The Enforceability Of Arbitration Awards Made Pursuant To Unilateral Jurisdiction Clauses

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Commentary

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Introduction

Unilateral Jurisdiction Clauses have been popular in commercial contracts, particularly those in the finance area, for some considerable time. However, recent reported decisions across the world have highlighted a marked divergence of opinion as to their validity. The consequent uncertainty of their continuing force at an international level is of particular concern in the arbitration field, where parties are frequently reliant on enforcement of awards in foreign places.

This article examines the recent jurisprudence and considers the potential ramifications for enforcement of international arbitration awards.

Unilateral Jurisdiction Clauses

A unilateral jurisdiction option clause (also known as an “asymmetrical” or “one-sided” jurisdiction clause) is exactly as its name suggests – a clause which gives only one party to an agreement the opportunity to choose the forum to adjudicate a dispute. The choice may be between two or more national state courts, between litigation and arbitration, or possibly even between supervising arbitral institutions. The other contracting party is then limited to either a specific forum, for example to arbitration or to a specified national court system.

The benefit of these clauses to the option holder are clear. In contracts where one party carries the principle risk, for example a contract involving a loan, a unilateral jurisdiction clause offers that party some added security because he should be able to pursue his counterparty in either the most appropriate jurisdiction in which to obtain recovery, or in a jurisdiction or forum where a resolution will be achieved more quickly, more conveniently, or even possibly more fairly.

It is these benefits which may now be in jeopardy in the international arbitration sphere where enforcement may be compromised by the law of the place enforcement which does not recognise the validity of these clauses, or in some cases where the law or the arbitration agreement or the arbitral seat does likewise.

New York Convention – Denial of Enforcement

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, agreed in New York on 10 June 1958, (the “Convention”), is universally accepted as one of, if not the, key tool that makes international arbitration work. An award is of little use if a party cannot enforce it. Approximately 75% of the world’s countries (149) are signatories, and this includes the largest jurisdictions (e.g. Russia, the USA, Canada, China, Australia), all of the EEA, and a large number of countries with
developing economies where investment opportunities are considerable. The extensive participation in the Convention means that parties can contract on an international basis, include an arbitration provision for dispute resolution and, theoretically, rest easy that should a dispute arise and an award in their favour be made, they will be able to enforce that award in the jurisdiction(s) where their counterparty has assets.

Article III of the Convention makes the recognition and enforcement of arbitral awards by contracting states mandatory: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . .” It is generally accepted that there is a presumption that awards will be enforced. However, Article V provides limited exceptions pursuant to which enforcement “may be refused.” For the current discussion, the relevant provisions are Article V(1)(a) and Article V(2)(b).

Article V(1)(a) provides that recognition or enforcement can be denied if “the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law where the award was made.” In the case of an arbitration clause which contains a unilateral jurisdiction clause, this means that an enforcing court may refuse enforcement if it finds that the unilateral option renders the arbitration clause invalid under the law applicable to the clause, or where that law is not specified, under the law of the seat of the arbitration.

Article V(2)(b) provides that enforcement may be denied if it “would be contrary to the public policy of [the] country [where enforcement is sought].” This means that a court could refuse to enforce an award made pursuant to a unilateral jurisdiction clause if such clauses are contrary to that jurisdiction’s public policy.

Recent International Decisions On Unilateral Jurisdiction Clauses
The following decisions have been discussed at length by a number of commentators for a variety of reasons. Our focus here is solely on the effect of the decisions on the availability of enforcement under the Convention.

RUSSIA:

Facts
On 19 June 2012, the Supreme Arbitrazh (Commercial) Court of the Russian Federation gave its judgment in the case of Russkaya Telefonnaya Kompaniya (“RTK”) v. Sony Ericsson Mobile Telecommunication Rus LLC (Case No. VAS-1831/12). The parties to the dispute had entered into an agreement for the sale and purchase of mobile phone equipment containing the following dispute resolution clause:

“Any dispute arising in connection with this Agreement . . . will be resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce . . . . The arbitration clause does not limit Sony Ericsson’s right to apply to a court of competent jurisdiction with a claim to recover the amounts owed for products delivered.”

A dispute arose as to the quality of a number of mobile phone handsets supplied by Sony Ericsson and despite the dispute resolution clause in the contract, RTK commenced proceedings in a Russian court claiming delivery of replacement goods. At first instance and on appeal, the courts dismissed RTK’s claim on the basis that its commencement of court proceedings breached the arbitration agreement contained in the parties’ contract. RTK referred the matter to the Presidium of the Supreme Arbitrazh Court of the Russian Federation (the “Supreme Court”) for consideration of the validity of unilateral option clauses, which by its submission violated Russian law principles of procedural equality.

The Supreme Court Decree
The Supreme Court overturned the lower court decisions and declared the disputes clause invalid on grounds of unconscionability. Relying on prior Supreme Court decisions, the Court found that the clause as drafted was contrary to Russian law’s position on procedural equality and “equality of arms.” The fact that one party had a unilateral right to decide the forum for a dispute meant that the parties no longer had equal procedural rights. Therefore, the clause was invalid.

Despite the clause’s apparent invalidity, RTK was permitted to proceed with its claim before the Russian courts. It has been suggested that the remedial approach of the court was to make the offending clause bilateral, thereby allowing RTK to commence proceedings in a Russian court and eliminating inequality. Of course equally the court may have considered that the clause’s invalidity meant it fell as a whole, and thereby absent a jurisdiction
clause to the contrary, RTK was able to take civil proceedings in Russia.

This decision came as a surprise to most. Russian courts were considered to be showing an increasingly pro-contractual freedom attitude and indeed prior cases had upheld unilateral jurisdiction option clauses.5 The decision has been widely criticised and commentators have suggested that it represents an attempt to protect the sovereignty of the Russian courts from the increasing encroachment of foreign legal regimes – particularly in the arbitration sphere.6

From the perspective of the New York Convention, the decision is a signal that Russia will not be hospitable to awards made in connection with a unilateral jurisdiction clause. It is at least conceivable that a Russian court would consider the approach in Sony Ericsson to mean that Russian public policy does not allow such bilateral clauses and to decline enforcement under Article V(2)(b).

Further, as regards Article V(1)(a), jurisdictions outside of Russia would have a discretion to refuse enforcement of an award made pursuant to a unilateral jurisdiction clause where the arbitration agreement is governed by Russian law, or (where that applicable law is not specified) where Russia was the seat of the arbitration. Of course the power to refuse enforcement is discretionary and pro-arbitration jurisdictions which routinely uphold these clauses may decline to exercise it. However, as we will see below, Russia is not alone in this approach, and national courts which have taken a similar approach may be more inclined to exercise the discretion to deny enforcement.

**FRANCE:**

The Cour de Cassation’s decision in September 2012 in the Rothschild case7 dealt a similar blow to the vitality of unilateral jurisdiction clauses under French law. Like Sony Ericsson, the decision has been widely criticised for its effect, its intellectual missteps, and for its departure for prior French jurisprudence upholding unilateral jurisdiction clauses. Again, we focus here on its potential impact on the enforcement of international arbitration awards pursuant to the Convention.

**Facts**

The Claimant was a French national, resident in Spain, who opened a bank account with Luxembourg-based private bank Edmond de Rothschild Europe through its French sister company. The jurisdiction clause in the contractual documents expressed:

> “Potential disputes between the client and the bank shall be submitted to the exclusive jurisdiction of the Luxembourg courts. The bank reserves the right to bring its claims before the courts of the client’s domicile or any other competent court should it not make use of the clause provided for in the previous sentence.”

Following the alleged underperformance of certain of her investments with the bank, and despite the foregoing clause limiting her to bringing an action in Luxembourg, the Claimant brought a damages claim in the Paris courts against Luxembourg and French banks.

**The Proceedings**

The Luxembourg bank challenged the jurisdiction of the French courts to consider the claim on the basis of the dispute resolution clause. At first instance and on subsequent appeal the courts focused on whether the clause was compatible with Article 23 of the Brussels Regulation which states:

> “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.”

Both courts found that while the Regulation permits clauses which give one party the option to choose between jurisdictions, it does not allow a party to have “discretion to choose whatever jurisdiction it wishes”.8 The clause in question was therefore null and void in its entirety, and did not even bestow jurisdiction on the Luxembourg courts.

The bank appealed to the Cour de Cassation. Although it upheld the decision of the lower courts, France’s highest court justified its decision on different grounds. The Cour de Cassation considered that the clause was “potestative” in nature and therefore invalid on public policy grounds pursuant to Article 1174 of the French Civil Code (the “Code”). The concept of potestativité is defined in Article 1170 of the Code and means when something is entirely within the power of one
party. Article 1174 renders void obligations the performance of which is subject to a condition precedent which is "potestative".

With this backdrop, the Cour de Cassation concluded:

"by reserving the Bank’s right to bring an action in Mrs X’s place of domicile or ‘in any other court of competent jurisdiction’, the clause only restricted Mrs X, who was the only party obligated to commence proceedings in Luxembourg; accordingly, the Court of Appeal correctly determined that the clause was potestative in nature, for the sole benefit of the Bank, and therefore was contrary to the objectives and the finality of the prorogation of jurisdiction provided for in Article 23 of the [Brussels] Regulation."9

Among the criticisms of the Cour de Cassation’s rationale are that: (i) although the determination required an interpretation of an autonomous EU provision (Article 23 of the Brussels Regulation), the Cour de Cassation applied a domestic French law concept; and (ii) the decision runs contrary to the key principle of freedom of contract – recital (14) of the Brussels Regulation itself expressly states that “the autonomy of the parties . . . must be respected”, save in limited circumstances which did not arise here.

More pertinently for the current discussion, the decision contradicts prior Cour de Cassation judgments, which upheld the right of parties to provide that only one of them had the ability to choose between referring disputes to arbitration or litigation.10 As with the Sony Ericsson case, it remains to be seen how permanent this departure will be. However, unlike the Sony Ericsson decision which involved two large corporates, this decision related to the rights of an individual compared to those of a financial institution. Although no such rationale was provided in the court’s reasoning, perhaps France’s supreme court would respond differently if the parties were on a more equal footing at the negotiation stage.

Whatever the longevity of this new line of reasoning, or the potential for the decision to be distinguished on different facts or different phraseology of a unilateral jurisdiction clause, the current position under French law11 is that these clauses are likely to be invalid under French public policy. While arbitration agreements do not fall within the scope of Article 23 of the Brussels Regulation, it is difficult to understand how a unilateral option clause providing a choice as between arbitration and litigation is permissible and yet one providing a choice as between jurisdiction of competent courts is not.

Therefore, if a French court is asked to enforce an arbitration award rendered pursuant to a unilateral jurisdiction clause, it may decline to do so under Article V(2)(b) of the Convention. Similarly, if a non-French court is asked to enforce an award where the arbitration agreement is expressly governed by French law (or where the applicable law is not expressed, and the seat of arbitration is France) it is possible that such court could decline enforcement on the grounds that the arbitration agreement is invalid under French law.

UNITED KINGDOM:

Most recently, and with reference to the French Rothschild decision, the English High Court affirmed the continuing validity of unilateral jurisdiction option clauses under English law.12 In 2010, Mauritius Commercial Bank Limited (“MBCL”), entered into a $10 million facility agreement (the “FA”) with a Mauritian registered company, Hestia Holdings Limited (“Hestia”). Hestia’s parent company, Sujana Universal Industries Limited (“Sujana”) (the second defendant) guaranteed Hestia’s obligations under the FA. Both the FA and the guarantee were governed by Mauritian law and subject to the exclusive jurisdiction of the Mauritian courts.

Facts

In 2011, MBCL and Hestia entered into an Amendment and Restatement Agreement, which incorporated a Restated Facility Agreement (the “RFA”) and increased the available loan to $20 million. Under the RFA, Sujana also entered into a further guarantee. The RFA provided that any disputes under it were to be governed by and construed in accordance with English law. The jurisdiction clause provided:

"(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").

(b) The Parties agree that the courts of England are the most appropriate and the most convenient
courts to settle Disputes and accordingly no Party will [argue] to the contrary.

(c) This Clause 24.1 is for the benefit of the Lender only. As a result the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction. To the extent allowed by law the Lender may take concurrent proceedings in any number of jurisdictions."

Hestia defaulted under the RFA and MCBL commenced proceedings in the English Commercial Court against Hestia as borrower and Sujana as guarantor.

The Proceedings
The Defendants challenged the English court’s jurisdiction on two main grounds. First, the Defendants argued that English rules of private international law did not allow parties to change a contract’s governing law by simply amending the contract. Instead, this would require discharge of the original contract, and entry into a new agreement. Therefore, the Defendants argued that Mauritian law applied because it was the governing law of the FA.

Applying Mauritian law, the Defendants relied on the French Rothschild decision which they argued would be followed by Mauritian courts. The Defendants submitted that the RFA’s jurisdiction clause was unenforceable because it was too one sided in nature: it effectively granted MCBL a unilateral right to bring an action in whatever jurisdiction it saw fit, no matter how inappropriate, or to resist any action brought by Hestia in the English Courts and force Hestia to bring an action in an alternative jurisdiction.

Alternatively, the Defendants asserted that if English law applied then the jurisdiction clause in the RFA was unenforceable because it was so one-sided that it was contrary to public policy and, more specifically “equal access to justice,” under Article 6 of the European Convention on Human Rights.13

The Decision
The Court rejected all of the Defendants’ arguments in a judgment replete with contractual autonomy rhetoric. It held that under English law, the parties could change a contract’s governing law retrospectively. Indeed to hold otherwise would mean overturning the express choice of the parties and would be a “triumph of form over substance” and contrary to the principle of contractual autonomy.14 In this context, the courts should “strive to give effect to [the parties’] bargain unless there are overwhelming policy objections.”15 Therefore, English law applied.

Although the Court found that the clause was not “wholly one-sided” because it was expressed in terms of not preventing MCBL from claiming in other jurisdictions (i.e. preserving its right to attempt to sue in other jurisdictions, rather than conferring jurisdiction on any court), it opined that even such a one-sided clause would be enforceable under English law:

"If... the true intention of the parties expressed in the clause is that MCB[L] should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect.”16

Whilst public policy may in certain circumstances require intervention in the contractual bargain struck by the parties, the Court did not accept that this was such a case. As for the Defendants’ argument that the jurisdiction clause contravened the principle of “equal access to justice” enshrined in Article 6 of the European Convention on Human Rights (“ECHR”), the Court said that this provision applied only to direct access to justice within the forum chosen by the parties, and not to choice of forum in itself. This case therefore emphasises the reluctance of the English courts to depart from the principle of contractual autonomy, save in exceptional cases of overwhelming public policy arguments.

In the wake of the turnaround decisions in Russia and in France, the English court’s decision demonstrates that at least in England, unilateral jurisdiction option clauses have not fallen out of favour. Therefore, there is no suggestion – on the basis of the current jurisprudence – that an English court would refuse enforcement under Article V(2)(b). Similarly, there is no basis for a foreign court to deny enforcement under Article V(1)(a) on the basis of English law.

The Effect Of The Recent Jurisprudence On The New York Convention Enforcement Paradigm

No Reported Decisions To Date
At the time of writing, the authors are not aware of any reported decisions where enforcement has been denied
under Article V(1)(a) or (2)(b), or indeed granted, in the context of a unilateral arbitration clause. However, a 2011 German decision in which enforcement was denied under Article V(1)(a) is illustrative of how an enforcing court may construe the recent jurisprudence discussed above.

In Germany No. 141, Subsidiary company of franchiser v. Franchisee, Higher Regional Court of Thuringia, 1 Sch 01/08, 13,17 the Court of Appeal in Thuringia refused to enforce an arbitral award rendered in the Netherlands because the dispute resolution clause was too "one-sided" and therefore invalid under Lichtenstein law (the law of the underlying agreement).18 The clause was not a unilateral option clause, but rather an exclusive jurisdiction clause by which all disputes were to be determined by arbitration in New York under the UNCITRAL rules.

The Defendant was a small entrepreneur and start-up, for whom travelling to New York was deemed too onerous. The clause therefore contradicted a provision of Lichtenstein law which provides that contractual clauses which disadvantage one party by creating a "considerable disparity" are void.

It is at least arguable that if the clause in question had been a unilateral option clause allowing the claimant to elect to submit the disputes to arbitration in New York, the result would have been the same. Certainly the clear import of the decision is that if a Convention signatory’s law disallows a "one-sided" dispute resolution clause, another state’s court faced with an application for enforcement can, and very possibly will, deny enforcement.

A Common/Civil Law Split?
The recent decisions discussed above may suggest a difference in approach between common law and civil jurisdictions. However at least one common law jurisdiction has invalidated unilateral jurisdiction option clauses, albeit in an arguably narrow situation. In 2000, California’s Supreme Court found that a unilateral arbitration clause in an employment contract (which was a contract of adhesion) was "unconscionable" unless there was a reasonable justification for its inclusion.19 The court made it quite clear that the rationale of having the upper hand would not qualify as a reasonable justification.20 The Court expressly left open the possibility that another employment contract could justify a "unilateral arbitration agreement"21 but did not endeavour to explain what an acceptable clause would look like.

The Amendariz case is arguably distinguishable on its facts from a case involving a unilateral jurisdiction clause agreed between two equally sophisticated and powerful parties, and indeed other common law States in the USA have upheld unilateral clauses. Nonetheless, it serves as a reminder of the continuing risk – even in common law jurisdictions – that these clauses present.

Conclusion
As we have seen, as useful as they may appear, currently on the global stage there is an uncertainty hanging over the viability of unilateral jurisdiction clauses. In the arbitration context, the principle risk is that an international arbitration award will not be enforced in a jurisdiction where such clauses have found disfavour. Similarly, even in jurisdictions such as England where party autonomy is highly valued and protected, it is possible that a court could exercise its discretion to decline enforcement under Article V(1)(a) because the law of the arbitration agreement or the law of the arbitral seat invalidates such clauses.

In view of the uncertainty surrounding the viability of these clauses in several jurisdictions, parties must carefully consider the following factors when including them in commercial agreements:

1. Where is any award likely to be enforced, and what is the status of unilateral clauses under the laws of that or those jurisdiction(s)?

2. What is the position vis-à-vis a unilateral jurisdiction clause under the law of the arbitration agreement and the law of the seat?

If the position is unclear under the law of any of these jurisdictions, a contracting party should consider whether its need for the clause outweighs the possible ramifications of it being found to be unenforceable. It is hoped that a level of foresight achieved through this analysis could avoid a party incurring significant costs in obtaining a favourable arbitration award only to be entirely unable to enforce it.

Endnotes
1. The latter form of option is not recommended because it can lead to the situation where one party to
the arbitration agreement is unable to effectively commence proceedings because it is beholden to the other party to choose the forum. Unless the optional institutions are prepared to assist, this can lead to great uncertainty, delay, and expense.


3. While many consider that this should be limited to the enforcing jurisdiction’s "international" public policy, the reality is that this is not always the approach taken by national courts.

4. The Supreme Court also made reference to Article 6 of the European Convention on Human Rights.

5. See, e.g., Frontpoint Global Emerging Markets Fund L.P. v Eurokommerz, 12 January 2010 (Case no. KG-A40/14014-09); Max Participations II Sarl v Eurokommerz, 23 December 2009 (Case no. KG-A40/13340-09); ING Bank NV v Eurokommerz, 18 January 2010 (Case no. KG-A40/14211-09); Red Burn Capital v. ZAO Factoring Company (Case no A40-59745/09-63-478) http://arbitration.practicallaw.com/0-500-9316.

6. See, Aftermath of II International law forum: is Russia becoming more hostile to foreign arbitration?, Natalia Belomestnova, PLC.


9. Ibid.


11. And possibly, as suggested by one commentator, under European law because unless the decision is reviewed by the ECJ there remains a possibility that it will be followed by other European national courts.


13. Official transcript at paragraph 43.

14. Id. at paragraph 19.

15. Id. at paragraph 30.

16. Id. at paragraph 43.


20. Id. at p. 43.

21. Id. at p. 45.