

UNILATERAL JURISDICTION CLAUSES MAY NOT ALWAYS BE EFFECTIVE

It is not uncommon, particularly in a finance context, for an agreement to give a wider choice to some parties than others to decide where disputes will be resolved. For example, an agreement may provide that the courts of a particular country have exclusive jurisdiction, but some of the parties, such as the lender, can instead opt to bring proceedings in another jurisdiction, and/or refer the dispute to arbitration. Another common alternative used in many agreements is for both parties to be able to bring a dispute to arbitration but for the lender to have the unilateral option of going to court.

These various unilateral possibilities give flexibility to the lender to bring proceedings in a jurisdiction where the defendant's assets are located, or to refer the dispute to arbitration if proceedings have been commenced in a different EU jurisdiction than the agreed EU jurisdiction with a view to delaying judgment (so-called torpedo actions) or if there may be enforcement risks with a court jurisdiction clause, as is often the case outside the EU, and particularly in emerging markets.

Whilst we have long been aware that unilateral options to arbitrate or litigate have been problematic in certain jurisdictions (China and Poland being two cases in point), recent decisions in a number of jurisdictions seem to have broadened the scope of this problem. In particular they have called into doubt the effectiveness of such clauses in France and Russia and they have broadened the issue to any aspect of inequality, including unilateral jurisdiction clauses (ie. jurisdiction clauses that are exclusive for one party but non-exclusive for the other).

Careful consideration should be given at the outset to the appropriate dispute resolution clause in the particular circumstances of the contract in issue, taking into account the benefits and risks of the possible clauses. Unilateral clauses confer considerable benefits in terms of flexibility and may still be the best option in many cases. Before including any type of unilateral jurisdiction clause in a contract (sometimes called a one-way, or split clause) parties may, however, wish to obtain local law advice on how such a

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CONTACT

Paula Hodges
Partner, London
+44 20 7466 2027

Charles Kaplan
Partner, Paris
+33 1 53 57 70 85

Matthew Weiniger
Partner, London
+44 20 7466 2364

Isabelle Michou
Partner, Paris
+33 1 53 57 74 04

Craig Tevendale
Partner, London
+44 20 7466 2445

Chris Parker
Partner, London
+44 20 7466 2767

Emmanuelle Cabrol
Partner, Paris
+33 1 53 57 73 79

Maurice Burke

clause would be viewed in countries likely to have jurisdiction over a dispute (whether under the terms of or absent the clause) and in countries where any judgment or award may need to be enforced.

Where a dispute has arisen, parties with the benefit of a unilateral jurisdiction clause should bear in mind when deciding where and when to begin proceedings that the opposing party may have a wider choice of where to litigate or arbitrate than appears to be the case.

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Background

In recent years there has been a growth in the use of jurisdiction agreements which give unilateral rights to one of the parties – to sue or arbitrate in a forum which isn't available to the other parties.

Such clauses give flexibility, and allow a party to take a view when the dispute arises on where it is most advantageous to have the dispute determined, usually in terms of enforcing any judgment or award.

Where an option to arbitrate is included, it also opens up the possibility of countering an attempt by another party to bring proceedings in a different EU court than the agreed EU forum in an attempt to delay judgment against that party (so called torpedo actions). There has always been some doubt over whether clauses which give unilateral rights would be given effect in all jurisdictions. For many years, the advice in certain jurisdictions in emerging markets has been to avoid clauses which provide for a unilateral option to arbitrate or litigate and to opt instead for 'arbitration only' clauses which will have the best chance of enforcement. However, recent cases have broadened the potential scope of this issue.

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Cases

The most recent case is the decision of the French Cour de Cassation (Cass Civ. 1ere, 26th September 2012). In that case, a bank customer commenced proceedings in France against a Luxembourg bank and a French financial institution through which she had opened her account. The Bank challenged the jurisdiction of the French court, relying on the terms of the contract with the customer which provided:

1. any dispute between the client and the Bank would be subject to the exclusive jurisdiction of the courts of Luxembourg; and
2. the Bank reserved its right to act before the courts of the

Partner, Singapore
+65 68688009

Justin D'Agostino
Partner, Hong Kong
+852 2101 4010

Peter Godwin
Partner, Tokyo
+81 3 5412 5444

David Gilmore
Partner, Tokyo
+81 3 5412 5415

Alastair Henderson
Partner, Bangkok
+66 2 6573829

Nicholas Peacock
Partner, London
+44 20 7466 2803

Dominic Roughton
Partner, Tokyo
+81 3 5412 5432

Craig Shepherd
Partner, Dubai
+971 4 428 6304

May Tai
Partner, Beijing
+86 21 23222152

client's domicile or any other competent court failing recourse to the election of the courts of Luxembourg.

The Paris Court of Appeal dismissed the jurisdictional challenge, holding that the discretionary right given to the bank alone violated the purpose of Article 23 of the Brussels Regulation (Council Regulation (EC) No 44/2001) which provides:

“1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.....”

The Bank appealed unsuccessfully to the Cour de Cassation which held that the clause was contrary to Article 23 because of its potestative nature. A term is potestative if performance is subject to or dependent upon an event which one of the contracting parties has the power to make happen or to prevent. In some civil law countries, including France, a potestative term is void for lack of mutuality of obligation.

The decision of the French court has caused surprise and consternation as previous decisions at appeal court level had not found unilateral clauses to be potestative. It is not entirely clear what law the French court applied to the validity question and whether if the matter was determined by the ECJ, the ECJ may find that the French decision misinterprets Article 23 or is incompatible with the principle that national law may not supplement or override the requirements set out in Article 23. Further, amendments to the Brussels Regulation (if they are brought into effect as suggested) provide that the law of the court chosen in the clause will apply to the substantive validity of the clause, which in this case would point to Luxembourg rather than French law.

In June the Supreme Arbitrazh court in Russia published its reasoning in the Sony Ericsson case. For a detailed briefing on the decision click [here](#). In summary, a dispute resolution clause which provided only one of the parties with an option to initiate court litigation, while restricting the other party to arbitration only, violated one of the basic principles of Russian law: that each party must have equal access to justice. Rather than invalidate the entire clause, the effect of the ruling was that the unilateral option was converted into a bilateral option.

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Comment

- It seems unlikely to make a difference whether the unilateral right is to commence court proceedings or refer a matter to arbitration – the reasoning of the court in both cases concerned the lack of reciprocity rather than the nature of the rights granted.

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- › There is no system of case law precedent in France or Russia but the decisions are likely to be followed given the level of the courts (the highest state commercial court in Russia and the highest court of appeal in civil and commercial cases in France).
- › Before including a one-way jurisdiction clause in a contract, parties may wish to obtain local law advice on how such a clause would be viewed, ie take advice in countries likely to have jurisdiction over a dispute, whether under the terms of or absent the clause, and in countries where any judgment or award may need to be enforced.
- › Parties may wish to review jurisdiction clauses in concluded contracts with a view to amendment of one way clauses where desirable and possible, particularly where the contract or parties are connected with jurisdictions where this is known to be an issue (at the moment France, Russia, China and Poland).
- › In contracts involving Russia, the safest course for parties who wish to avoid proceedings being brought in the Russian courts is likely to be a pure arbitration clause, although much will depend on individual circumstances, in particular the location of assets.
- › In contracts involving France, the safest course is to ensure the jurisdiction clause gives reciprocal rights. If this is not the case, the clause will, it seems, be likely to be void and jurisdiction in France will depend upon the usual rules as to jurisdiction, as set out in the Brussels Regulation for cases within the Regulation and domestic French law in other cases.
- › In principle, this is not a problem in the English courts which have held that unilateral clauses are perfectly valid whether as options to arbitrate or to litigate. It remains to be seen, however, whether other EU states will interpret article 23 in the same way as the French courts and what effect amendments to the Brussels Regulation will have and/or whether the matter will come before the ECJ.
- › It also remains to be seen what, if any, effect these decisions will have where enforcement is sought of judgments or arbitration awards where jurisdiction has been assumed under the provisions in a one way-clause. There seems no reason why a judgment under a clause which gave parties wider rights than they appreciated they had, ie where the clause would have been equalised, should be affected. Where a clause is considered void, arguments may be raised that enforcement would be contrary to public policy (although in EU member states the judgment creditor may be able to rely on Article 35(3) of the Brussels Regulation which states that the test of public policy may not be applied to the rules relating to jurisdiction).
- › Where a dispute has arisen, parties with the benefit of a unilateral jurisdiction clause should bear in mind in deciding where and when to begin proceedings that the opposing party may (in certain jurisdictions) have a wider choice of where to litigate or arbitrate than appears to be the case.
- › The message overall is to give careful consideration to the appropriate jurisdiction clause in a contract, taking into account the

risks and benefits different clauses will bring.

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