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Unilateral option clauses in arbitration: a survey as to their effectiveness

Unilateral option clauses – i.e. dispute resolution clauses providing for arbitration but giving one party the right instead to refer any particular dispute to litigation before the courts – are a common feature in many transaction documents. However, unilateral option clauses have again found themselves in the legal spotlight in the last few months. Clifford Chance has compiled a survey as to their effectiveness in over 40 jurisdictions.

The courts of Bulgaria and Russia have handed down judgments highlighting the potential pitfalls of such clauses. Similar considerations have also arisen in a non-arbitration context in a decision of the French Cour de cassation.

With corporates seeking fresh opportunities outside the more tried-and-tested legal jurisdictions – and banks frequently lending to them – these judgments provide an opportune moment to take stock of the validity – or lack thereof – of unilateral option clauses on a jurisdiction–by–jurisdiction basis.

Benefits

The potential benefits of unilateral option clauses are well-known. These clauses preserve one party's ability to choose the most favourable form of dispute resolution after a dispute has arisen. They offer the certainty and consistency of, for example, the English courts, while retaining the ability to refer a dispute to confidential arbitration proceedings if a matter is commercially sensitive or if enforcement of an arbitral award pursuant to the New York Convention is required in the relevant jurisdiction.

However, the enforceability of unilateral option clauses has recently been brought into question in certain jurisdictions. Senior courts in Bulgaria and Russia have questioned their validity and refused to enforce their terms. It cannot be assumed that the governing law of the agreement as a whole will determine the issue.

Recent Decisions

(i) Bulgaria

In a non-binding judgment of 2 September 2011, the Bulgarian Supreme Court struck down a unilateral option clause in a loan agreement. The clause gave the lender alone the choice between referring disputes to the courts or to arbitration. The court decided that, as a matter of Bulgarian law, a contract cannot give one party the ability unilaterally to affect the rights of the other. As a result, the unilateral option clause contained in the loan agreement was void.

(ii) Russia

In its judgment of 19 June 2012, the Presidium of the Supreme Arbitrazh Court decided that a unilateral option clause violated the principle of Russian law that parties to a dispute must have equal procedural rights. The judgment is unclear as to the effect of unilateral option clauses. It seems, however, that Russian law converts a unilateral option clause into a bilateral option clause, giving both parties the right to choose between arbitration and the courts. In this case, the party without the option was permitted to proceed with litigation before the Russian courts.

Key issues

- Unilateral option clauses are commonplace in many transaction documents
- However, their validity has recently been called into question by the courts of several jurisdictions
- Specialist advice should be sought on a case-by-case basis

The Supreme Arbitrazh Court's judgment should not affect the enforceability in Russia of arbitral awards based on unilateral option clauses. There is, however, a risk for a party starting an arbitration that the other party will commence parallel proceedings before the Russian courts. This not only gives rise to the additional expense of two sets of proceedings, but brings the risk that the Russian courts will hand down a judgment contradicting any arbitral award. That contradictory judgment might then be used to resist the enforcement of the award in Russia, thereby torpedoing the arbitration proceedings – a tactic which is all-too-common and which undermines the rationale behind the inclusion of the unilateral option clause in the first place.

(iii) France

In a judgment of 26 September 2012, the Cour de cassation decided that an agreement to refer all disputes to the Luxembourg courts but which granted one party the unilateral ability to refer disputes to any other court with jurisdiction was ineffective because it did not comply with the requirements of Article 23 of the Brussels I Regulation. As a result, the clause did not confer exclusive jurisdiction on the Luxembourg courts (i.e. the entire clause failed, not just the option element).

The decision of the Cour de cassation related to a choice between courts rather than between arbitration and the courts, which is the subject of our survey. Nonetheless, the decision indicates the approach that the French courts might take in the future with regard to unilateral option clauses. There are strong arguments why the decision of the Cour de cassation should not be followed as to the meaning of Article 23 of the Brussels I Regulation - which is ultimately a matter of EU law for the Court of Justice of the European Union. In contrast, arbitration clauses fall outside the Brussels I Regulation and are a matter for French law and the French courts.

Survey

Our international arbitration specialists and selected local counsel have worked together to produce a snapshot of the treatment of unilateral option clauses in their home jurisdiction as at January 2013. The results have been summarised in a "traffic light" table which ranks, 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.

Parties should take care when considering whether to incorporate unilateral option clauses into their agreements and should take specialist advice on the enforceability of option clauses in the jurisdiction:

- of any proposed court or arbitration proceedings;
- in which the contractual counterparty is domiciled; and
- in which the contractual counterparty's 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 be sought when seeking to determine the most advantageous dispute resolution regime.

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Clifford Chance's survey covers the following jurisdictions:

Argentina	Greece	Romania
Australia	Hong Kong	Russia
Austria	Hungary	Singapore
Brazil	India	Slovakia
Bulgaria	Indonesia	Slovenia
Canada	Italy	South Africa
China	Japan	South Korea
Croatia	Kazakhstan	Spain
Cyprus	Kuwait	Sweden
Dubai International Financial Centre	Luxembourg	Switzerland
Egypt	Mexico	Turkey
England & Wales	The Netherlands	UAE
Finland	Pakistan	Ukraine
France	The Philippines	USA
Germany	Poland	

For further information or a copy of the summary "traffic light" table, please contact Marie Berard or James Dingley.