-mail, or in other communication means must be attached with a receipt from both parties.*"

Article 9 Indonesian Arbitration Law further governs in the event that parties choose to resolve the dispute after the dispute itself has emerged, such agreement must be made in a written agreement signed (executed) by all the parties.[84] However, in the event that the parties are unable to sign the regarding written agreement, such written agreement must be made as notarial deed.[85]

New York Convention 1958

Indonesia has ratified the Convention through Presidential Decree Number 34 on August 1981.[86] Since that time, Indonesia has effectively become a party of the Convention, with the application of reciprocity as well as commercial reservations.[87]

In regards to the Convention, it is clear that Article 1(1) and 1(3) Indonesian Arbitration Law strongly align with what has been governed by Article II the Convention since the arbitration agreement is required to be made in writing[88] and essentially, there has been established 2 (two) main types that are considered to be the valid forms of arbitration agreements: an arbitration clause inside a contract or a separate arbitration agreement in writing.[89] Furthermore, it is also evident that the obligation to have the arbitration agreement in writing executed by both parties, or at least contained in an exchange of letters (which the alternatives may vary), under Article 4(2), 4(3), and 9 Indonesian Arbitration Law is in accordance with Article II(2) the Convention as well.

UNCITRAL Model Law

Indonesia has never adopted either Article 7 Option I or Option II the UML.[90] Regardless, the formal validity of arbitration agreement under Indonesian Arbitration Law encompasses similarities with several requirements noted in Article 7 Option I the UML. *In casu*, Article 1(1) and 1(3) Indonesia Arbitration Law strongly align with what has been governed by Article 7(2) Option I the UML since the arbitration agreement is required to be made in writing. Furthermore, the provision under Article 1(3) Indonesian Arbitration Law is in accordance with Article 7(1) Option I the UML, whereas there is a clear division towards the main alternatives which are considered to be the valid forms of arbitration agreements: an arbitration clause inside a contract or a separate arbitration agreement.

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[84] Article 9(1) Indonesian Arbitration Law.
[85] Article 9(2) Indonesian Arbitration law.
[86] Pheo M. Hutabarat, "Enforcement of Foreign Arbitral Awards in Indonesia", https://law.asia/enforcement-foreign-arbitral-awards-indonesia/, downloaded on 24th of August 2024; Agustina Merdekawati & Andi Sandi, "Analysis on Indonesia's Fulfillment of Oblgiationss Rising from Internasional Treaties", *Mimbar Hukum*, Vol. 8, No. 3, Oktober 2016, p. 501.
[87] Tony Budidjaja, 'Indonesia', *Loc.cit.*
[88] Article II(1) New York Convention 1958.
[89] Article II(2) New York Convention 1958.
[90] Albertus Primadi & Rizki Karim, "Indonesian Arbitration Law Turns 21: A Timely Metamorphosis?", https://arbitrationblog.kluwerarbitration.com/2020/08/24/indonesian-arbitration-law-turns-21-a-timely-metamorphosis/, downloaded on 24th of August 2024.

It is also evident that the ownership of arbitration agreement by the parties, in the form of document exchanges, aligns with Article 7(3) and 7(4) Option I the UML since the content of the arbitration agreement is recorded through the document exchanges, such as through telex, telegram, facsimile, e-mail, and other communication means.

Moreover, although Article 1320 Indonesian Civil Code governs that agreements in general are not required to be made in writing in order to be valid and binding, Article 1(1) and 1(3) Indonesian Arbitration Law still demand the parties to have the arbitration agreement made in writing. Therefore, Indonesian Arbitration Law does not resemble the "no formal requirements" under Article 7 Option II the UML.

Based on the elucidation above, it can be concluded that Indonesian Arbitration Law highly values the arbitration agreement in writing as the valid form. The arbitration agreement in writing holds importance in the commencement of the international commercial arbitration, whereas "*there is no arbitration without a valid arbitration agreement*".[91] In general, written arbitration agreement under Indonesian Arbitration Law has been in line with the international practice and the parties utilizing this procedural law may hold benefits from owning such arbitration agreement, which has been discussed in Section 3.2.

3.3 New Zealand's Perspective on the Importance of Arbitration Agreement in Writing

International and domestic arbitration in New Zealand is governed under Arbitration Act 1996 Number 99 (as at 30 January 2021) ("**New Zealand Arbitration Act**").[92] This act initially came into force on July 1997 and afterwards, it altered the legal framework that New Zealand used to have: Arbitration Act 1908 based on the English model.[93] New Zealand Arbitration Act is closely aligned with the UML, which is integrated (comprising the 2006 amendments) into Schedule 1 with minor adjustments.[94] Moreover, New Zealand has ratified the Convention, with the note of reservation that New Zealand will "*…apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.*"[95]

Throughout the amendment in 2006, New Zealand Arbitration Act specified that under Article 7(1) Schedule 1 in New Zealand Arbitration Act, arbitration agreement could be made orally or in writing. Subject to Section 11 (in regards to consumer arbitration agreement),[96] an arbitration agreement must be made in either arbitration clause inside a contract or separate arbitration agreement. Furthermore, pursuant to Article 7(2) Schedule 1 in New Zealand Arbitration Act, reference inside a contract to a document that has an arbitration clause is seen as an arbitration agreement, *"...provided that the reference is such as to make that clause part of the contract*."

[91] Nita Triana, "Urgency of Arbitration Clause in Determining the Resolution of Sharia Economic Disputes", AHKAM, Vol. 18, No. 1, 2018, p. 76, https://journal.uinjkt.ac.id/index.php/ahkam/article/viewFile/8872/5252.
[92] Parliamentary Counsel Office, "New Zealand Legislation: Arbitration Act 1996", 2021, https://www.legislation.govt.nz/act/public/1996/0099/latest/whole.html accessed on 25th of August 2024.
[93] New Zealand Dispute Resolution Centre, "Arbitration Act 1996", https://www.nzdrc.co.nz/arbitration/arbitration-guides-and-resources/arbitration-act-1996/#:~:text=The%20main%20feature%20of%20the,with%20laws%20in%20other%20jurisdictions accessed on 25th of August 2024.
[94] Nicola Swan, "Guide to Arbitration Places: New Zealand", DELOS, 2024, p. 5, https://delosdr.org/wp-content/uploads/2019/10/Delos-GAP-2nd-edn-New-Zealand.pdf downloaded on 25th August 2024; ICLG, "International Arbitration Laws and Regulations New Zealand 2023 – 2024", 2023, https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/new-zealand accessed on 25th of August 2024
[95] Nicola Swan, "Guide to Arbitration Places: New Zealand", *Op. Cit,* p. 1.
[96] Daniel Kalderimis, "Arbitration Guide: New Zealand", *Op. Cit*, p. 6.

The allowance to have oral arbitration agreement still exists until today in order to make sure that New Zealand stays current with the global best practices as well as to mirror Article 7 Option II the UML that governs no exact written requirement for arbitration agreement.[97]

Moreover, Article 35 Schedule 1 in New Zealand Arbitration Act exists to govern regarding the recognition and enforcement of arbitral awards. Here, specifically in paragraph (2)(b), New Zealand Arbitration Act uses the sentence: "*if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement…*" This shall mean that this specific provision tries to facilitate what is governed under Article 7(2) Schedule 1 in New Zealand Arbitration Act, which permits the form of the arbitration agreement to be made orally or in writing. In the event the arbitration agreement between the parties is made in writing, the original or the duly certified copy of the arbitration agreement has to be submitted to the enforcing court. On the other hand, in the event there only exists oral arbitration agreement, the parties can rely on such arbitration agreement as an attempt to recognize and enforce the arbitral award. Here, Article 35 Schedule 1 in New Zealand Arbitration Act eventually circumvents possible conflict coming from: a) the "no formal requirements" based on Article 7(1) Schedule 1 in New Zealand Arbitration Act; as well as b) the applicability of Article IV the Convention, providing that the party submitting for the recognition and enforcement of the arbitral award shall supply, *inter alia*, the original or the duly certified copy of arbitration agreement in writing based on Article II the Convention.[98]

In light of the explanation above, New Zealand Arbitration Act gravitates towards Article 7 Option II the UML, which applies the "no formal requirements" (the arbitration agreement can be made orally or in writing) to deem the arbitration agreement as valid. However, New Zealand Arbitration Act still highly values the arbitration agreement in writing as the valid form. This can be seen from how the provisions in regards to arbitration in writing is still clearly and properly governed in New Zealand Arbitration Act. What is more, New Zealand Arbitration Act specially governs in respect of consumer arbitration agreement that it has to be made in writing.[99]

While the arbitration agreements are allowed to be concluded orally, the cross-border commercial parties are best recommended to ideally craft the arbitration agreement in writing.[100] Arbitration agreement in writing may reduce the chance that a party claims that no arbitration agreement has ever been concluded.[101] Further, the arbitration agreement in writing provides the parties the chance to priorly develop the optimal procedure for the arbitration.[102] This includes how the parties can ensure that the arbitral proceeding will result to enforceable arbitral award,[103] taking into account that majority of jurisdictions across the globe still implements the arbitration agreement in writing.[104]

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[97] Hong-Lin Yu, "Written Arbitration Agreements – What Written Arbitration Agreements?", *Op.cit*, p. 76; New Zealand Dispute Resolution Centre, "Understanding the Arbitration Act 1996", https://www.nzdrc.co.nz/arbitration/arbitration-guides-and-resources/arbitration-act-1996/#:~:text=The%20main%20feature%20of%20the,with%20laws%20in%20other%20jurisdictions accessed on 25th of August 2024.

[98] Hong-Lin Yu, "Written Arbitration Agreements – What Written Arbitration Agreements?", *Op. Cit*, p. 77.

[99] Article 7(1) of Schedule 1 New Zealand Arbitration Act.

[100] Daniel Kalderimis, "Arbitration Guide: New Zealand", *Op. Cit*, p.5.

[101] *Ibid*, p. 5-6.

[102] *Ibid*, p. 6.

[103] Gary B. Born, *International Arbitration: Law and Practice, Op.cit*, Section 1.02 (c).

[104] Hong-Lin Yu, "Written Arbitration Agreements – What Written Arbitration Agreements?", *Op. Cit*, p. 72.

IV. CONCLUSION

In accordance with international arbitration law (the Convention and the UML), which is affirmed by the majority of jurisdictions worldwide, it is important for the cross-border commercial parties to have arbitration agreement in writing. The arbitration agreement in writing will almost invariably be the dependable choice to have the arbitration agreement deemed as formally valid.

Moreover, based on the comparison between international arbitration law and Indonesian Arbitration Law, Indonesian Arbitration Law highly values the arbitration agreement in writing as the valid form of arbitration agreement. The existence of Indonesian Arbitration Law has been in accordance with the international practice and the parties making use of the regarding law may obtain advantages from owning such arbitration agreement.

Lastly, based on the comparison between international arbitration law and New Zealand Arbitration Law, it is unequivocal that New Zealand Arbitration Act gravitates towards Article 7 Option II the UML. Nevertheless, New Zealand Arbitration Act still highly values the arbitration agreement in writing as the valid form of arbitration agreement. This is shown from how the provisions concerning the arbitration agreement in writing is still clearly and properly governed in New Zealand Arbitration Act. Additionally, this specific national law particularly rules that the consumer arbitration agreement has to remain concluded in writing.

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