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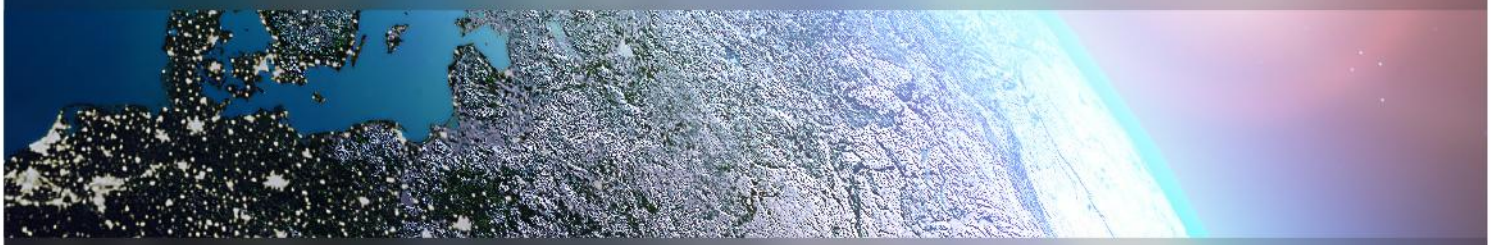

UNILATERAL OPTION CLAUSES – 2017 SURVEY

UNILATERAL OPTION CLAUSES – 2017 SURVEY

Dispute resolution clauses providing for arbitration but giving one party the exclusive right to elect to refer a particular dispute to litigation before the courts – also known as "unilateral option clauses" – have remained a common feature in many transaction documents since we carried out our last survey in 2014.[1]

Following recent decisions in France and Singapore – and in light of the result of the United Kingdom's referendum of 23 June 2016 on its membership of the European Union (the "EU") – the time is right to re-visit the topic to see if such unilateral option clauses remain 'fit for purpose'.

Clifford Chance has therefore refreshed and expanded its survey as to their effectiveness. The survey now covers over 60 jurisdictions, 21 of which are included for the first time (including 14 African jurisdictions).

England & Wales

English courts continue to uphold unilateral option clauses

The attitude of the English courts to "one-sided" dispute resolution clauses is well-settled.

In cases such as *NB Three Shipping v Harebell Shipping* [2004] EWHC 2001 (Comm) and *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), the English courts have upheld unilateral option clauses giving one party the choice to take the case to arbitration.

Similarly, in *Mauritius Commercial Bank v Hestia Holdings Limited* [2013] EWHC 1328 (Comm) (a case to which the Brussels I Regulation did not apply), the English courts upheld a "one-sided" dispute resolution clause which provided for the exclusive jurisdiction of the English courts but which also stated that the Claimant bank should not "*be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction*".

The attitude of the English courts is that the parties' agreement as to dispute resolution – however that agreement may be structured – should be upheld. If the parties decide to bestow greater flexibility on one party than on the other, that is their choice and the courts will not intervene to override that decision.

What about 'Brexit'?

There is no reason to think that the English courts will change their approach to dispute resolution provisions – but the outcome of the United Kingdom's referendum on its membership of the EU is one factor that may influence the parties' approach to their dispute resolution regime or the exercise of any rights conferred by that regime. The referendum vote in favour of 'Brexit' has no immediate impact – the United Kingdom remains a member of the EU for the time being – but it seems likely that it will lead to the United Kingdom leaving the EU at some time in or after March 2019.

Leaving the EU will not affect international arbitration in the United Kingdom in any significant way, nor the approach of the English courts to one-sided dispute resolution provisions. However, the EU's Brussels I regime will probably cease to apply in the English courts. There is currently uncertainty as to what, if anything, will replace that regime – an equivalent agreement (as is the case with Denmark), the Lugano Convention, the Hague Convention on exclusive choice of court agreements and/or something else altogether?

This uncertainty may be relevant if it is important that any court judgment or arbitral award is readily enforceable throughout the EU (although cross-border enforcement of judgments remains rare in practice).

If, for example, no substitute for the Brussels I regime is agreed, it is likely that an English court judgment will still be capable of being enforced in many EU Member States (though this must be assessed on a state-by-state basis), but enforcement may not be as quick or easy as intended under the Brussels I regime.

If rapid enforcement throughout the EU is important, then arbitration – or at least the option of arbitration – may be an attractive alternative because the United Kingdom and the EU's member states will all remain parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), which provides for the mutual enforcement of arbitral awards. Unilateral option clauses can help preserve this flexibility.

[1] See "*Unilateral option clauses in arbitration: an international overview*", Practical Law (http://uk.practicallaw.com/7-535-3743). See also the 2013 edition of our survey.

UNILATERAL OPTION CLAUSES – 2017 SURVEY (CONTINUED)

Continental Europe

Whilst the legal position regarding "one-sided" dispute resolution or unilateral option clauses is settled in England & Wales, the position is less certain in continental Europe, where different jurisdictions' attitudes to similarly-worded clauses vary widely.

French Cour de Cassation – 2012 Rothschild decision

Perhaps most notable is the September 2012 decision of the French *Cour de Cassation* in the case of *Mme X v Banque Privée Edmond de Rothschild Europe* No. 11-26.022 [2013] ILPr.

In that case, the *Cour de Cassation* found that a "one-sided" dispute resolution clause (of the same kind seen in the English case of *Mauritius Commercial Bank*) referring all disputes to the courts of Luxembourg but granting one party the unilateral ability to refer disputes to any other court with jurisdiction was not an agreement conferring jurisdiction within the meaning of Article 23 of the Brussels I regime,[2] but rather the imposition of terms by one party on the other.

Although its decision was based purely on EU law – and notwithstanding that the Brussels I regime is *prima facie* of no application to arbitration proceedings – the *Cour de Cassation* stated that such an imposition would be contrary to the French law concept of '*conditions potestatives'* which render "one-sided" contractual provisions ineffective, thereby also casting doubt upon the French courts' attitude to unilateral option clauses.[3]

This decision – which remains in line with the prevailing attitude of the courts of the Czech Republic, Hungary, Poland, Romania and Russia – was heavily criticised by many commentators on the bases that:

- there is nothing in the Brussels I regime that permits a court to reject an agreement as to jurisdiction if that agreement confers greater rights on one party than on the other; and
- the decision was also seen as undermining the principle of sanctity of contract.

Italian & Spanish Courts – before and after Rothschild

Conversely, however – and barely a year before *Rothschild* – the Milan Court of Appeal reached the opposite conclusion in the case of *Sportal Italia v Microsoft Corporation*, holding such clauses to be valid.

Some six months after that decision, so too did the Italian Supreme Court (in Case No. 5705, *Grinka in liquidazione v Intesa San Paolo, Simest, HSBC*) whilst holding that such clauses were entirely consistent with Article 23 (as was) of the Brussels I regime.

So too have the Spanish courts come down in favour of such clauses. Whilst at the time of the first edition of our survey they had not been called upon to examine the issue, the Madrid Court of Appeal (in the case of *Camimalaga S.A.U. v DAF Vehiculos Industriales S.A. and DAF Truck N.V. –* and in overturning the decision of the court of first instance) held that a clause allowing the Claimant to elect to refer disputes either to arbitration under the arbitration rules of the Netherlands Arbitration Institute or to specified Dutch courts was valid and binding on the bases that:

- as a matter of Spanish law, there was nothing to prevent the parties consenting to arbitration and other forms of dispute resolution; and
- this was in keeping with practice in other jurisdictions.

French Cour de Cassation – 2015 decision upholds "one-sided" dispute resolution clause

The distance between the positions taken by, on the one hand, the courts of France and, on the other, those of Italy and Spain appeared, however, to have narrowed in the October 2015 case of *eBizcuss/Apple*.

In this case, the French *Cour de Cassation* held – on the basis that the clause in question was more narrowly drafted than the one that was in issue in *Rothschild* – that a "one-sided" dispute resolution clause (providing Apple with the choice of forum) did indeed satisfy the foreseeability requirement of Article 25 of the recast Brussels I regime (which the clause in *Rothschild* was held not to) and was therefore valid (albeit that the clause in question only offered a choice between different courts, rather than between arbitration and the courts and was not therefore a unilateral option clause *per se*).

French Cour de Cassation – 2016 decision brings back uncertainty

However, in 2016, the French courts have again moved back more towards the position originally taken in *Rothschild*.

[2] As from 10 January 2015, now Article 25 of the recast Brussels I regime, which applies to all jurisdiction clauses (regardless of when they were agreed) where the parties have agreed that a court or courts of a EU Member State are to have jurisdiction irrespective of the domicile of the parties in question (i.e. removing the requirement that at least one of the parties to the agreement is domiciled in an EU Member State).

[3] Article 25 (recast Article 23) of the Brussels I regime may nevertheless be relevant to unilateral option clauses in arbitration if such clauses also include a jurisdiction clause.

UNILATERAL OPTION CLAUSES – 2017 SURVEY (CONTINUED)

In April 2016, the case of *Société Générale SA v M. Nicolas Y. and Société Civile ICH and Société NJRH Management Ltd and SELARL AJ Partenaires* was heard in the Rennes Court of Appeal. The case, again, examined a "one-sided" dispute resolution clause (not a unilateral option clause *per se* as it did not refer to arbitration) which referred disputes to the courts of Zurich, but also gave the bank the option to refer the dispute to any other "*tribunal compétent*."

A claim was originally commenced by Société Civile ICH before the courts of Angers – however, both the court of first instance and the Court of Appeal in Angers declined jurisdiction (as the English courts would have done in their position) on the grounds that:

- only the bank, not Société Civile ICH, could elect to exercise the "option" in the "one-sided" dispute resolution clause; and
- as Angers had not been specified by the parties, the dispute should properly be heard before the courts of Zurich (i.e. the forum the parties had specified).

The decision of the Angers Court of Appeal was appealed before the French *Cour de Cassation.* The *Cour de Cassation* referred the case back to the Court of Appeal in Rennes on the basis that the Angers Court of Appeal had failed to take into account the "one-sided" or uneven nature of the dispute resolution clause when reaching its decision.

Ultimately, the Rennes Court of Appeal determined (in reliance on Article 6 of the Lugano Convention 2000) that the case should be heard in Paris (Société Générale's domicile).

Unfortunately, this decision does little to clarify the attitude of the French courts. Whilst, on one view, Société Générale was successful in its arguments to have the dispute heard in Paris, this was not achieved pursuant to the election of a Claimant in proceedings;

and (notwithstanding the decisions of the courts in Angers which sought to uphold the parties' agreement) nor was the dispute heard in Zurich, which was clearly intended to be the 'default' jurisdiction.

In light of the varied – and changing – court practices illustrated by the above cases, if parties are intending to incorporate "one-sided" clauses (including unilateral option clauses) into their agreements, such clauses should:

- be drafted in as precise and narrow a manner as possible; and
- ensure that the designated tribunal(s) / court(s) are capable of being identified clearly on the basis of objective and precise elements;

in order to reduce their susceptibility to challenge and, in the context of an EU Member State, satisfy the requirements of foreseeability and certainty required for the Brussels I regime.

Singapore

Once outside of the EU, the number of jurisdictions whose courts have been explicitly requested to address the question of the validity of unilateral option or "one-sided" dispute resolution clauses decreases markedly – although, whilst jurisdictions such as Brazil, Saudi Arabia, India, Indonesia, China and South Korea remain sceptical, it is thought likely that many others are, in principle, willing to uphold such clauses.

Singapore is one such jurisdiction that had not been explicitly asked to consider the validity of unilateral option clauses when the last edition of our survey was compiled – although at the time it was thought likely that the Singaporean courts would have regard to the attitude of the English courts were the issue to arise before them.

The issue has, however, now been considered by the Singaporean High court in the recent 2016 case of *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 23.

The parties' dispute concerned a contract for the installation of underwater anodes on Diego Garcia, the largest of the islands in the Chagos Archipelago in the Indian Ocean.

The contractually-agreed dispute resolution clause provided as follows:

> "*Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law, and held in Singapore*".

Accordingly, on the face of the clause, only Dyna-Jet (and not Wilson Taylor) had the right to refer any dispute to arbitration in Singapore. Nonetheless, Dyna-Jet commenced proceedings before the Singapore High Court. Wilson Taylor then applied for a permanent stay of those court proceedings in an attempt to compel Dyna-Jet to exercise its option to refer the dispute to arbitration instead.

UNILATERAL OPTION CLAUSES – 2017 SURVEY (CONTINUED)

The Singapore High Court held – having considered "*the overwhelming weight*" of modern Commonwealth authority – that the underlying clause was, as a matter of principle, valid and binding, on the bases that:

- mutuality of the right to elect to arbitrate is not a requirement for the purposes of concluding an "*arbitration agreement*" within the meaning of the Singapore International Arbitration Act; and
- the only material mutuality was the mutual consent of the parties at the point when they entered into a dispute resolution agreement (i.e. even if that agreement was unilateral or "one-sided" in nature).

Whilst this particular decision was concerned with a clause providing a unilateral option to arbitrate, the Singapore High Court also drew no distinction between other types of "*asymmetric*" dispute resolution agreements, including arbitration agreements which make arbitration mandatory subject to an express right to opt for litigation. The decision in *Dyna-Jet* can therefore be interpreted as a broad endorsement of the validity of the most frequently used variations of "one-sided" dispute resolution clauses.

The *Dyna-Jet* decision provides a degree of certainty – although the Singapore High Court did grant Wilson Taylor leave to appeal the decision on the basis that the case presented important issues of principle, which the judge noted "*are novel not just for Singapore law but for international arbitration in general*".

The importance of this appeal for the wider international arbitration and business communities should therefore not be underestimated.[4]

[4] The appeal has not been listed at the time of publishing (January 2017).

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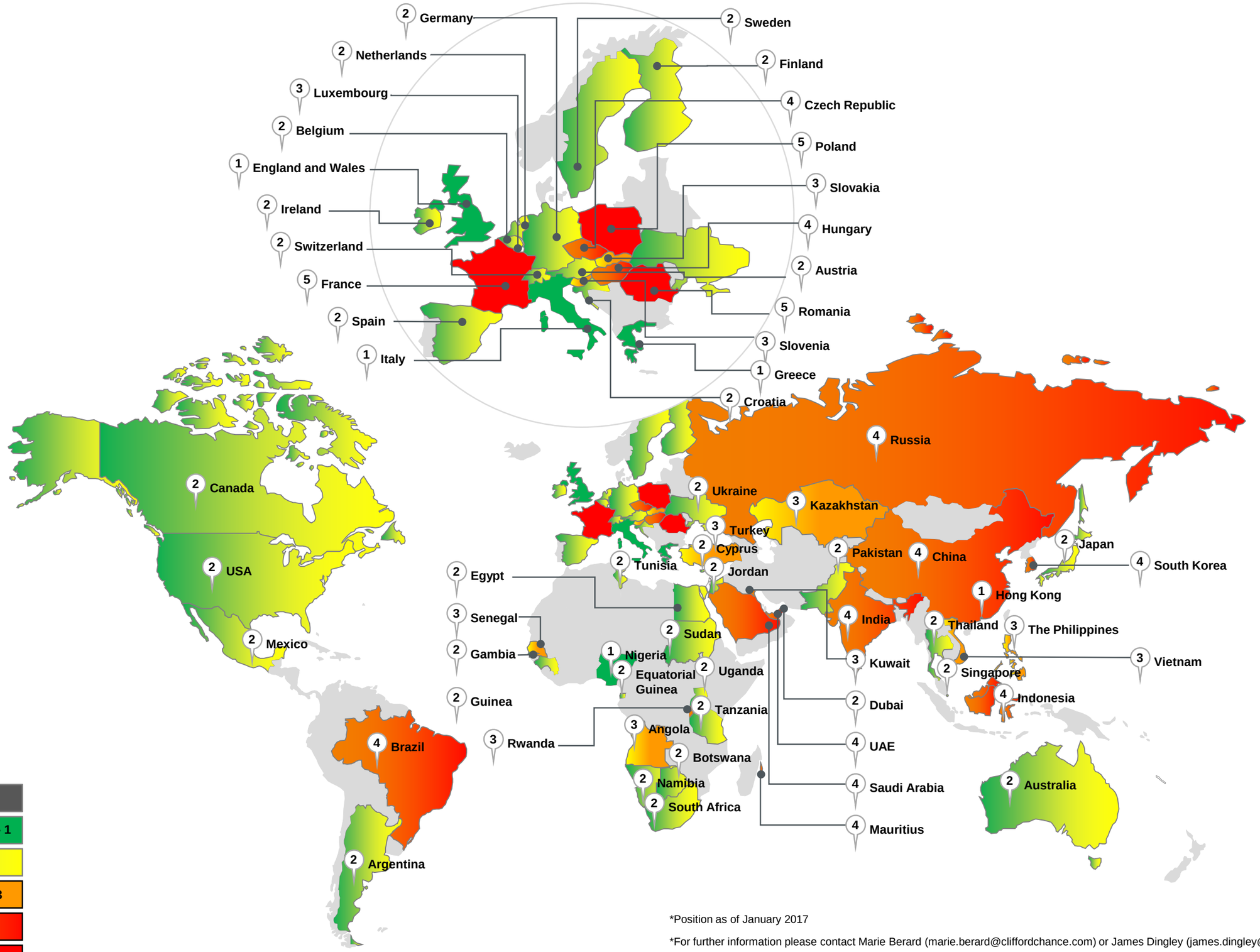
UNILATERAL OPTION CLAUSES IN ARBITRATION: HEAT MAP



*Position as of January 2017

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UNILATERAL OPTION CLAUSES – 2017 SURVEY: RESULTS

Our international arbitration specialists and selected local counsel (listed in full on the back page of this briefing) have worked together to produce a snapshot of the treatment of unilateral option clauses in their home jurisdiction as at January 2017.

As a reminder, what we have termed "unilateral option clauses" are dispute resolution clauses providing for disputes to be referred:

- to arbitration but giving one party the exclusive right to elect to refer a particular dispute to litigation before the courts; or
- to a court, but giving one party only the right to elect to refer the dispute to arbitration instead.

As before, the results are summarised in "traffic light" format, ranking from green to red, via various shades of amber depending on the local courts' stated – or, absent applicable case law, likely – position on unilateral option clauses.

Our key message remains: parties should take care when considering whether to incorporate unilateral option clauses into their agreements and should seek specialist advice on the enforceability of unilateral option clauses not only in the jurisdiction to whose governing law their agreement is subjected, but also in the jurisdiction:

- of any proposed court or arbitration proceedings (to the extent different from jurisdiction of the governing law);
- in which contractual counterparties are domiciled; and
- in which contractual counterparties' assets are located (i.e. where any award or judgment would need to be enforced if not voluntarily satisfied).

The consequences of including a unilateral option clause in transaction documents that are connected with a jurisdiction that does not regard them as valid can be severe. They can range from the clause being declared void (potentially resulting in local courts seizing jurisdiction over a dispute) through to enforcement of an arbitral award being refused.

For this reason, each transaction should be approached on a case-by-case basis and specialist advice should be sought when seeking to determine the most advantageous dispute resolution regime.

For further information or a copy of the summary of our survey, please contact **Marie Berard** or **James Dingley**.

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UNILATERAL OPTION CLAUSES: JURISDICTION BY JURISDICTION

Key
Generally no issues
Issues unlikely
Position uncertain
Potential issues
Issues likely

England & Wales	The English courts have held that unilateral option clauses (containing either an option to litigate or arbitrate) are valid in respect of arbitration proceedings seated in England and Wales. Recent case law suggests that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in England and Wales.
Greece	The Greek courts have held that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Greece for that reason.
Hong Kong	The Hong Kong courts have held that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Hong Kong.
Italy	The Italian courts have held that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Italy.
Nigeria	The Nigerian courts have upheld unilateral option clauses, and there is no reason to believe that they would not uphold these clauses in the future. There is also no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Nigeria.
Argentina	Whilst the Argentine courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held valid on the basis of the principle of *pacta sunt servanda* and provided they are, amongst other things, agreed upon in writing and drafted sufficiently clearly. There is a *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Argentina.
Australia	Whilst the Australian courts have not examined the validity of unilateral option clauses *per se*, by reference to favourable court decisions in relation to similar clauses, it is thought that they would be held to be valid. Similarly, it is likely that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Australia.
Austria	Whilst the Austrian courts have not examined the validity of unilateral option clauses *per se*, such clauses are frequently used in practice. Austrian scholars accept the enforceability of such clauses, irrespective of whether they appear in general business terms or standard contract forms. However, agreements which permit a party to exercise its option after the initiation of the proceedings are likely to be considered null and void. In any event, careful drafting is required in order to avoid parallel litigation and arbitration proceedings.
Belgium	Whilst a lower court in Belgium has upheld the validity of a unilateral option clause, it is also recognised that other courts in Belgium may be inclined to follow the approach of the French *Cour de Cassation* and thereby take a more conservative view of these clauses. Belgian commentators have argued in favour of the validity of unilateral option clauses, regardless of whether they allow a party to choose between courts or between arbitration and courts.

UNILATERAL OPTION CLAUSES IN ARBITRATION: JURISDICTION BY JURISDICTION

Botswana	Whilst the courts of Botswana have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be valid on the basis of the principle of *pacta sunt servanda* and provided they are drafted in a clear, unambiguous way.
Canada	Whilst the Canadian courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be valid provided they are drafted sufficiently clearly (although they may be considered to be unfair contract terms in a consumer context). Similarly, there is a *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Canada.
Croatia	Whilst the Croatian courts have not examined the validity of unilateral option clauses *per se*, such clauses are frequently used in practice and there is, therefore, no reason to believe the Croatian courts would not enforce an arbitral award rendered on the basis of a unilateral option clause.
Cyprus	Even though the Cypriot Supreme Court has not specifically confirmed to date the position with respect to unilateral option clauses containing an option to litigate, based on established case law, there is a *prima facie* presumption that the Cypriot courts will insist on the parties honouring their bargain in cases where they have agreed resolution of disputes by a foreign court or by arbitration, and there is no reason to believe options to arbitrate would be treated any differently, or that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Cyprus.
Dubai International Financial Centre	The courts of the Dubai International Financial Centre have upheld unilateral option clauses granting one party the right to refer disputes to arbitration, and have taken jurisdiction over claims that contain a unilateral option to litigate in the courts of other jurisdictions, but have not yet examined the validity of unilateral option clauses entitling one party to refer disputes to litigation (instead of an arbitration default).
Egypt	Whilst the Egyptian courts have not examined the validity of unilateral option clauses *per se*, commentators believe that the Egyptian courts would, absent any ambiguity in the drafting of the clause, hold such clauses to be valid.
Equatorial Guinea	Whilst the Equatorial Guinea courts have not examined the validity of unilateral option clauses *per se,* it is believed that these clauses would be upheld on the basis of the principle of sanctity of contract.
Finland	Whilst the Finnish courts have not examined the validity of unilateral option clauses *per se*, such clauses are *prima facie* not prohibited and it is believed that they would be upheld. However, a unilateral option clause in a consumer contract, giving the non-consumer the right to exercise the option, could be considered unreasonable and therefore be set aside.
Gambia	Whilst the Gambian courts have not examined unilateral option clauses *per se*, commentators believe that they are likely to find unilateral option clauses (containing either an option to litigate or arbitrate) valid and binding. There is, therefore, no reason to believe that arbitral awards rendered pursuant to these clauses will not be enforced in Gambia.
Germany	The German courts have held that unilateral option clauses are valid unless they violate *boni mores* (good morals) or represent an "unreasonable disadvantage" (if classifiable as standard contract terms). An unreasonable disadvantage may be found in exceptional cases in which, for instance, specific circumstances allow the conclusion to be drawn that the option clause enables its beneficiary to circumvent the application of mandatory law such as, for example, German law on unfair contract terms, or in which the jurisdiction of a competent state court could, once validly raised for the matter, then be obstructed.

UNILATERAL OPTION CLAUSES IN ARBITRATION: JURISDICTION BY JURISDICTION

Guinea	Whilst the Guinean courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would hold such clauses to be valid if they reflect the unambiguous agreement reached between professional parties. Similarly, there is a *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Guinea.
Hashemite Kingdom of Jordan	Whilst the Jordanian courts have not expressly upheld a unilateral option clause *per se*, the Jordanian Court of Cassation has recognised the existence of a unilateral option clause which allowed one party the right to refer a dispute to arbitration. There is nothing to suggest that such clauses would not be upheld by Jordanian courts on the basis that they represent the will of the parties.
Ireland	Whilst the Irish courts have not considered the validity of unilateral option clauses, an Irish court would be likely to adopt the position that such clauses are valid. An Irish court would be expected to take this approach on the basis that both parties have accepted the arrangement, so that there is no lack of mutuality. This approach by the court would be subject to any arguments regarding issues such as ambiguity, undue influence or unconscionable bargain. English case law is of persuasive authority in Ireland and an Irish court should take note that these clauses are valid in England and Wales. The fact that the parties have agreed that disputes might be referred to arbitration (even by unilateral option clause) should constitute a valid and binding arbitration agreement under Irish law. Similarly, it is likely that an award rendered under such a clause would be enforceable in Ireland.
Japan	Whilst the Japanese courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would hold such clauses to be valid on the basis that they reflect the agreement reached by the parties.
Mexico	Whilst the Mexican courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be valid provided they were drafted sufficiently clearly. Similarly, there is a *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Mexico.
Namibia	Whilst the courts of Namibia have not examined unilateral option clauses *per se*, it is believed that they would be upheld as valid as long as they are in writing and are drafted in a clear and unambiguous manner.
Netherlands	Whilst the courts of the Netherlands have not examined the validity of unilateral option clauses *per se*, such clauses have previously been upheld. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in the Netherlands.
Pakistan	Whilst the Pakistani courts have not yet examined the validity of unilateral option clauses *per se*, it is thought that they would likely be held to be valid on the basis of the principle of *pacta sunt servanda,* unless such a clause fell within the ambit of Section 28 of the Contract Act 1872. Pursuant to Section 28 of the Contract Act 1872, any agreement according to which a party is subject either to an absolute restriction from enforcing his rights under such agreement by the usual legal channels or under which the time within which it may thus enforce its rights is limited, is void to that extent. However, the Pakistani courts would nevertheless allow the enforcement in Pakistan of an arbitral award rendered on the basis of a unilateral option clause (in part in reliance on the approach of the courts in other common law jurisdictions).
Singapore	A recent decision of the Singapore High Court has given a party leave to appeal the validity of a unilateral option clause on grounds that it raised a question of general principle and public importance. However, it is thought likely that the Singapore Courts will follow the English-law position and hold unilateral option clauses to be valid.

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South Africa	Whilst the South African courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be valid provided that the contract in question was freely entered into and not illegal, immoral or contrary to public interest. However, South African legislation suggests that such unilateral option clauses may be held to be unfair in a consumer context.
Spain	The Spanish courts have held that unilateral options clauses providing arbitration as a default, but giving one party the right to defer its disputes to the courts, are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Spain.
Sudan	Although the Sudanese Courts have not examined the validity of unilateral option clauses *per se*, there is no reason to believe that they would be held invalid, based on the freedom of contracting, provided they are carefully drafted, absent any ambiguity.
Sweden	Whilst the Swedish courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would hold such clauses to be valid. The limited exception to this would be if such a clause could be shown to be unconscionable or unreasonable (most likely to occur in a consumer context), in which case such a clause could be set aside. There is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Sweden.
Switzerland	Whilst there is little relevant case law, the Swiss courts have held (and it is generally believed) that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Switzerland.
Tanzania	Whilst the courts of Tanzania have not examined unilateral option clauses *per se*, it is believed that they would be upheld as valid and enforceable provided they are drafted in a sufficiently clear manner and parties are of equal bargaining power. In transactions where parties are not at arm's length, the likely position is less clear.
Thailand	An arbitration clause where one party has a unilateral option either to litigate or arbitrate is not prohibited under the Arbitration Act B.E. 2545 (2002) and has been held to be enforceable by a Thai court of first instance. It is also important to note that exclusive jurisdiction clauses are ineffective in Thailand, as Thai courts can always accept jurisdiction to the extent permitted by Thai laws.
Tunisia	Whilst the Tunisian courts have not examined unilateral option clauses *per se*, it is thought that the Tunisian courts may enforce unilateral option clauses as contractual agreements made between two parties are strictly enforced.
Uganda	Whilst the Ugandan courts have not examined the validity of unilateral option clauses *per se*, there is no reason to believe that they would be invalid provided the clause reflected the intention of the parties. There is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Uganda.
Ukraine	The Ukrainian courts have analysed the validity of unilateral option clauses on several occasions and the courts have consistently held that such clauses are compatible with parties' freedom to select the manner in which to protect their rights as provided by the Ukrainian Constitution. There is, however, a remote risk that a Ukrainian court could find, in specific circumstances, that such a clause breaches Ukrainian public policy (if it can be said to breach principles of equality and fair treatment).

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USA	Courts in the United States do not take a uniform approach to the validity of unilateral option clauses. Many courts have upheld unilateral option clauses as valid, including on grounds that the clause is not so one-sided as to be unconscionable. However, other courts have held unilateral option clauses invalid (in particular in domestic disputes involving consumers or employees) on grounds of unconscionability and/or lack of mutuality (i.e. the requirement that there be mutuality of remedy among the parties).
Angola	The courts of the Angola have not examined the validity of unilateral option clauses.
Kazakhstan	The Kazakh courts have not examined the validity of unilateral option clauses *per se*. Even if, for any reason, a court in Kazakhstan invalidated a unilateral arbitration clause, this would not have a binding effect on other courts. Commentators believe that the Kazakh courts may follow the approach taken in Russia, Kazakhstan's Civil Code. However, in 2011 Article 8 of Kazakhstan's Civil Code was amended so as to say that parties are free to dispose of their rights, including the right to protection, therefore it is possible that a unilateral option clause represents the form of disposal of rights to protection.
Kuwait	Whilst the Kuwaiti courts have not examined the validity of unilateral option clauses *per se*, it is thought that a unilateral option clause referring disputes to arbitration with an option to litigate should be enforceable as the recent practice of the Kuwaiti courts is that it declines to accept jurisdiction in case of a valid arbitration clause and should dismiss any proceedings commenced before them in breach of an arbitration agreement (even one which contains an option to litigate). However, if the unilateral option clause refers disputes to the courts of a foreign country with an option to arbitrate, it is possible that the Kuwaiti courts might seize jurisdiction over a dispute with a connection to Kuwait, thereby rendering the option to arbitrate moot. However, and whilst there is no case law precisely on point, there is no reason to believe that a Kuwaiti court would not enforce an arbitral award rendered on the basis of a unilateral option clause.
Luxembourg	Whilst the Luxembourg courts have not examined the validity of unilateral arbitration option clauses *per se*, they have themselves previously held unilateral jurisdiction option clauses to be valid. Given that the Luxembourg courts traditionally tend to turn to French case law for guidance, they may now take the view that unilateral option clauses may be invalid if they confer too wide discretion on one party. Provided the underlying option clause is not held to be invalid for this reason, there is at this stage no reason to believe that an arbitral award rendered pursuant to a unilateral option clause would not be enforceable in Luxembourg.
Rwanda	The courts of Rwanda have not examined unilateral option clauses *per se*. However, case law suggests that the courts of Rwanda are, on occasion, willing to intervene in arbitral proceedings.
Senegal	Whilst the courts of Senegal have not yet examined unilateral option clauses *per se,* they may follow the jurisprudence of the French courts (although do not always do so).
Slovakia	The Slovakian courts have not excluded the validity of unilateral option clauses in a commercial context *per se*, however in a consumer context it is believed that the courts are likely to take a negative view on dispute resolution clauses which are restrictive to one party.
Slovenia	The Slovenian courts have not examined the validity of unilateral option clauses.
The Philippines	The courts of the Philippines have not examined the validity of unilateral option clauses.
Turkey	In Turkey, a court examining a unilateral option clause may decide that both parties are able to exercise the benefit of an option to arbitrate, not only the party originally afforded that benefit, rather than determining that the clause is invalid. In this way, a unilateral option clause is converted into a bilateral option clause.

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Vietnam	Whilst the Vietnamese courts have not examined the validity of unilateral option clauses *per se*, they will recognise the validity of bilateral option clauses, as well as the validity of unilateral option clauses which provide a consumer with the unilateral option to take a dispute to arbitration. The validity of clauses providing a unilateral option to non-consumers is unpredictable and might violate the principle of equality under Article 3.1 of the Civil Code of Vietnam.
Brazil	Whilst the Brazilian courts have not examined the validity of unilateral option clauses *per se*, Brazilian law requires the consent of all parties to submit a dispute to arbitration, such that there is, therefore, a risk that Brazilian courts may not recognise the validity of unilateral option clauses.
China	Whilst the Chinese courts have not examined the validity of unilateral option clauses *per se*, there is a real risk that such clauses would be held to be invalid on the basis either that the requisite agreed intention to resolve disputes by arbitration would be lacking or because the Chinese court would have jurisdiction by default in any event. This invalidity of the unilateral option clause could result in any arbitral award rendered on the basis of it being held unenforceable.
Czech Republic	Whilst the Czech courts have not examined the validity of unilateral option clauses *per se*, the Constitutional Court has confirmed that clauses which provide both parties the option to choose between local courts and arbitration are valid. However, it cannot be excluded that the Czech courts would conclude that unilateral option clauses breach the principle of equal treatment and are therefore invalid. Furthermore, in consumer context, such clauses would likely be struck down as an unfair term.
Hungary	Whilst the Hungarian courts have not examined the validity of unilateral option clauses *per se*, such clauses are not expressly prohibited by Hungarian law. However, there is a risk that a unilateral option clause may not be considered sufficiently precise and certain and may therefore be found invalid. The unequal bargaining position of the parties to a unilateral option clause is also likely to raise concerns from a Hungarian law perspective.
India	Whilst the Indian courts have examined the validity of unilateral option clauses, the position remains uncertain. Although a unilateral option to arbitrate may be valid if the parties to a contract expressly agree upon it, a unilateral option to litigate that expressly restricts one party from exercising its rights to obtain any recourse before the Indian courts will, in contrast, be invalid.
Indonesia	The Indonesian courts have not examined the validity of unilateral option clauses *per se*. However, when considering an option clause giving only one party the ability to refer a dispute to the courts, the Indonesian courts, whilst holding that they did not have jurisdiction, nevertheless stated that any clause which did not provide for equal treatment of the parties would be invalid. There is, therefore, a risk that Indonesian courts may not recognise the validity of unilateral option clauses. The existence of a written arbitration agreement eliminates the right of the parties to submit the resolution of the dispute or difference of opinion contained in the agreement to the court.
Mauritius	Whilst the Mauritian courts have not examined the validity of unilateral option clauses *per se*, it is believed that such clauses would be deemed '*potestatif*' and rendered invalid. However, there is no reason to believe that the enforcement of an arbitral award rendered on the basis of a unilateral option clause would not be possible if the foreign law governing the contract permits such clauses.

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Russia	Russian courts commonly consider that unilateral option clauses violate the principle of equal procedural rights, and in a number of cases, the courts have held such unilateral option clauses to be invalid. However, the prevailing view is that unilateral option clauses *per se* are not invalid, but shall be converted into a bilateral option clause, giving both parties (and not only a party) the option to choose the forum. The Russian courts continue to uphold the validity of unilateral option clauses which allow a claimant to choose its dispute resolution forum.
Saudi Arabia	Whilst the courts of Saudi Arabia have not (to our knowledge) examined the validity of unilateral option clauses which purport to give only one party the right to choose a forum, such clauses are unlikely to be upheld on grounds of unfairness.
South Korea	The courts of South Korea have not examined the validity of unilateral option clauses *per se*. Whilst there are no express rules prohibiting unilateral option clauses being used in contracts, the prevailing view is that such clauses are invalid for a lack of a clear intention of the parties to arbitrate.
United Arab Emirates	Whilst the courts of the United Arab Emirates have not (to our knowledge) examined the validity of unilateral option clauses, there is a danger (particularly with respect to clauses granting one party the option to refer disputes to arbitration) that they might not be upheld on the basis that they are contrary to public policy.
France	The French courts have changed their position on unilateral option clauses a number of times. Significant caution should be exercised if such clauses are intended to be incorporated into agreements. In recent years the French courts have refused to give effect to these clauses while justifying their decision on a number of grounds. If these clauses are incorporated, they should be drafted in a precise and narrow manner in order to satisfy a test of certainty and legal foreseeability. In particular, the tribunal(s) designated in the jurisdiction clause must be identifiable on the basis of objective and precise elements.
Poland	The Polish courts have not yet examined the validity of unilateral option clauses. However, Polish law expressly prohibits the use of provisions in arbitration agreements which violate the principle of equality of the parties, such as unilateral option clauses. For this reason, there is a risk that a unilateral option clause will be held ineffective or invalid and that the enforcement of an arbitral award rendered on the basis of a unilateral option clause might be refused.
Romania	Whilst the Romanian courts have not examined the validity of unilateral option clauses *per se*, it is believed that such clauses would be held to be ineffective. Pursuant to certain provisions of the Romanian Civil Procedure Code, an arbitration clause will be invalid if it provides either party with the option to choose between arbitration and litigation, with the dispute in question falling to be decided by the Romanian courts by default. Similarly, the enforcement of arbitral awards rendered on the basis of a unilateral option clause may be challenged before the Romanian courts on the same grounds. Arbitration clauses which exclude the jurisdiction of the Romanian courts should therefore be used.

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