ARBITRATION & ADR - UNITED KINGDOM

Courts' attitude towards unilateral option clauses

11 March 2021 | Contributed by Clifford Chance

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What are unilateral option clauses?

Unilateral option clauses provide for disputes:

- to be referred to arbitration, but give one party the exclusive right to elect to refer a dispute to litigation before the courts; or
- to be referred to a court, but give one party the exclusive right to elect to refer the dispute to arbitration instead.

Parties should exercise caution when considering whether to include unilateral option clauses in their agreements. Specialist advice should be sought on the enforceability of these clauses in the jurisdiction:

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

The consequences of including unilateral option clauses in agreements connected to a jurisdiction that considers them to be invalid can be severe. They can range from the clause being declared void (potentially resulting in local courts seizing jurisdiction over the dispute) to the inability to enforce an arbitral award.

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.

Courts' attitude towards unilateral option clauses

The English courts consistently uphold unilateral option clauses giving one party the right to take a dispute to arbitration. They will even protect a party's right to exercise this option through a stay of proceedings if necessary.

Case law

In *NB Three Shipping v Harebell Shipping Ltd* ([2004] EWHC 2001 (Comm)), the High Court upheld a unilateral option to arbitrate. In that case, the defendant applied for a stay of court proceedings commenced by the claimant, pending arbitration. The court held that the relevant clause afforded the defendant a right to determine that a dispute be arbitrated, even if the claimant had already commenced litigation proceedings. On this basis, the court granted the stay.

Similarly, in *Law Debenture Trust Corp v Elektrim Finance BV* ([2005] EWHC 1412 (Ch)), the High Court granted an injunction against one of the defendants to prevent it from pursuing the dispute in arbitration. This was because although the clause provided that disputes be referred to arbitration, it afforded the claimant an exclusive right to refer the matter to the English courts. Once more, it did not matter that that defendant had already attempted to commence arbitration proceedings.

The English courts take a similar approach in relation to asymmetric jurisdiction clauses which not only provide for the exclusive jurisdiction of particular courts, but also provide one party with the right to take its disputes to any other courts with jurisdiction.

In *Mauritius Commercial Bank v Hestia Holdings Limited* ([2013] EWHC 1328 (Comm)), the Commercial Court upheld an asymmetric jurisdiction clause which provided for the exclusive jurisdiction of the English courts, but allowed the lender to take proceedings to any other courts in any jurisdiction. The Commercial Court also commented that it was difficult to identify a rationale or policy reason to object to a prospective change in governing law, especially in the face of the countervailing principle of contractual autonomy. Moreover, such an agreement was not contrary to the parties' equal access to justice, since Article 6 of the European Convention on Human Rights is directed to access to justice within a chosen forum, not to the choice of forum.

The High Court applied the reasoning in *Mauritius Commercial Bank* in *Ourspace Ventures Limited v Halliwell* ([2019] EWHC 3475 (Ch)). The latter case concerned enforcement of a personal guarantee relating to a loan agreement. The guarantee provided for arbitration but gave the claimant the option to litigate its dispute by written notice to the defendant. The claimant exercised this option, referring the dispute to the "English Courts". However, the option to litigate clause which was relied on had been drafted in a contradictory manner, referring to both the "English Courts" and the "[Dubai International Financial Centre (DIFC)] Courts". The judge determined that because there were more references in the clause to "DIFC" than "English", the reference to "English Courts" was the erroneous one. That being said, adopting the reasoning in *Mauritius Commercial Bank*, the judge accepted the claimant's submission that the proper construction of the clause was to allow the claimant to bring proceedings in any jurisdiction (including England) and not only the DIFC.

Most recently in *Etihad Airways PJSC v Flöther* ([2020] EWCA Civ 1707) the Court of Appeal recognised the widespread use and legitimate commercial purpose of asymmetric jurisdiction clauses.

Clearly, the English courts favour contractual autonomy. Where an agreement provides greater flexibility for one party to determine the forum of dispute or jurisdiction of choice, the courts will not intervene to override this right.

Brexit and enforcement

The flexibility granted by such unilateral option clauses may be particularly valuable in light of the uncertainty that Brexit has cast upon the enforcement of English judgments in the European Union.

Where enforcement throughout the European Union is important, arbitration (and the option to decide on a dispute resolution forum at the time that a dispute arises) is an attractive alternative as the United Kingdom and all EU member states 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. However, treatment of these clauses varies dramatically between jurisdictions, even those within the European Union itself. This runs the risk that it may be difficult or impossible to enforce arbitral awards in jurisdictions where unilateral options clauses are not recognised.(1)

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Endnotes

(1) For an overview of the effectiveness of unilateral option clauses in over 95 different jurisdictions, please refer to the Clifford Chance Unilateral Option Clauses Survey 2021, available here.