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Research Article

Reconstruction of Arbitration Agreement Arrangements to Prevent Pathological Arbitration Clauses in Indonesia

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ABSTRACT

Pathological arbitration clauses can hinder the arbitration process and open up opportunities for the parties to avoid arbitration or challenge its decision. These clauses may arise due to deliberate intent or a lack of understanding on the part of the parties. Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (AAPS Law) does regulate arbitration agreements, but it is not comprehensive in preventing the emergence of pathological clauses. This study aims to identify forms of pathological arbitration clauses that hinder the effectiveness of arbitration and to formulate a reconstruction of arbitration agreement regulations to prevent them in Indonesia. The research method used is juridical-normative with an emphasis on legal norms as the main object. The data used consists of primary and secondary legal materials through legislative, analytical, comparative, and conceptual approaches. The results of the study show that pathological arbitration clauses hinder arbitration because they contain ambiguities, such as unclear arbitration authority to resolve disputes, the existence of options for the parties to choose a court, and the appointment of unavailable arbitrators. To prevent pathological arbitration clauses, Article 9 of the AAPS Law needs to be reconstructed by including arbitration clause regulations that explicitly state the authority of arbitration without exception. The conclusion of this study is that there are pathological clauses in the agreement and therefore the reconstruction of Article 9 of the AAPS Law is carried out by providing legal certainty on the pactum de compromittendo in the arbitration agreement.

Keywords: Pathological Arbitration Clause; Arbitration Agreement; Reconstruction.

A. INTRODUCTION

In both international and national arbitration practices, pathological arbitration clauses are considered defective and create impediments (Henriques, 2015). The term was first introduced by Eismann in 1974, who suggested that such clauses contain defects that impede the efficient execution of the arbitration process (Sherman & Bennett, 2006). An arbitration clause is considered pathological if it deviates from its essential elements (Hijriani et al., 2025). For example, it may not engender an arbitration obligation or preclude district court intervention in dispute resolution, confer full authority to the arbitrator to resolve disputes, or stipulate a procedure to facilitate the prompt and efficient implementation of arbitration awards (Samra & Ramachandrean, 2020).

According to Eismann, an arbitration clause must establish binding obligations for the parties

involved (Suardi et al., 2024). The clause must resolve disputes through arbitration and preclude court intervention before an award is issued. It must authorise the arbitrator or panel to adjudicate disputes and facilitate a procedure to efficiently obtain an enforceable arbitration award (Irawan et al., 2025). These principles guide disputing parties and legal representatives in drafting arbitration clauses (Samra & Ramachandrean, 2020).

Pathological arbitration clauses make it harder for arbitration to work as a way to settle business disputes outside of state courts. These faulty clauses can disrupt the arbitration process, possibly making it impossible to continue (Henriques, 2015), preventing the arbitration authority from settling disputes, or leading to unenforceable awards (Sherman & Bennett, 2006). Errors in these kinds of clauses don't always make them invalid, but they might be if the ambiguity or contradiction is bad enough. For example, a clause that says disputes should go to both a district court and arbitration could be a problem (Henriques, 2015). Arbitration clauses are hard to put into action because of rules already in place in national and international agreements. This stops the parties from going through with the arbitration process (Mayana et al., 2024).

A problematic arbitration clause occurs when the parties select a specific arbitrator who subsequently becomes unavailable. This happened in a case between Encyclopedia Universalis S.A. ("EUSA") of Luxembourg and Encyclopedia Britannica, Inc. ("E.B.") of Delaware. In 1966, EUSA and E.B. signed a license agreement that included an arbitration clause. This clause said that each side had to choose an arbitrator, and the two arbitrators had to choose a third with the agreement of both sides (Setyawan et al., 2025). If they couldn't agree, the President of the Tribunal de Commerce of Luxembourg would choose one from the British Chamber of Commerce in London's list. But in 1995, when there was a disagreement, the British Chamber stopped keeping a list of arbitrators. The EUSA arbitrator asked the Luxembourg Court to choose a third arbitrator, which led to the appointment of a lawyer based in Luxembourg. E.B. disagreed with this and said that the clause was not followed. The Luxembourg court and EUSA chose an arbitrator, who then made a decision (Sherman & Bennett, 2006).

EB challenged the award in the Southern District of New York's United States District Court (Shabrina & Putrijanti, 2022). The District Court did not agree with the EUSA's award or the arbitrators chosen by the Luxembourg Court. It was decided that the parties were still required to go through arbitration, even though the British Chamber of Commerce's list of arbitrators was lost. This was because the conditions of impossibility and frustration of purpose were not met. The arbitrators went beyond their powers because the panel didn't follow the agreed-upon rules for how to make decisions. The court said

that the parties had to choose a third arbitrator from a list of qualified international arbitrators in order to protect the integrity of arbitration. The court suggested that the third arbitrator be from the London Court of International Arbitration (Sherman & Bennett, 2006). The Court of Appeal agreed with the District Court's decision to not recognize the arbitration award because the panel was not made up of people who were agreed upon by both parties. But this decision was later changed because the EUSA and Luxembourg Court's arbitrators going beyond their authority was not a valid reason to refuse recognition under the New York Convention (Sherman & Bennett, 2006).

Arbitration clauses with unclear terms can become pathological, which could cause arguments about how to read them (Henriques, 2015). An arbitration clause with unclear terms is one that has clauses that don't match up (Sherman & Bennett, 2006). For instance, a clause may mention both arbitration and district court jurisdiction without giving any more details, or it may not make it clear where the arbitration will take place or who the arbitrator will be (Comșa, 2018).

In Indonesia, arbitration can sometimes fail because the arbitration clauses are unclear and can be read in different ways. This happened with PT. Prima Citra Perdana and PT. Asuransi AXA Indonesia, who had first agreed to a contract to insure heavy equipment and cars. The agreement had an arbitration clause that said:

> *If there is a disagreement about how much should be paid under this policy (with liability being otherwise admitted), the disagreement will be decided by an arbitrator chosen in writing by the parties in disagreement, or, if they can't agree on a single arbitrator, by two arbitrators, one chosen in writing by each party. Before the arbitrators start the reference, they must agree on an umpire in writing. The umpire will sit with the arbitrators and run their meetings. Before you can sue the insurers, you have to get an award.*

PT. Asuransi AXA Indonesia ended the agreement because they couldn't agree on how to pay for the policy. PT. Prima Citra Perdana took PT. Asuransi AXA Indonesia to court in South Jakarta, saying that the end of the contract had nothing to do with a disagreement over a policy payment. The company said that ending an insurance contract was against the law in the district court's area of responsibility. PT. Asuransi AXA Indonesia said that ending a contract because of a disagreement over policy payments should be settled through arbitration. The South Jakarta District Court, on the other hand, said in Interim Decision No. 534/Pdt.G/2011/PN.Jkt.Sel. that the arbitration clause only applied to disagreements about the insurance policy's monetary value. The court determined that the arbitration clause did not encompass the resolution of disputes pertaining to unlawful acts (Wijayanti et al., 2025).

Pathological arbitration clauses are evident in the cases of PT Prima Laksana Mandiri and PT. Asuransi AXA Indonesia. The parties agreed on equipment and vehicle insurance, including an

arbitration clause similar to that of PT Prima Citra Perdana. Prima Citra Perdana's. When PT. Asuransi AXA Indonesia terminated the agreement due to payment disputes. Prima Laksana Mandiri initiated legal proceedings in the South Jakarta District Court, alleging an unlawful act. PT. Prima Laksana Mandiri argued that the termination fell within the court's jurisdiction and was not a payment dispute. PT. Asuransi AXA Indonesia contended that PT. Prima Laksana Mandiri's interpretation of 'if a difference arises regarding an amount that must be paid under this policy' is too narrow and that disputes should be resolved through arbitration. However, the South Jakarta District Court, in Interim Decision No. 535/Pdt.G/2011/PN.Jkt.Sel, ruled that the arbitration clause only grants the authority to resolve payment disputes. The court affirmed its jurisdiction in examining tort lawsuits against PT. Asuransi AXA Indonesia regarding termination of the agreement.

According to the authors, the arbitration clause section stating "if a difference arises regarding an amount that must be paid under this policy" does not explicitly confer comprehensive authority for arbitration to resolve all disputes between parties. This clause exhibits characteristics similar to the pathological arbitration clause described by Comsa: a clause designed to encompass two jurisdictions and contains an ambiguous agreement on arbitration utilization (Comșa, 2018). The clause restricts arbitration jurisdiction to disputes concerning the amount payable under the policy, potentially engendering significant disputes. This was demonstrated when PT. Asuransi AXA Indonesia terminated the agreement over policy payments, as PT. Prima Citra Perdana and PT. Prima Laksana Mandiri argued that unilateral termination does not constitute a dispute over payable amounts. They exploit the ambiguous arbitration jurisdiction gap, arguing unlawful acts fall outside arbitration's purview. The authors consider the arbitration clause in these cases pathological, aligning with Sherman and Bennet's description. Both scholars assert that arbitration clauses are pathological when they likely precipitate disputes in arbitration (Sherman & Bennett, 2006).

As this case occurred between two companies in Indonesia, it should still adhere to Indonesian law. According to Article 5, paragraph (1) of the Arbitration and Alternative Dispute Resolution Law (AADR Law), disputes that can be resolved through arbitration include those in the trade and business sectors. In this case, a pathological arbitration clause could be invoked, considering that the plaintiff, PT. Prima Citra Perdana filed a lawsuit in the District Court instead of resolving the dispute through arbitration. In practice, however, this cannot be justified, as the agreement clause only narrows disputes regarding the amount to be paid based on the policy. Nevertheless, the dispute resolution clause must be implemented as the main step in resolving disputes in the business sector. The

pactum de compromittendo principle should also apply to this agreement, as the form of dispute resolution has been determined before the dispute occurs, as stated in Article 1, Number 3, which confirms that arbitration agreements include arbitration clauses in written agreements made by the parties before the dispute arises.

These instances illustrate pathological arbitration clauses in agreements formulated by the parties prior to the emergence of a dispute (also known as the pactum de compromittendo) (Kartasasmita, 2021). These kinds of clauses can make arbitration much harder (Hufron & Fikri, 2024). If the clause has flaws that cause confusion, the original goal of resolving business disputes quickly and outside of court through arbitration may not be met. As a result, people who want arbitration may have to go through a long process of resolving their differences in court. This result goes against the goals of arbitration, which is to be a quick and cheap way to settle disputes instead of going to court (Sherman & Bennett, 2006).

The AADR Law governs arbitration agreements in Articles 1(3), 2, and 9. Nonetheless, it lacks thorough measures to avert pathological arbitration clauses in the Pactum de Compromittendo. The AADR Law only delineates the 'Acta Compromise', an arbitration agreement established post-dispute (Kartasasmita, 2021). Considering the instances of pathological arbitration agreements, analogous circumstances may arise again. The vagueness of such agreements enables parties to evade arbitration, redirect dispute settlement to district courts, or nullify arbitration rulings. Pactum de compromittendo is essentially a mechanism for conflict resolution via arbitration. Article 1339 of the Civil Code establishes a framework for interpreting articles that rely not only on the written text but also on principles of fairness, custom, or law inherent to the agreement. Nevertheless, considering the presence of two categories of agreements, as outlined in Article 1, paragraph 3 of the AAPS Law, legal certainty and qualifications are imperative for the execution of pactum de compromittendo, to ensure legal certainty and to establish a standard for the parties when drafting the content of the dispute resolution provisions in arbitration.

This paper is the inaugural examination of pathological arbitration provisions in Indonesia. Numerous studies in international journals have addressed these types of clauses, however they have presented varying perspectives. Sherman and Bennett assert that such clauses are prevalent in international agreements and that the law does not consistently address them effectively. The paper asserts that skilled drafting can prevent such provisions (Sherman & Bennett, 2006). Henriques (2015) examines examples in Portugal, asserting that good faith norms should include arbitral institutions and suggesting that institutional regulations ought to delineate good faith for all stakeholders. Comșă outlines the various forms of pathological provisions and their

possible remedies, promoting the correction of flawed clauses to restore the parties' intention to arbitrate (Comșă, 2018). Waincymer demonstrates that courts typically adopt a flexible stance and recognize terms that reflect the parties' intentions, notwithstanding any pathological elements (Waincymer, 2016). Samra and Ramachandrean contend that pathological clauses might hinder arbitration by undermining the parties' intentions (Samra & Ramachandrean, 2020). Shore asserts that these clauses are typically addressed by discerning the parties' intentions, and advises avoidance of such clauses (Shore, De Benedetti & De Nitto Persone, 2022). From a philosophical perspective, 'faith' is a very difficult main factor in the formation of an agreement, whether based on subjective or objective good faith. 'Faith' is not a determining factor in the formation of an agreement or clause because its validity cannot be measured. However, faith can be important, and its quality can be measured if there are benchmarks in subjective and objective good faith. Subjective good faith can be seen in awareness, honesty and the good intentions of the parties involved in implementing the agreement, or in this case, carrying out dispute resolution by arbitration. Objective good faith can be seen in the substance of the agreement, or in this case, the arbitration settlement clause. It is necessary to add and/or reconstruct regulations determining the content or form of the arbitration dispute resolution clause before the dispute occurs (pactum de compromittendo), so that the judge or arbitrator can see if the arbitration clause was made with objective good faith.

The author believes that several potential solutions are required to address pathological arbitration clauses. However, this research focuses on the nature of such clauses and on reconstructing arbitration agreement arrangements under the AADR Law to avoid them. They propose that the regulation of arbitration agreements should include provisions for the creation of arbitration clauses in Pactum de Compromittendo, with the aim of mitigating the occurrence of pathological arbitration clauses (Paranata, 2025). This approach aims to enhance the effectiveness of arbitration as a mechanism for resolving business disputes in Indonesia (Wardana, Rahayu & Sukirno, 2024).

Legal theory is essential for studying and formulating qualifications for arbitration clauses agreed upon before disputes arise (pactum de compromittendo). The researcher therefore uses John Rawls' theory of contract justice, which will be discussed further in the subsequent section, to determine the necessary form of the article needed to regulate the form of an arbitration clause (in a pactum de compromittendo) that is valid, fair and equal for the parties who will draft it.

A state-of-the-art study is needed to determine whether the current research is novel in relation to previous studies. The first previous study, entitled 'The Role of Arbitration in the Resolution of International Commercial Disputes'

by Mohammad Naqib Ishan Jan and Abdulrashid Lawan Haruna, essentially focused on the dominance of the arbitration method in resolving international disputes. It is true that the arbitration method brings many advantages to international agreements, such as flexibility, freedom for the parties involved, neutrality and confidentiality (Jan & Haruna, 2014). The difference between the two studies is that the previous one prioritised the study of the benefits of arbitration in international agreements, while this one examines the reconstruction of the pactum de compromittendo regulations in arbitration clauses in Indonesia, which could also be applied in other countries to provide legal certainty. The second study, titled "Arbitration in Resolving Construction Cost Claim Disputes Due to Time Extensions: A Study of Contract Law in Indonesia," was conducted by Amaliyah Noor Indahwati, S. Sami'an, and Sarwono Hardjomuljadi (Indahwati, Sami'an, & Hardjomuljadi, 2024). This study's results demonstrate that arbitration institutions in Indonesia are highly effective in resolving disputes related to construction cost claims resulting from project extensions. Arbitration serves as an efficient dispute resolution method owing to its temporal framework and binding legal authority, which offers greater flexibility compared to litigation remedies. The distinction between the prior study and the present study lies in the former's focus on evaluating the benefits of arbitration as a dispute resolution mechanism in a singular context, specifically construction cost claims, whereas the latter addresses the pathology clause of arbitration within agreements and endeavors to articulate a reconstruction of the article concerning the pactum de compromittendo in commercial contracts.

The previous third study, entitled 'The Enforcement of International Arbitration Awards in Indonesia: A Comparative Study with the United States, the Netherlands and Singapore', by Panusun Harahap. The results of this study essentially state that, although Indonesia ratified the New York Convention in 1958, its procedures for court and arbitration implementation are still complicated, unlike Singapore and the United States, which are more effective and efficient in resolving arbitration disputes. Therefore, Indonesian legal reform is needed to simplify arbitration procedures (Harahap, 2019). The difference between the previous and current studies is that the former discusses the effectiveness of Indonesian arbitration institutions in resolving international disputes, while the latter examines pathology clauses in arbitration and provides a detailed reconstruction of pactum de compromittendo regulations.

The fourth previous study entitled "Conflicts of Laws and Jurisdictions in Indonesia-related Arbitrations Seated in Singapore-Perspectives From The Tribunal" by Gary F. Bell, the results of this study essentially state that there are contradictions and steep gaps in the implementation of the execution of arbitration decisions in Indonesia and in Singapore, in

practice the implementation of arbitration always uses the Indonesian civil concept but uses arbitration dispute resolution in Singapore, with this creating difficulties for arbitrators in Singapore to resolve disputes, as well as arbitrator decisions in Singapore are difficult to execute in Indonesia (Bell, 2022). The difference between previous and current research is that the previous study discusses more about decisions and executions between Indonesia and Singapore, while the current research examines more about regulations or legal arrangements that are still not firm in providing legal certainty regarding arbitration clauses and ultimately giving rise to pathological arbitration clauses and requiring regulatory reconstruction. The latest research, entitled 'Judicial Control of Foreign Arbitral Awards in Indonesia' by Winner Sitorus, essentially examines the fact that the 1958 New York Convention, ratified by Indonesia, grants countries too much authority to decide on arbitration disputes from other countries. This has implications for the Indonesian state, which often refuses to provide decisions on international arbitration disputes (Sitorus, 2016). The difference between this research and previous studies is that previous studies focused more on the authority of Indonesian arbitration institutions to handle international cases. In contrast, this study focuses on regulations regarding arbitration pathology clauses that often occur both nationally and internationally. Therefore, it is necessary to reconstruct the regulations regarding the pactum de compromittendo arbitration clause in the AADR Law.

Based on the above description of ideas and problems, it can be seen that arbitration clauses agreed upon before a dispute begins (pactum de compromittendo) are not regulated in detail. Therefore, this study aims to identify and understand pathological arbitration clauses hindering the effectiveness of arbitration, and to formulate regulations for arbitration agreements to prevent pathological clauses in Indonesia.

B. RESEARCH METHODS

This study uses a juridical-normative approach by focusing on legal norms as the main object of analysis, considering that this study aims to formulate a form of regulatory reconstruction that is relevant to existing cases and regulations. The applicable statutory approach, the use of theory is also used to examine research questions. This study uses secondary data sources, including primary and secondary legal materials. Primary legal materials include laws and regulations, international conventions, and jurisprudence relating to arbitration agreements. Secondary legal materials include books, journal articles, and other written materials relevant to arbitration agreements. This study uses a statue approach by using a study of laws and regulations, international conventions, and jurisprudence, this study also uses an analytical approach to analyze the Pathological Forms of Arbitration Clauses and also analyzes articles in a

regulation that need to be reconstructed (Natalis & Purwanti, 2025). This study also uses a comparative approach by presenting case studies with pathological cases of arbitration clauses in other countries as study material. In addition, this research also uses a conceptual approach to examine the concepts contained in the agreement, including the concept of pactum de compromittendo in agreements containing arbitration clauses as dispute resolution, and other relevant concepts will also be examined. The data in this study were collected through document analysis, searching for relevant concepts, theories, and legal opinions, then analyzed qualitatively and presented descriptively (Rudy & Mayasari, 2022).

C. RESULTS AND DISCUSSION

1. Pathological Forms of Arbitration Clauses That Impede the Efficacy of Arbitration

An arbitration agreement is a legally binding contract that comes from both parties agreeing to it. It is governed by Book III Chapter II of the Civil Code. Article 1313 says that an agreement is "an act by which one or more people bind themselves to one or more people." This means that when people agree to do something, it becomes a legal event (Lubis & Fahmi, 2021). Article 1320 says that a valid agreement must have consent, competence, a clear object, and a legal cause (Rudy & Mayasari, 2022). Consent happens when people willingly agree to be bound, either directly or indirectly. If someone forces you to sign an agreement, lies to you, or makes a mistake, the agreement is not valid (Lubis & Fahmi, 2021).

An arbitration clause or compromise clause is a part of a business contract that is based on the idea of freedom of contract. This clause signifies a consensus wherein parties opt to refer the resolution of commercial disputes to arbitration (Adolf, 2015). There are two main types of arbitration agreements: Pactum de Compromittendo and Acta Compromis (Rudy & Mayasari, 2022).

Pactum de Compromittendo is an arbitration agreement that two people make before they have a disagreement. This arbitration clause is part of the main agreement and says that any future disputes will be settled through arbitration. This agreement is based on Article 1, paragraph (3), and Article 7 of the AADR Law. The arbitration agreement is a key part of the main agreement (Rudy & Mayasari, 2022).

Acta Compromise is an agreement made by both sides to settle a disagreement through arbitration. The main agreement did not have an arbitration clause. The parties agree to settle a disagreement through arbitration and put this in writing. Article 9 of the AADR Law (Rudy & Mayasari, 2022) says that Acta Compromis is in charge. This type of arbitration agreement is different from the main agreement because it is a separate, specialized agreement made by the parties to settle disputes that come up before ad

hoc arbitration or within certain arbitration institutions (Adolf, 2015).

There can be no arbitration unless both parties agree to it and sign an arbitration agreement (Winarta, 2015). An arbitration agreement establishes the arbitrator's jurisdiction and outlines the procedural elements of the arbitration process (Pujiyono, 2018). It seeks to settle disagreements between parties, both before and after they happen. Without this agreement, the parties can't use arbitration to settle their differences (Kartasasmita, 2021). So, arbitration clauses should help the parties settle their differences, not become pathological clauses that cause new ones (Sherman & Bennett, 2006).

In arbitration practice, pathological arbitration terms can hinder the process (Comșa, 2018) as they often lead to misunderstandings regarding intent, arguments over the application of verdicts, or clauses that complicate enforcement. From a practitioner's perspective, a pathological arbitration provision is defined as an arbitration agreement that is deficient for the following reasons: The clause lacks a clear definition of the arbitration process; it is insufficiently explicit regarding the implementation of arbitration; the clause requires a detailed specification of the arbitration procedure. Arbitration agreements lack clarity; the document does not specify the location or the identity of the arbitrator (Comșa, 2018).

The authors examined the arbitration clause in the insurance contracts between PT. Prima Citra Perdana and PT. Asuransi AXA Indonesia, as well as between PT. Prima Laksana Mandiri and PT. Asuransi AXA Indonesia, deeming it pathological. The language fails to explicitly indicate that the parties consent to resolve conflicts via arbitration, instead establishing two jurisdictions by stipulating that arbitration is employed to adjudicate disputes over the amount owing under the agreement policy (Latifiani et al., 2025). This provides district courts the opportunity to resolve disputes between parties (Handayani & Hardiyanti, 2025).

Eismann asserts that a pathological arbitration clause does not serve its fundamental purpose because it cannot enforce arbitration as a means of resolving disputes. This is due to the clause's unclear wording, which creates a conflict between the authority of arbitration and the court, or a flaw in the way the parties' intentions are expressed that is not easy to see at first glance (College of Commercial Arbitrators, 2022).

Eismann defines pathological arbitration clauses as those that substantially diverge from the fundamental requirements (Shore, De Benedetti & De Nitto Persone, 2022). An arbitration clause must meet four basic requirements: it must create binding obligations for the parties involved; it must stop the district court from getting involved in disputes before the arbitration award; it must give the arbitrator the power to settle disputes between the parties; and it must allow procedures that make it easy and quick to issue an enforceable award. An

arbitration clause becomes pathological if any of these conditions are not met. To prevent this classification, the clause must include all these components (Samra & Ramachandrean, 2020).

Comsa asserted that a pathological arbitration clause could constitute a valid agreement that fulfils all the necessary criteria. However, the way it is worded may have legal consequences that differ from what the parties anticipated when they signed the contract. One of the most frequent pathological variants of poorly formulated arbitration clauses is the optional clause. This type stipulates that parties may elect to pursue arbitration or litigation in a district court to resolve disputes (Comsa, 2018). Another form simultaneously outlines the arbitration dispute resolution process while also conferring jurisdiction over disputes to certain district courts. Such ambiguous arbitration clauses are detrimental to the parties involved, resulting in an ineffective and inefficient dispute resolution process (Alcolea, 2025).

Another flaw in a pathological arbitration clause could be the inclusion of inaccurate information regarding the arbitration institution, the name of the arbitrator, or the specified rules, which could render the arbitration option unavailable. This occurred in the case of EUSA and EB, where the parties agreed to appoint a third arbitrator from the British Chamber of Commerce's list. When a dispute arose 29 years later, difficulties arose as the list no longer existed. According to Moses, Sherman and Bennett argue that the EUSA and EB arbitration clause is pathological due to incorrect information about the arbitrator's name, rendering the option invalid (Kortl & Chbib, 2024). Such conditions prevent the parties from conducting arbitration as specified. Consequently, the initial objective of resolving disputes efficiently through arbitration has not been achieved (Alcolea, 2025).

Sherman and Bennet do not entirely agree that, in the absence of a pathological arbitration clause, there must be complete certainty regarding the ongoing availability of the designated arbitrator or institution. The authors posit that parties cannot guarantee an arbitration institution will not dissolve or the appointed arbitrator will not expire. They assert that parties can mitigate the risks associated with pathological arbitration clauses by rigorously scrutinizing and exercising caution in the selection of a particular arbitrator or institution during the formulation of an arbitration clause (Sherman & Bennett, 2006).

An entity or process is deemed effective in arbitration if it fulfills its specified objectives. Effectiveness comes from the word "effect," which means "impact," and it is measured by how well someone achieves their goals (Pusida, Pati, & Lambey, 2018). Efficiency means doing a job with care and accuracy. Efficient individuals demonstrate the ability to minimize expenditure on required resources (Mokoagow et al., 2024).

Arbitration is a popular method of resolving business disputes due to its effectiveness and efficiency. The parties can choose the time and

place and hire an expert arbitrator. The process is private and adaptable, and the arbitrator can usually make decisions faster than a court can. The parties must follow the arbitrator's decision (Kartasasmita, 2021).

An arbitration agreement that clearly states what the parties want makes it easier for the arbitrator to settle the dispute in line with those wishes (Boklan & Bahri, 2020). The parties' clear agreement to arbitration, as stated in a clause, cancels out any implied term (Howse, 2016). The more clearly an arbitration clause shows what the parties want, the better it is at keeping pathological clauses from happening. The arbitrator's comprehension of the parties' intentions is augmented when their willingness to participate in arbitration is explicitly conveyed, thereby validating the clause's effectiveness (Waincymer, 2016). The people who write the arbitration clause need to think about things that could cause problems with it and make it so that those problems don't happen (Sherman & Bennett, 2006).

2. Reconstructing Arbitration Agreement Arrangements to Prevent the Occurrence of Pathological Arbitration Clauses in Indonesia

Arbitration agreements are regulated in several articles under the AADR Law. Article 1 paragraph (3) of the AADR Law defines an arbitration agreement as "an agreement in the form of an arbitration clause contained in a written agreement made by the parties before a dispute arises, or a separate arbitration agreement made by the parties after a dispute arises." *Pactum de Compromittendo* and *Acta Compromis* are arbitration agreements according to this article. These two types are further affirmed in Article 2 of the AADR Law.

> This legislation governs the settlement of conflicts or disagreements between parties in a particular legal arrangement who have agreed to arbitration. The agreement explicitly states that any disputes or differences, whether current or potential, stemming from the legal relationship will be addressed through arbitration or other alternative dispute resolution methods.

Article 9 of the AADR Law delineates the regulation of arbitration agreements. This article comprises four paragraphs that elucidate the provisions governing arbitration agreements, as follows:

(1) In the event that the parties choose dispute resolution through arbitration after the dispute has occurred, agreement regarding this matter must be made in a written agreement signed by the parties.
(2) In the event that the parties cannot sign a written agreement as intended in paragraph (1), the written agreement must be made in the form of a notarial deed.
(3) The written agreement as intended in paragraph (1) must contain:
   a. Disputed issues;
   b. Full name and place of residence of the parties;
   c. Full name and place of residence of the arbitrator or arbitration panel;
   d. The place where the arbitrator or arbitration panel will make a decision;
   e. Secretary's full name;
   f. Dispute resolution period;
   g. Statement of willingness from the arbitrator; and

h. A statement of the willingness of the disputing party to bear all costs necessary for resolving the dispute through arbitration;

(4) Written agreements that do not contain the matters referred to in paragraph (3) are null and void by law.

Based on the description, Article 9 of the AADR Law only applies to arbitration agreements made after a dispute arises (Acta Compromis). However, this article lacks provisions for arbitration clauses within agreements established before a dispute emerges. Therefore, Article 9 of the AADR Law must be amended to provide comprehensive regulation of arbitration agreements, covering both pre- and post-dispute scenarios between parties (Kendall, 2024).

The addition of new articles and the reconstruction of existing ones has indirectly begun to limit the scope of the principle of freedom of contract (Mevorach, 2021). However, this regulatory reconstruction is not carried out without reason, but rather based on the facts of the cases and jurisprudence explained above which require regulatory reconstruction. The law must always be dynamic in accordance with existing developments. The more that is protected and guaranteed by law, the more orderly the existing social structure will be. In practice, however, regulatory reconstruction must also be accompanied by the existence of a supervisory body to oversee the many unequal agreements or arbitration clauses that only benefit certain parties (Widyawati et al., 2024). This study will not discuss the formation of a contract supervisory body further, as it focuses on the form of regulatory reconstruction in arbitration clauses drafted before a dispute occurs (pactum de compromittendo).

Reconstruction is the act of rebuilding or copying something that already exists (Bunga, 2021). The parts that were wrong at first were changed to make them right. The goal of reconstruction is to fix broken systems or structures and make them better (Dagan & Baron, 2025). The process consists of three steps: keeping the entity's basic parts while keeping its original nature; fixing areas that have become damaged and strengthening weak points; and updating the entity without changing its original features (Rifai, 2019). In the legal world, reconstruction means changing the law. Legal reconstruction is necessary to make the law fit the needs of society (Bunga, 2021).

Article 9 of the AADR Law was reworked to include updates while keeping its basic structure the same. Article 9's rules about arbitration agreements were broadened to include rules about agreements made before a dispute (pactum de compromittendo). This expansion is very important for reducing bad arbitration clauses. Preventing such clauses through practical formulation reduces unnecessary expenditure and deters parties from impeding arbitration. It also eliminates the risk of challenging the enforceability of awards in district courts (Sherman & Bennett, 2006).

Changing Article 9 of the AADR Law could help the ongoing discussion about changing the law (Demamu, 2024). Academics and arbitration professionals have emphasized the imperative of revising the AADR Law (Herman & Rusman, 2025). This law was passed during the transitional period after Soeharto and has always been a problem because it doesn't have a solid academic basis (Kliklegal, 2021a). The AADR Law was not based on the opinions of all the people who would be affected by it, and it's not clear if there was enough research done before it was passed (Chopard, 2025). The draft law did not go through a clear review process that included all interested parties (Kliklegal, 2021b). The ideal formulation of legislation should be predicated on an academic text delineating the philosophical, sociological, and legal dimensions of the proposed law (Kliklegal, 2021a).

The AADR Law needs to be changed to fit with how society and the law work today (Kliklegal, 2021a). Two decades after its enactment, a major challenge is still meeting the needs of businesses and making sure that arbitration is a dependable way to settle business disputes. To fix this, the government needs to put in place the right protection policies (Hukum Online, 2015a) and change the AADR Law to better protect the interests of businesses (Hukum Online, 2015b). It should be easier to send the government a draft proposal for the AADR Law (Campbell & Clancy, 2024). One way to do this is to send a full academic paper to the House of Representatives (Hansen, Kartono, & Susanto, 2025). As a result, House members can suggest adding the draft AADR Law to the National Legislation Programme (Hidayat, 2020).

Revising regulations is a critical component of regulatory reform in Indonesia. Recommendations for revision may be proposed when potential issues are identified within a regulation, and it is necessary for the community and state administrators to be involved (Silalahi, 2020). The provision in Article 9 of the AADR Law that governs arbitration agreements remains essential (Komarudin, Handoko & Hussain, 2025). However, modifications are required to ensure that this article encompasses the arbitration clause (pactum de compromittendo). Furthermore, Article 9 of the AADR Law should incorporate specific criteria for arbitration clauses to prevent pathological clauses and require parties to formulate arbitration clauses in good faith (Wilcox, 2024).

Good faith is an obligation in pre-contractual relationships and during contract implementation (Priyono, 2017). Good faith exists in two forms: subjective, referring to an individual's internal honesty; and objective, pertaining to external factors such as adherence to norms (Innaka, Rusdiana & Sularto, 2013). Many civil law nations require good faith in negotiations and contract drafting (Halimah & Pranoto, 2019). This aligns with Van Dunney's view that contract review extends beyond the contractual stage (Innaka, Rusdiana & Sularto,

2013). Parties demonstrating good faith in negotiations and contract formation fulfil their research (onderzoeksplicht) and information (mededelingsplicht) obligations with regard to material facts relating to the subject matter (Khairandy, 2017).

One manifestation of good faith when establishing an arbitration clause is parties taking diligent measures to formulate a clause free from deficiencies. Measures to mitigate pathological arbitration clauses include the following (Sherman & Bennett, 2006):

1) The parties' intention to mandate arbitration must be clearly and unequivocally articulated.
2) Verify the existence and nomenclature of the designated arbitration institution.
3) The parties must explicitly determine the existence and designation of the authorised arbitration institution.
4) If conditions precede arbitration, the methodology or time limit for fulfilling them must be clearly specified.
5) Refrain from nominating a specific individual as the arbitrator.
6) Avoid imposing excessive requirements for arbitrator qualifications.
7) Ensure the appointed arbitration institution consents to fulfilling its mandate.
8) Ensure arbitration procedures are explicit, applicable, and free from ambiguities or contradictions.
9) If a deadline for implementing arbitration is stipulated, the clause must delineate preventive measures or extensions permissible at the discretion of the arbitration institution, arbitrator, or court. If prevention or extension after initiation is contingent upon mutual agreement, it may impede arbitration when consensus is difficult.
10) If conditions precede arbitration, the methodology or time limit for fulfilling them must be clearly specified.

There are three fundamental principles that legal practitioners should consider when assisting disputing parties in avoiding pathological arbitration clauses, which can serve as a reference for the authors of this research. These principles encompass the following (Sherman & Bennett, 2006):

a. Legal practitioners should recognize that effective arbitration clauses are well-established and unambiguous. The clause must be clear and provide explicit provisions regarding arbitration authority.
b. Given that each party has distinct needs and objectives, a single standard arbitration clause may not apply universally. Legal practitioners must be flexible in developing alternatives for each case and situation. This flexibility enables them to avoid errors when formulating efficient solutions aligned with parties' requirements.
c. Legal practitioners play a crucial role in drafting effective arbitration clauses, guided by the principle that 'if a matter can be disputed, then it will be disputed.' This proactive

approach helps identify and mitigate potential risks and gaps that could undermine arbitration clauses. Even when parties struggle to agree on the desired arbitration procedure, legal practitioners can anticipate future disputes by including provisions that delegate authority to implement the procedure to the appointed arbitration institution.

Considering the above, it is crucial to refine the regulations of arbitration agreements in Article 9 of the AADR Law to reduce pathological arbitration clauses. Article 9 was revised by incorporating provisions for establishing arbitration agreements before disputes arise. After paragraph 4, an additional paragraph shall be added to Article 9, stating:

Paragraph (5)

When parties opt to resolve disputes through arbitration before they occur, a mutual agreement is typically formalized in an arbitration clause, integrated as an essential component of the primary contract.

Paragraph (6)

The arbitration clause is established in writing by parties in good faith, addressing the following matters:

a. The intention to use arbitration for resolving future disputes must be articulated explicitly and unequivocally, establishing binding obligations for the parties involved.
b. It is necessary to eliminate alternative options for utilizing district courts to resolve disputes between parties. All forms of district court interventions were precluded until an arbitration award was rendered.
c. The authority for dispute resolution should be conferred upon specific arbitration institutions, whose legal status and credibility have been verified. The parties must ascertain that the designated arbitration institution will consent to fulfilling its mandate.
d. The process of appointing an arbitrator should be delineated without specifying the name of the particular individual. Parties should stipulate only a limited set of specific requirements for arbitrator qualifications.
e. Establish clear, applicable, unambiguous, and non-conflicting arbitration procedures, including:
    i. Methodology for appointing an arbitrator or arbitration panel.
    ii. Designated location for arbitration proceedings.
    iii. Prescribed duration of arbitration process.
    iv. Authorization for arbitration to implement procedures conducive to efficient conditions facilitating execution of awards.
    v. Decision-making process employed by the arbitrator or panel.
f. In the event of a stipulated deadline for arbitration implementation, parties shall delineate preventive measures or

permissible extensions based on policies of the arbitration institution, arbitrator or district court.

g. Where conditions precedent to arbitration exist, parties shall specify the manner and time limit for fulfilling the required conditions.

This regulatory reconstruction was not formulated haphazardly; it also took into account existing practices, cases and jurisprudence. As the previously described cases indicate, there are ineffective and overlapping alternative dispute resolution options, and the scope of dispute resolution within an agreement is narrowing, as has occurred in the two previously described PTs (Kadir et al., 2025). This regulatory reconstruction also draws on John Rawls's theory of social contract justice, which states that justice can be achieved through social consensus. In order to determine such a consensus or agreement, conditions of freedom, rationality and equality must be met by all parties to the agreement. According to Rawls's theory of contractual justice, these conditions will ensure the enjoyment of rights and a fair distribution of obligations.

D. CONCLUSION

A pathological arbitration clause is a bad or unclear part that makes it harder to carry out arbitration or an award quickly. Such clauses hinder proper arbitration or fail to implement it, rendering them ineffective for out-of-court dispute resolution. These kinds of clauses often don't make it clear who has the authority to arbitrate, which means that the courts are still an option. Pathological clauses also don't make it clear who the arbitrator is, what institution they work for, where they work, or what the rules and procedures are.

Pathological arbitration clauses that make arbitration less effective include those that are not clear about how to resolve disputes, those that overlap with district courts, and those that name fake or nonexistent arbitration institutions. It is important to make arbitration more effective at settling business disputes. To achieve this, Article 9 of the AADR Law needs to be rewritten to include rules about a pre-dispute arbitration agreement (pactum de compromittendo). An extra paragraph in Article 9 says that arbitration clauses must be clearly written so that arbitration is the only way to settle business disputes. The parties must write the clause in good faith, making sure that it covers all important parts of the arbitration process and that it is clear and unambiguous. This will give the agreement and the parties who are bound by it legal certainty.

The findings of this study may also be utilized in other nations to enhance the certainty and continuity of legal resolution efforts via arbitration. This will help judges and arbitrators figure out and settle current cases.

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