



# UNILATERAL ARBITRATION CLAUSES: LEGAL VALIDITY

Master's Thesis

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## INTRODUCTION

Against the backdrop of a significant expansion of foreign economic relations and growth of the foreign trade volume, increases the popularity of a special mechanism to deal with international business disputes, namely international commercial arbitration. The major advantage of arbitration is that it gives parties a significant degree of autonomy and flexibility by allowing them to tailor the "rules of the game" to their specific commercial and practical needs. Often these "rules" provide for the use of the so-called unilateral arbitration clause.

A unilateral arbitration clause is exactly what its name suggests – a clause which gives only one party to an agreement the opportunity to make a forum selection (arbitration and litigation) to settle a dispute. Such clauses can be found under a variety of names, including 'one-sided', 'hybrid', 'optional', 'asymmetrical', etc. All these terms reflect different characteristics of the mechanism, but what brings them together is an intrinsic imbalance of the parties they provide for and the unilateral effect of the clause. Therefore, the present study will refer to 'unilateral arbitration clause' as a catch-all term, combining all of the abovementioned.

The rationale behind the use of unilateral arbitration clauses follows from the necessity to circumvent ordinary means of dispute resolution and decide on a specifically designed mechanisms. In particular, unilateral arbitration clauses seek to preserve the advantages of both litigation and arbitration. It enables the beneficiary of an option to choose between the differing advantages of each forum, to ensure successful and efficient enforcement of an award against assets of debtors in a world where assets may be located in several jurisdictions and very quickly relocated.<sup>1</sup>

However, the benefits offered by the flexibility of unilateral arbitration clauses are becoming tempered by the real-world uncertainty as to whether they will function as they are intended to. This assumption follows from the case law of both national courts and arbitral tribunals, showing a steady increase of disputes arising out of the use of unilateral arbitration clauses. The source of all concerns is rooted in an unequal position provided for the parties under such clauses.

Different jurisdictions provide different interpretations to such clauses. While most jurisdictions uphold unilateral arbitration clauses, there is a warning tendency in the

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<sup>1</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

national courts of various countries to hold them void, thus leaving the parties with litigation as the only one available dispute resolution avenue (what is initially sought to be prevented by the inclusion of these clauses). The purpose of this study is to get acquainted with the concept of unilateral arbitration clause and its potential challenges. It also aims to identify the “driving force” of all the assumptions referring to inadmissibility and unenforceability of unilateral arbitration clauses. Another goal the author plans to achieve concerns the comparative analysis of the legal principles supporting the two opposing positions, accepting and rejecting the use of unilateral arbitration clauses respectively. As a practical component, the study will present a recommendation to business parties with respect to drafting of an arbitration agreement and possible inclusion of the unilateral arbitration clause in their commercial contract.

The present study is divided into three parts. The first one recalls the notion and main features of an arbitration agreement. It then considers the concept of unilateral clauses in general, followed by the peculiarities of unilateral arbitration clauses, their rationale and legal pitfalls in drafting within the context of international business transactions. The second part deals with the issue of validity and enforceability of unilateral clauses in certain key jurisdictions and analyses the reasons for differing approaches. The third part examines whether unilateral arbitration clauses are still fit for purpose. In particular, the analysis of the two fundamental principles involved, the principle of party autonomy and the principle of equal treatment, is provided in this part. Each part also ends with the “key takeaways” designed to summarize the abovementioned and recall the main issues discussed.

## PART I. BACKGROUND

Before addressing the concept of unilateral arbitration clause, it is reasonable to provide the meaning of an arbitration agreement itself and its main features.

An arbitration agreement is the foundation stone of international arbitration.<sup>2</sup> It records the consent of the parties to submit their dispute to arbitration – a consent that is essential condition, as opposed to national courts. For there to be a valid arbitration, there must a valid agreement to arbitrate. An arbitration agreement is valid when both parties have manifested their consent to submit their dispute to arbitration.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – The New York Convention)<sup>3</sup>, being the backbone act in international arbitration, does not provide the definition of arbitration agreement. It only contains a reference that an arbitration agreement must be "in writing". However, the definition can be found in UNCITRAL Model Law on International Commercial Arbitration, which states that an arbitration agreement is *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in connection with a defined legal relationship, whether contractual or not."*<sup>4</sup>

There are two basic categories of arbitration agreements: arbitration clause and submission agreement.<sup>5</sup> The first one, which is the most commonly used, is drawn up in a contract and agreed upon before any dispute may arise. The second one is an agreement to submit existing disputes to arbitration.

Arbitration clauses are usually short, while submission agreements are usually long. This is due to the fact that parties are unaware of what kind of dispute may arise in the future and how they should be best handled. In contrast, submission agreements deal with disputes that has already arisen, and so they are usually drafted in accordance with the circumstances of the case, taking into account all the details.<sup>6</sup>

Most commercial contracts provide for arbitration clauses. Martin Hunter and Alan Redfern call these clauses as 'midnight clauses', because very often they are the last to be considered in contract negotiation, sometimes even late at night.<sup>7</sup> It is hard not to agree, at the beginning

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<sup>2</sup> N. Blackaby, C. Partasides, A. Redfern, M. Hunter – Redfern and Hunter on International Arbitration, 2009.

<sup>3</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

<sup>4</sup> Article 7(1) of the UNCITRAL Model Law on International Commercial Arbitration, with 2006 amendments.

<sup>5</sup> The terms arbitration agreement, arbitration clause and submissions agreement are considered equivalent.

<sup>6</sup> N. Blackaby, C. Partasides, A. Redfern, M. Hunter – Redfern and Hunter on International Arbitration, 2009.

<sup>7</sup> Ibid.

of a business relationship parties are optimistic and they spend relatively little time thinking about the 'worst-case scenario'. Therefore, insufficient thought is usually given as to how possible disputes are to be resolved.

Three important features related to an arbitration clause need to be mentioned.

First, by signing a contract, containing an arbitration clause, the parties are in fact signing two different agreements. This means that an arbitration clause is separate from the main contract of which it forms part and, as a consequence, it survives the termination of that contract. In the legal doctrine this is called the principle of separability. The main aim of this principle is to let an arbitration clause operate independently from the main contract. At the same time, the principle of separability does not imply that an arbitration clause should be treated as a legal phenomenon completely independent from the main contract. Instead, the principle brings some additional 'vitality' to an arbitration clause, when the obligations of the parties are no longer valid (as often disputes arise out of the termination of the main contract).

The principle of separability leads to another important feature. An arbitration agreement is generally subject to law other than the substantive law that governs the main contract as a whole. This also follows from the New York Convention, which stipulates that the agreement under which the award is made must be valid "*under the law to which the parties have subjected it*", or, failing any indication thereon, "*under the law of the country where the award is made*".<sup>8</sup>

However, it is rarely the case that arbitration clause addresses the question of the choice of law applicable to it. Usually the parties to a contract provide only the substantive law applicable to the relationship between them, refer to one or the other arbitration rules and choose the place of arbitration, but are silent on the rules that should govern the arbitration agreement. Thus, in the absence of any express or implied choice by the parties as to the law governing the agreement to arbitrate, the law of the seat of the arbitration is generally applied (*lex loci arbitri*).

The next feature – a valid arbitration agreement has the power to exclude jurisdiction of national courts. This is a very important feature of an arbitration agreement, which is based on Article II (3) of the New York Convention: "*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the*

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<sup>8</sup> The New York Convention, Article V (1)(a).

*meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*" The member States have intentionally limit the jurisdiction of their national courts with respect to disputes of which there is an arbitration agreement.

Finally, the award rendered by the arbitral tribunal on the basis of an arbitration agreement is deemed to be final and binding upon the parties to such arbitration agreement.

### 1.1. Nature of Unilateral Clauses

By choosing arbitration as an alternative to litigation, the parties are also free to establish an alternative option within arbitration, that is to say an alternative within the alternative. Based on that, there are two types of alternative arbitration agreements:

- 1) Providing a choice between several arbitral institutions;
- 2) Providing a choice between arbitral institution and national courts.

With regard to the first type, the reasons to conclude such agreements varies. For instance, parties might not be able to agree upon a single arbitral institution, so they choose a compromise. There are also cases when parties establish alternatives depending on the nature of possible dispute or its amount. In any case, the present alternative corresponds to the nature of arbitration that is based on the principle of party autonomy.

The opportunity of entering into arbitration agreements of this kind finds its regulatory reflection. For example, the Chamber of Commerce and Industry of the Russian Federation concluded agreements on cooperation in the field of international commercial arbitration with a number of chambers of commerce of other countries, containing standard clauses that the contracting parties are encouraged to include in their contracts. One of such agreement with the Central Chamber of Commerce of Finland provides the following: if the respondent is a Russian natural or legal person, the arbitration will take place in the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation in accordance with its rules; if the respondent is a Finnish natural or legal person, the arbitration will be conducted in the Council of Arbitration of the Central Chamber of Commerce of Finland in accordance with its rules.<sup>9</sup>

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<sup>9</sup> Agreement between the Chamber of Commerce and Industry of the Russian Federation and the Central Chamber of Commerce of Finland on cooperation in the field of commercial arbitration (Moscow, 25 April 2003).

Thus, the conclusion of alternative arbitration agreements of the first type is sufficiently substantiated. The only possible concern is the possibility of having parallel proceedings, where either party in the event of a dispute tries to exercise its right to an alternative treatment in a particular arbitral institution.

Speaking of the second type of alternative arbitration agreements, providing a choice between arbitration and national courts, it represents a mixture of arbitration and prorogation agreement. Despite its prevalence, such agreements, as opposed to the first type, has not yet received an unambiguous acknowledgement in the legal doctrine. The case law on this issue is also quite controversial, as will be discussed in the following chapters.

The subject of the present study, unilateral arbitration clause, falls within the second type of alternative arbitration agreements.<sup>10</sup> It can be defined as an agreement providing one of the parties the right to choose between the two available means to resolve a dispute, whereas the other party is confined only to one of the options.<sup>11</sup>

### *Mechanisms of Drafting Unilateral Clauses*

A unilateral jurisdiction clause could look like this way:

“All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be finally resolved by arbitration in accordance with [add institutional arbitration rules]. Notwithstanding the foregoing, [Party A] shall be free at its sole option to seek judicial relief...”<sup>12</sup>

This clause provides for arbitration as a means of dispute resolution, while retaining the right of Party A to refer to national court. Conversely:

“The courts of England shall have jurisdiction to settle any dispute which may arise out of or in connection with this Agreement but [Party A] shall have the option of bringing any dispute hereunder to arbitration...”<sup>13</sup>

This clause differs from the previous by establishing litigation as a main option. Sometimes one of the parties is granted an option or is compelled to resort to arbitration or litigation just for a certain type of disputes only:

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<sup>10</sup> See Appendix 1 – Types of alternative arbitration agreements.

<sup>11</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

<sup>12</sup> Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* – 3<sup>rd</sup> Edition, WoltersKluwer, 2013.

<sup>13</sup> Ibid.



“... This Agreement to arbitrate shall not apply with respect to the Lender’s rights to submit and pursue in a court of law any actions related to the collection of the debts.”<sup>14</sup>

Or,

“If the matter in dispute is not resolved through mediation within thirty (30) days after the start of the mediation, then, but not before the expiry of the 30<sup>th</sup> day, such dispute shall become subject to arbitration ... In addition, the Seller has the right to bring any and all claims relating to payments in the courts of Mediterraneo. The Buyer herewith submits to the jurisdiction of the courts of Mediterraneo.”<sup>15</sup>

Another example:

“1.1. Subject to paragraph 1.2 below, any dispute, controversy or claim arising out of, relating to or in connection with this Agreement (a “Dispute”) shall be referred exclusively to the courts of [England and Wales].

1.2 Notwithstanding paragraph 1.1 above, if the [party with option] so elects by way of written notice to [the other party/parties] specifying the Dispute in question, that Dispute shall be referred to and finally resolved by arbitration under the [LCIA Arbitration Rules] (the “Rules”), which Rules are deemed to be incorporated by reference into this clause. The arbitral tribunal shall consist of [one/three] arbitrators. The seat (or legal place) of arbitration shall be [London, England] and the language of the arbitration shall be [English].

1.3 Any election pursuant to paragraph 1.2 above must be made before [party with option] institutes (and instead of instituting) court proceedings (other than proceedings solely for interim relief) in relation to the Dispute, or at any time before [party with option] takes a substantive step in any court proceedings in relation to the Dispute which have been commenced by [the other party/parties].”<sup>16</sup>

Variations are possible by adding different criteria, such as jurisdictions, amounts of the claim, and others.<sup>17</sup> In spite of such variations, unilateral arbitration clauses still bear the features of ‘normal’ arbitration agreement. However, it is important to note that while being not triggered a unilateral arbitration clause cannot be regarded as an arbitration agreement as such, but a dispute resolution clause with alternative options (unilateral jurisdiction clause), which transforms into an arbitration one once the dispute is brought for settlement

<sup>14</sup> Amold vs. United Companies Lending Corporations, 1998 available at <http://caselaw.findlaw.com/wv-supreme-court-of-appeals/1460194.html>

<sup>15</sup> From XXI Annual Willem C. Vis International Commercial Arbitration Moot.

<sup>16</sup> Philip Clifford – Finance Agreements: A Practical Approach to Options to Arbitrate.

<sup>17</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

to arbitration (and the parties cannot exercise any further election). Conversely, if one of the parties brings the case to national court, dispute resolution clause automatically turns into a prorogation agreement.

## 1.2. The Rationale behind an Alternative

The asymmetrical distribution of rights and duties under the unilateral arbitration clause is rooted in the unequal position of the parties to these agreements. On most occasions, one of the parties holds stronger bargaining power and is able to compel the other party to accept the proposed terms, although it might be unfavorable for that party.<sup>18</sup> However, what are the benefits of having the two options?

It is generally believed that arbitration is a more flexible than litigation means of dispute resolution, which provides a wider scope for the enforcement of arbitral awards thanks to the New York Convention. However, in certain disputes litigation can also provide some advantages. For instance, in the simplest situation, where the debt for the loan is obvious and there is no dispute in that respect, it would be a better option for the lender to file a lawsuit to recover the debt in the state court of the borrower's location (or location of his assets). In this case, litigation provides an opportunity in the shortest possible time with minimum cost get a decision on recovery of debt in virtually uncontested situation, when initiation of arbitration proceedings may be too expensive and time consuming.

The lender in that example wishes to enjoy the benefits of both options available, and being a stronger party from economic standpoint tries to take advantage of that by inserting the mechanism that offers the lender some added security and enables him to pursue the assets of the debtor more quickly and conveniently. When a dispute arises that party can ascertain which option is more suitable.<sup>19</sup>

Consequently, unilateral arbitration clauses are frequently included in financial agreements. However, this kind of clauses may also be found in tenancy agreements, employment and consumer agreements.<sup>20</sup>

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<sup>18</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>19</sup> Philip Clifford – Finance Agreements: A Practical Approach to Options to Arbitrate.

<sup>20</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

### 1.3. Legal Pitfalls in Drafting and Using Unilateral Clauses

The New York 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.<sup>21</sup> Majority of the world's countries (156<sup>22</sup>) are signatories, including such large jurisdictions as Russia, USA, China and all of the European Economic Area countries. The extensive participation in the Convention means that parties can enter into contractual relations 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 favor be made, they will be able to enforce that award in the jurisdiction(s) where their counterparty has assets.”*<sup>23</sup>

Article III of the New York 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.

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 option, 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.

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<sup>21</sup> Siubhan J.E. Magee and Judith Mulholland – The Enforceability of Arbitration Awards Made Pursuant to Unilateral Jurisdiction Clauses.

<sup>22</sup> The status of the New York Convention available at: [http://www.uncitral.org/uncitral/ru/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/ru/uncitral_texts/arbitration/NYConvention_status.html)

<sup>23</sup> Siubhan J.E. Magee and Judith Mulholland – The Enforceability of Arbitration Awards Made Pursuant to Unilateral Jurisdiction Clauses.

Having mentioned the two legal grounds for denial of enforcement of an arbitral awards, let us consider the two legal pitfalls that give rise to all disputes over validity of unilateral arbitration clauses.<sup>24</sup> These pitfalls are best described in two possible scenarios.<sup>25</sup>

In scenario 1, party A may choose between arbitration and litigation while party B is limited only to national courts. In this case, if party A initiates proceedings, party B should comply with whatever party A has chosen.<sup>26</sup> However, if party B files a claim to national court, party A would be able to request a transfer of the dispute to arbitration based on Article II of the New York Convention.<sup>27</sup>

In scenario 2, party A has the same set of options while party B is entitled to seek remedy only in arbitration. In the present case, party B is also obliged to comply with whatever party A has elected. However, the case law shows that if party A institutes proceedings, party B often does not accept the chosen jurisdiction on the grounds of invalidity of a unilateral clause. At the same time, party A may attempt to turn to national court in violation of the unilateral clause based on the same grounds.<sup>28</sup>

These two scenarios may create a serious dispute over the forum selection, which could even overshadow the initial dispute and lead to a protracted legal battle. It is therefore essential for the parties to have a proper thought about these issues before including a unilateral arbitration clause to their contract. Doing so requires consideration of the laws of several jurisdictions, such as the law governing the arbitration agreement, the law of the seat of the arbitration and the law of any states in which enforcement might be sought. However, as it can be seen in the following chapter, it might be impossible to reach firm conclusions about the validity of a proposed option because the legal position is uncertain in one or more of the relevant jurisdictions.

Summarizing the First Chapter, it has been demonstrated that:

- 1) Unilateral arbitration clause is a type of alternative arbitration agreements which provides a choice between arbitral institution and national court to only one of the parties;

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<sup>24</sup> Philip Clifford – Finance Agreements: A Practical Approach to Options to Arbitrate.

<sup>25</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>26</sup> Ibid.

<sup>27</sup> Article II (3): *“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”*

<sup>28</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

- 2) Unilateral arbitration clauses are frequently included in financial agreements, such as the loan agreement, allowing the party with an option (usually the creditor) to pursue the assets of the debtor more effectively;
- 3) The asymmetrical distribution of the rights is, therefore, based on unequal positions of the parties during the agreement negotiations;
- 4) Unilateral arbitration clauses bear the risk of being considered invalid under the law of several jurisdictions, including the law governing the arbitration agreement, the law of the seat of the arbitration and the law of any country in which enforcement of an award might be sought.

## PART II. ENFORCEABILITY OF ARBITRATION AWARDS MADE PURSUANT TO UNILATERAL CLAUSES

It is difficult to content that there is a certain jurisdiction which is *ab initio* hostile to unilateral arbitration clauses. A large number of jurisdictions uphold this type of arbitration agreements. However, there have been a number of cases that indicate a volatile attitude toward unilateral clauses. Two recent decisions in Russia and France have cast a shadow on the use of unilateral clauses and raised concerns about its expediency, while one even more recent Spanish decision confirmed a unilateral clause, thus bringing a further twist in the tale and increasing the state of flux and unpredictability in the area.<sup>29</sup> This chapter presents a review of approaches to unilateral clauses in different jurisdictions.

### 2.1. Common Law Jurisdictions

#### *United Kingdom*

The first reported decision directly concerning unilateral arbitration clause was the English Court of Appeal case *Baron vs. Sunderland Corp (1966)*. Analyzing the clause, in which only one party had the right to refer to arbitration, the court stated: “*It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference.*”<sup>30</sup> That decision was followed in *Tote Bookmakers Ltd vs. Development and Property Holding Co Ltd. (1985)*.<sup>31</sup>

Until 1986, an arbitration agreement in England had to be mutual, that is, to provide both parties equal rights to refer the dispute to arbitration. The turning point in the judicial practice of English courts is the case *Pittalis vs. Sherefettin (1986)*.

In *Pittalis* decision, the Court of Appeal, referring to the consent of the parties in respect of unilateral arbitration clause, refused to recognize the defect of mutuality in a clause.<sup>32</sup> In particular, Lord Justice Fox reasoned: “*I can see no reason why, if an agreement between two parties confers on one of them alone the right to refer the matter to arbitration, the reference*

<sup>29</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>30</sup> Born G.B. International Commercial Arbitration. Alphen aan den Rijn: Kluwer Law International, 2009. P. 733.

<sup>31</sup> *Tote Bookmakers Ltd vs. Development and Property Holding Co Ltd.*, 2 All E.R. 555, 1985.

<sup>32</sup> Bevan A. – Optional arbitration agreements: the English position. Available at <http://www.cdr-news.com/categories/expert-views/optional-arbitration-agreements-the-english-position>

*should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact the option is exercisable by one of the party only seems to me to be irrelevant. The arrangement suits both parties.”*

After this decision, the English courts have ceased to focus on mutuality or symmetry of arbitration clauses. Textbook examples that affirmed the interpretation of *Pittalis* are decisions in *NB Three Shipping Ltd vs. Harebell Shipping Ltd (2004)*, *Debenture Trust Corp plc vs. Elektrim Finance BV (2005)*. In the first case the court stated that there is nothing that makes such clauses invalid, there is nothing contradictory in granting one party a ‘better’ position than the other party to a contract. In the second case, the court declared, “... a unilateral clause gives an additional advantage to one of the parties but this should be treated in the same vein as any other contractual clause giving advantage and not as a peculiarity on its own.”<sup>33</sup>

In the recent decisions of *Mauritius Commercial Bank Ltd vs. Hestia Holdings Ltd and another (2013)*<sup>34</sup> case, the English High Court left no doubts as to the general validity of unilateral arbitration clauses in England, noting that such clauses inserted in commercial agreements serve the needs of businesses, which are subject to overarching party autonomy.<sup>35</sup>

Therefore, there is no suggestion – on the basis of the current jurisprudence – that an English court would refuse enforcement under Article V (2)(b) of the New York Convention. Similarly, there is no basis for a foreign court to deny enforcement under Article V (1)(a) of the New York Convention on the basis of English law.

#### *United States of America*

U.S. case law provides the largest source of material regarding unilateral arbitration clauses. However, the vast majority of cases deal with consumer contracts (credit card contracts in particular) and employment agreements.<sup>36</sup> Nevertheless, it is valuable to demonstrate the reasoning U.S. courts provide. The validity of such arbitration clauses has been questioned under two doctrines: the doctrine of lack of mutuality and the doctrine of unconscionability.

Courts in the United States, invalidating unilateral arbitration clauses, follow the approach according to which such clauses are unfair with respect to “little guys”.<sup>37</sup>

<sup>33</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>34</sup> Berard M., Dingley J. – Unilateral option clauses in arbitration: an international overview. Available at: <http://uk.practicallaw.com/7-535-3743>

<sup>35</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>36</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

<sup>37</sup> Drahozal C.R. Nonmutual Agreements to Arbitrate // Journal of Corporation Law. University of Iowa College of Law, 2002.

Up to 1990s, a considerable number of courts in the United States did not recognize unilateral arbitration clauses on the basis of the doctrine of lack of mutuality. A good example of the application of this doctrine is the case *Hull vs. Norcom Inc. (1985)*. The agreement between the employee and the employer containing an arbitration clause, provided only the employer with an alternative right to refer to the court in case of violation of the employee's obligations. The point raised in this case is that there may not be identical rights and obligations for each of the parties, however, there should be consideration, i.e., promises on both sides, not strict mutuality. The Court of Appeal of the Eleventh Circuit held the arbitration clause void due to lack of promises that both parties (not only the employee) would abide by the arbitration option.<sup>38</sup>

The application of the doctrine of mutuality of obligations as a ground for invalidating unilateral arbitration clauses is also reflected in a number of decisions of the Supreme Court of Arkansas. In the case *Showmethemoney Check Cashers vs. Wanda Williams and Sharon McGhee (2000)*, based on the reasoning of the decision in *Hull vs. Norcom*, the Supreme Court of Arkansas agreed that the arbitration clause was non-mutual, since arbitration agreements "... should not be used as a shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action."<sup>39</sup> In *E-Z Cash Advance, INC. vs. Harris (2001)* the court applied the same approach.<sup>40</sup> The underlying idea is simple: a valid agreement must always be reciprocal, if the agreement does not provide mutual obligations – it is void for lack of mutuality.<sup>41</sup>

Subsequently, the U.S. courts start to base their decisions on the doctrine of unconscionability. Unconscionability means a degree of unreasonableness of an agreement forcing a court to modify or nullify it. The doctrine refers to contractual terms that are extremely unjust and one-sided in favor of one party possessing more bargaining power.<sup>42</sup> Thus, it is regarded unconscionable for a party to exploit its economic power and urge the other party to accept a unilateral arbitration clause without clear understanding about the unfair advantage it gives.<sup>43</sup>

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<sup>38</sup> Decision available at <http://law.justia.com/cases/federal/appellate-courts/F2/750/1547/389556/>; Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>39</sup> Decision available at <http://caselaw.findlaw.com/ar-supreme-court/1171743.html>

<sup>40</sup> Decision available at <http://caselaw.findlaw.com/ar-supreme-court/1484904.html>

<sup>41</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

<sup>42</sup> Ibid.

<sup>43</sup> Hans Smith – The unilateral arbitration clause: a comparative analysis, *American Review of International Arbitration*, Issue 20, 2009.



The largest number of judicial decisions reflecting a new trend were issued in California. In accordance with the law of this State, substantial unconscionability is found in cases where by virtue of the arbitration agreement the weaker party is given the opportunity to go to arbitration to resolve disputes, while the stronger party is entitled to choose between the different forums.

In the California Court of Appeal case *Armendariz vs. Foundation Health Psychcare Services, Inc. (1998)*<sup>44</sup> the employees challenged the arbitration agreement under which all disputes relating to unfair dismissal were subject to arbitration, while the employer also had the opportunity to refer to court, thus enjoying broader opportunities to protect interests. The arbitration clause was part of the employment agreement, which actually was a contract of adhesion, the terms of which employees could not negotiate. Applying the doctrine of unconscionability the court formulated two requirements for that doctrine: procedural (exploitation of bargaining power) and substantive (one-sided unreasonable effect). Since both requirements in this case were met, the unilateral arbitration court was held unenforceable on the grounds of the unconscionability doctrine.

Another example is the case *Arnold vs. United Companies Lending Corp. (1998)*, in which the Supreme Court of Appeals of West Virginia found unfair the asymmetrical arbitration clause in the contract between the lender and borrower and, consequently, unenforceable. Describing the arbitration clause as an agreement between rabbits and foxes, the court stated: "*The relative positions of the parties, a national corporate lender on one side and elderly, unsophisticated consumers on the other, were grossly unequal.*"<sup>45</sup>

Thus, it can be argued that in a number of U.S. states a negative attitude of courts towards the use of unilateral arbitration clauses remains, especially in employment agreements and contracts with consumers as one of the parties. This approach is particularly peculiar to state courts with traditions of "hostility to arbitration agreements in general" in disputes involving domestic arbitration agreements.<sup>46</sup>

However, as it was stated above, unilateral arbitration agreements involving consumers and employees are more likely in general to be held void due to consumer and employee protection laws. Therefore, the same set of reasoning might not always apply to commercial

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<sup>44</sup> Decision available at <http://caselaw.findlaw.com/ca-court-of-appeal/1390294.html>

<sup>45</sup> Decision available at <http://caselaw.findlaw.com/wv-supreme-court-of-appeals/1460194.html>

<sup>46</sup> Born G.B. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009. P. 735.

based relations between legal entities. Nevertheless, the grounds upon which the validity of such clauses has been challenged should be kept in mind for further discussion.

### *Australia*

There is no settled case law in Australia invalidating unilateral arbitration clauses. With a reference to English decisions *Pittalis vs. Sherefettin*, the High Court of Australia in *PMT Partners Pty. Ltd. vs. Australian National Parks & Wildlife Service (1995)* upheld a unilateral arbitration clause, reasoning that the true and plain meaning following from the construction of the clause and the applicable legislation does not support any restriction of a party's right to elect between arbitration and litigation, as provided by the clause in the dispute.<sup>47</sup>

## 2.2. Continental Jurisdictions

### *Russia*

Until recently, Russian national courts and arbitral tribunals had been generally approving unilateral arbitration clauses and other alternative dispute resolution agreements. For instance, in one of the cases considered by the Moscow District Commercial Court, it was deemed permissible for the lender to enjoy its exclusive right of forum selection provided under the terms of a contract and file a claim within Russian state court.<sup>48</sup> The court stated, inter alia, that the claimant as a party providing financing (and given the heightened risks of a lender) may use its granted right of choice to determine jurisdiction for resolving a particular dispute, whereas the optional clause serves both as a prorogation and an arbitration agreement.<sup>49</sup>

A similar favorable approach was also taken by the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (hereinafter – ICAC). In one of its cases the arbitral tribunal found that it had jurisdiction to hear the dispute based on the following clause: “*Any disputes or disagreements arising out of or in connection with the present Contract shall be referred to the Brussels Commercial Tribunal in Belgium, or to Arbitration at the Chamber of Commerce and Industry of the Russian Federation, or to Arbitration at the Chamber of Commerce and Industry of the Republic of Kazakhstan, at seller's option.*”<sup>50</sup> In rendering its award, the tribunal relied on the principle of party autonomy,

<sup>47</sup> Decision available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1995/36.html>

<sup>48</sup> Ruling of the Moscow District Commercial Court, dated December 21, 2009, in Case No. КГ-Ф40.11967-09.

<sup>49</sup> Ibid.

<sup>50</sup> ICAC case No. 41/2001, November 14, 2001.

which grants the parties the right to agree on any dispute resolution procedure that best suits them.<sup>51</sup>

However, the pre-existing approach has drastically changed after the case *Russian Telephone Company vs. Sony Ericsson Mobile Communications Rus (2012)* (hereinafter – Sony Ericsson case).<sup>52</sup> The seller (Sony Ericsson) entered into an agreement with the buyer (Russian Telephone Company) regarding the supply of cell phone equipment. The agreement between the parties provided the following dispute resolution clause:

*“Any dispute arising out of or in connection with the present Agreement that cannot be resolved amicably shall be finally resolved in accordance with the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be London, and the proceedings shall be held in English. This arbitration clause shall remain in full force and effect and shall survive the termination of this Agreement and shall not restrict the rights of the Parties to recourse to courts of competent jurisdiction for interim or injunctive relief... In addition, the arbitration clause shall not limit the right of Sony Ericsson to take action in any court having jurisdiction to recover debt owed for Product supplied.”<sup>53</sup>*

This is a typical unilateral arbitration clause, which allows the seller to litigate disputes regarding the debt recovery in any jurisdiction competent in accordance with rules of private international law.

The buyer filed a claim against the seller in Moscow Commercial Court seeking replacement of allegedly defective cell phones. The seller filed a motion to dismiss the claim on the grounds of existence of valid and enforceable dispute resolution clause, under which the buyer was only entitled to rely on arbitration in London. This decision was upheld by two further instances (9<sup>th</sup> Commercial Appeals Court and Federal Commercial Court of the Moscow District) until it reached the final appeal before the Presidium of the Supreme Commercial Court of the Russian Federation. The Presidium reversed the previous lower courts decisions finding the unilateral arbitration clause invalid.

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<sup>51</sup> A. Asoskov, A. Yadykin, A. Kucher – Asymmetric dispute resolution clauses: validity under Russian law after the Sony Ericsson jurisprudence.

<sup>52</sup> *Russian Telephone Company vs. Sony Ericsson Mobile Communications Rus Ltd.*, Decision No. 1831/12 of Supreme Commercial Court of the Russian Federation, June 19, 2012.

<sup>53</sup> *Ibid.*

The Presidium put the main emphasis on the violations of the principles of due process and party equality relying on the case law of the Russian Constitutional Court and the European Court of Human Rights (hereinafter – ECHR).<sup>54</sup> The Presidium stated:

*“... Together with the provisions of the dispute resolution agreement related to the arbitration clause, such prorogation agreement gives Sony Ericsson an advantage over Russian Telephone Company, since it is the only one granted the right to choose the method of dispute resolution and therefore, violates the balance of interests between the parties... Based on the general principles of protection of the civil law rights, a dispute resolution agreement cannot grant only one party to a contract (the seller) the right of recourse to a competent state court and deprive the other party (the buyer) of that right. If such agreement is concluded, it will be deemed void as violating the balance of power between the parties. Consequently, the party whose rights are violated by such dispute resolution agreement should also be entitled to refer to a competent state court, so that it may enforce its guaranteed rights to judicial remedy on equal terms with its counterparty”* (emphasis added).

The conclusion made by the Presidium leaves room for different interpretations as to what exactly is the Court’s approach toward unilateral arbitration clauses.

**First interpretation** implies modification of the unilateral clause into bilateral one. The court trying to put both parties on equal footing cured the defect in the unilateral clause instead of invalidating it. As a result, arbitration and prorogation agreements remain valid but with both parties given symmetric rights to choose among these options.

This approach raises the following warnings. First of all, since the substance of the clause is significantly altered, this means nothing less than an amendment of the contract by the Court. Such amendment according to the Russian law is only possible in the cases of contracts of adhesion.<sup>55</sup> However, the Presidium never referred to adhesion, basing the arguments only on the violation of the abovementioned principles, envisaging no other legal implication than invalidation of all or part of the clause.<sup>56</sup> Second of all, such modification deprives the clause of its purpose. The wording agreed by the parties provided the seller with the right to refer to a competent court not just any dispute, but only “*claims to recover*

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<sup>54</sup> *Suda vs. Czech Republic* (Appl. No. 1643/06); *Batsanina vs. Russia* (Appl. No. 3932/02); *Steel and Morris vs. United Kingdom* (Appl. No. 68416/01); Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>55</sup> Articles 428.1 and 428.2 of the Civil Code of the Russian Federation.

<sup>56</sup> A. Asoskov, A. Yadykin, A. Kucher – Asymmetric dispute resolution clauses: validity under Russian law after the Sony Ericsson jurisprudence.

*debt owed for the Product supplied.*” In this way, how could the seller have these type of claims?<sup>57</sup>

**Second interpretation** implies invalidation of the dispute resolution clause to the extent of its unilateral part. In the case at hand, only the part of the dispute resolution clause allowing the seller to refer the dispute to national courts was unilateral in nature. Invalidation of this part would have maintain the effect of the arbitration clause providing for the ICC arbitration.<sup>58</sup>

In this way, after the Presidium had vacated the decisions of the lower courts and had remanded the case for a new hearing on the merits in the court of first instance (Moscow Commercial Court), this Court would have been obliged to dismiss the claim without a consideration and refer the parties to international commercial arbitration in accordance with Article II of the New York Convention. This, however, never happened.

**Third interpretation** implies full invalidation of the dispute resolution clause. This means the application of the rules of private international law with regard to judicial competence, according to which the case should be sent back for a new hearing to Moscow Commercial Court (the place of the domicile of the respondent). This is what actually happened.

Though this interpretation appears to be consistent with the Presidium’s line of argument, in view of the abovementioned interpretations, there still remains uncertainty whether the Supreme Commercial Court actually implied this approach.<sup>59</sup>

The *Sony Ericsson* case has raised serious concerns among scholars and practitioners, some of them even doubting the future of arbitration in Russia. However, given the lack of further reliable case law from Russian national courts, it appears to be premature to consider this case as reflected a defined negative approach by the Russian national courts toward unilateral arbitration clauses.

### France

Similar to Russia, French courts have been generally supporting the use of unilateral clauses. For instance, in 1973 the Cour d’Angers refused to invalidate an arbitration clause in the contract between Dutch and French companies, according to which the Dutch company was

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<sup>57</sup> A. Asoskov, A. Yadykin, A. Kucher – Asymmetric dispute resolution clauses: validity under Russian law after the Sony Ericsson jurisprudence.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

entitled to a right to choose between an arbitration and a state court of the Netherlands. Subsequently, the decision was upheld on appeal.<sup>60</sup>

However, the decision of the Cour de Cassation in *Mme 'X' vs. Banque Privee Edmond de Rothschild (2012)* (hereinafter – *Rothschild case*) made a stark difference. The case dealt with a unilateral dispute resolution clause providing for prorogation, which was held void on the grounds that it provided potestative condition, which is contrary to the Brussels I Regulation setting out the rules for forum selection.<sup>61</sup> Although the case did not involve arbitration agreement, the conclusions made by the French courts with regard to unilateral nature of the clause are important to stress out for the purposes of the present work.

The dispute resolution clause inserted in the bank account agreement between Mrs. 'X' (natural person domiciled in Spain) and a French branch of the Luxemburg bank Edmond de Rothschild provides the following:

*"Potential disputes between the client and the bank shall be subject to the exclusive jurisdiction of the Courts of Luxembourg. Failing such election of jurisdiction, the Bank reserves the right to bring an action before the courts of the client's domicile or any other court of competent jurisdiction."*<sup>62</sup>

The rationale behind this clause is to allow the Bank to use all possible forums reflecting locations of the client and his assets.<sup>63</sup>

Mrs. 'X' filed a claim before a French court seeking for compensation of damages arisen out of poor performance of the investment portfolio. The Bank challenged the jurisdiction of the French court relying on the dispute resolution clause. Noting that in general an option to choose between jurisdictions should not be condemned, the Cour d'Appeal, however, dismissed the challenge.

On appeal, the Cour de Cassation confirmed the decision of the lower court stating:

*"... 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 restricted only Mrs. X, who was the only party obliged to commence proceedings in Luxemburg; accordingly, the Cour d'Appeal correctly determined that the clause was potestative in nature in favor of the Bank, and thus was*

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<sup>60</sup> Fouchard, Gaillard, Goldman On International Commercial Arbitration / Edited by E. Gaillard and J. Savage. Op. cit. P. 140.

<sup>61</sup> The Brussels I Regulation was repealed in 09.01.2015 by Regulation (EU) No 1215/2012.

<sup>62</sup> Decision on French available at:

[https://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_cilive\\_568/983\\_26\\_24187.html](https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_cilive_568/983_26_24187.html)

<sup>63</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

*contrary to the objectives and finality of the prorogation of jurisdiction provided by the Article 23 of the [Brussels I] Regulation.*"<sup>64</sup>

Following the reasoning of the Cour de Cassation, the clause should be considered as potestative when it binds, in effect, only one party, whereas the other retains the possibility to act at the place of counterparty's domicile or before any other courts of competent jurisdiction. It is therefore the unilateral nature of the clause that makes it potestative.<sup>65</sup> It is noteworthy that the focus in the *Rothschild* case is made on the nature of the agreement itself<sup>66</sup>, and not on the principle of party equality and the fact that an agreement was entered into with the consumer as a weaker party.

The legal grounds retained by the Cour de Cassation in its ruling also left some doubts in the legal community. According to French law, an obligation is concluded under a potestative condition when "*it makes the performance of the agreement subject to an event the occurrence of which only one party can provoke or prevent.*"<sup>67</sup> Can a forum selection clause has such an effect on the agreement? Doubtfully, since it is the performance of the contract (or failure of such performance) that leads the parties to solve their dispute before any given court. Therefore, the right to choose a jurisdiction provided only to one party should not be seen as a potestative condition, void under French law.<sup>68</sup>

Unlike in Russia, where the *Sony Ericsson* case remains a single model approach, the decision in *Rothschild* is not unique in its kind. The Cour de Cassation has recently looked again at the issue of unilateral clauses. The decision in *Danne vs. Credit Suisse* (2015) was given in the context of the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (hereinafter – Lugano Convention).<sup>69</sup>

The case concerned a French company and a Swiss bank (Credit Suisse). Under the dispute resolution clause, the French company was restricted to bringing an action before the courts in Zurich while the Swiss bank could sue in any other competent court. In violation of the dispute resolution clause, the French claimant commenced the proceedings in France.

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<sup>64</sup> Decision on French available at:

[https://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_cilive\\_568/983\\_26\\_24187.html](https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_cilive_568/983_26_24187.html)

<sup>65</sup> C. Burford, L. Wynaendts, D. Zerbib – What future for unilateral dispute resolution clauses?

<sup>66</sup> In accordance with the French and Luxembourg law, obligations entered into under potestative condition are invalid (Art. 1174 of the French Civil Code).

<sup>67</sup> Article 1170 of the French Civil Code.

<sup>68</sup> C. Burford, L. Wynaendts, D. Zerbib – What future for unilateral dispute resolution clauses?

<sup>69</sup> The Lugano Convention determines jurisdiction between EU member states and Switzerland, Norway and Iceland (Along with the Brussels I Regulation forms a single complex jurisdiction regime).



The main question the judges faced with was whether Article 23 of the Lugano Convention, providing for the rules of prorogation of jurisdictions, governs such unilateral jurisdiction clause? The Paris Cour d'Appeal held that Article 23 of the Lugano Convention is applicable and that there was express choice of exclusive jurisdiction of Zurich courts, hence the French courts lacked jurisdiction.<sup>70</sup>

The Cour de Cassation overturned the decision stating that a unilateral right of the bank to commence proceedings before “*any other competent court*” does not meet the requirements for legal certainty and predictability under Article 23 of the Lugano Convention, which makes the entire dispute resolution clause unenforceable. Noteworthy, in order to give substance to its decision the Cour de Cassation referred to the case law of the Court of Justice of the European Union (hereinafter – CJEU). In one of its judgments the CJEU emphasized that the jurisdiction clause should stipulate the objective reasons for one or another court to which the parties wish to submit their disputes be chosen.<sup>71</sup>

Summarizing, what can be inferred from the French case law? The *Rothschild* judgment was broadly criticized which gave an impression that it is in any event final and going to be revised. On the contrary, it was upheld by the *Credit Suisse* judgment, which in fact widens the effect of *Rothschild*. This clearly indicates a general trend in France with regard to unilateral dispute resolution clauses. Bearing in mind that the focus in the reasoning of both cases is given to the nature of the unilateral clause and to the fact that the clauses are not sufficiently precise and predictable, thus it can be assumed that in the future French courts may come to a similar conclusion in disputes related to unilateral arbitration clauses.

### *Bulgaria*

The highest court of Bulgaria, the Supreme Court of Cassation, invalidated a unilateral arbitration clause in the loan agreement, according to which the lender could initiate proceedings before the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry (hereinafter – BCCI), any other arbitral institution, or before the Court of Sofia, while the borrower was entitled to bring claim only in the state court.<sup>72</sup>

The Supreme Court of Cassation was confronted with an application for setting aside an arbitral award of the BCCI. In support of its claims, the Applicant (the borrower) referred to the fact that the arbitration clause was contrary to ‘good morals’ (*agreement contra bonos*

<sup>70</sup> S. James, K. Gibbons, H. Motani – Another knock for unilateral jurisdiction clauses in Europe.

<sup>71</sup> CJEU case C-387/98 available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-387/98>.

<sup>72</sup> Decision No. 71 under the case No. 1193/2010, September 2, 2011, available in Bulgarian at: <http://domino.vks.bg/bcap/scc/webdata.nsf/Keywords/C8F68993563DD5FFC22578FF00499C60>



*mores*) and is therefore invalid. In addition, the borrower argued that the arbitration clause violated the principle of procedural equality of arms, a fundamental principle of the Bulgarian civil procedural law. The Bulgarian Court came to the conclusion very similar to the reasoning in *Rothschild* case. In particular, the court stated that: “*such clauses may be interpreted as creating through contractual arrangements potestative right*”, which is not allowed under the Bulgarian law and might only be established by a statute.

It should be noted that the parties to the present agreement were natural persons. However, there were no reference made by the Supreme Court of Cassation with regard to protection of the ‘weaker’ party, since none of the parties could be presumed to be in a ‘stronger’ position.<sup>73</sup>

### Poland

Poland does not have a settled case law with regard to unilateral arbitration clauses. There is a reason for that. In 2005, a new arbitration law was enacted in Poland, which is almost a verbatim adoption of the UNCITRAL Model Law with the exception of the following. The Polish law explicitly provides that provisions of the arbitration agreement violating the principle of parties’ equality, e.g. those entitling only one party with the right to choose between arbitration or litigation, are void, but only to the extent of its unilateral part.<sup>74</sup> This rule is based on Article 32 of the Polish Constitution, which declares equality before the law. Thus, this provision of the law constitutes a direct legislative ban on the use of unilateral arbitration clauses.

The importance of the principle of parties’ equality is undoubted. But should it be able to limit the principle of parties’ autonomy and the established practice of commercial relations allowing one of the parties to the agreement enjoy better position? Polish legislators gave a straightforward answer to this question.

### Germany

German law does not explicitly prohibit the use of unilateral clauses. The German courts have also not refused to enforce unilateral clauses.<sup>75</sup> This, however, relates to a negotiated agreement. A distinction should be made if a clause is contained in a standard form agreement (adhesion).

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<sup>73</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>74</sup> Para. 2, Art. 1161 of the Procedural Civil Code of the Republic of Poland (Arbitration law).

<sup>75</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

If the unilateral clause is contained in the contract of adhesion, the relevant provisions of the German Civil Code applies, which provides that *“provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract...”*<sup>76</sup>

In one of the cases heard by the German Bundesgerichtshof, the Court held the unilateral arbitration clause contained in a contract of adhesion void. The Court found, inter alia, that when the party with a state forum option initiate the proceedings, the other party with unilateral arbitration option may request to refer the matter to arbitration. This makes the state forum option nugatory since any attempt to use it may face counter-action of halting the litigation in favor of arbitration. In addition, the claimant could therefore incur unnecessary costs of bringing the proceedings to state court.<sup>77</sup>

### Portugal

There is one notable case concerning the unilateral arbitration clause. In *Xilam Animation vs. Lnk Videos* the Licensing agreement between the French (Licensor) and Portuguese (Licensee) companies contained the following arbitration clause:

*“This agreement is governed and interpreted according to the French law and both parties agree to refer any dispute to the jurisdiction of the courts of Paris. Notwithstanding any contrary provision of this agreement, Licensor may choose to submit the dispute to binding arbitration under the Rules of IFTA before the courts of Paris, France, and Distributor hereby accepts arbitration in accordance with the IFTA Rules.”*<sup>78</sup>

Despite obvious uncertainty in the wording of the clause (*‘arbitration before the courts’*), which could have been the ground for rendering the clause as *‘pathological’* and incapable of being performed, the issues raised in the case concerned only the unilateral nature of the clause.

The dispute arose from the alleged violation of the agreement by the Licensee. After successful arbitration, the Licensor was seeking the recognition of the award before the courts of Portugal. Lnk Videos tried to challenge the award on the grounds of lack of jurisdiction of the arbitrator to hear the case. The Court of Appeals refused to invalidate the

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<sup>76</sup> Section 307(1) of the German Civil Code.

<sup>77</sup> BGH (Federal Court of Justice) judgement, September 24, 1998, III ZR 133-97; Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

<sup>78</sup> Decision of Tribunal da Relacao de Lisboa (Court of Appeal of Lisbon) as of July 12, 2012.

arbitration clause stating that the constitution of the arbitral tribunal was in accordance with the parties' agreement.

In its reasoning the Court addressed the issue of unilateral arbitration clauses in standard form contracts. Recognizing that a certain restriction of parties' rights exists, the Court noted that "inconvenient" arbitration clauses would be considered void only when the respective provision would cause gross inconvenience to one of the parties.<sup>79</sup> In the present case the Court of Appeal of Portugal upheld the validity of unilateral arbitration clause, since none of the parties suffered gross inconvenience.

### Italy

Italian law has an established practice supporting the use of unilateral clauses, starting in 1970 with the judgement of Corte di Cassazione.<sup>80</sup> In *Grinka in liquidazione vs. Intesa San Paolo* (2012) the Italian Court also upheld the clause in which one party had a right to refer to Italian courts or "any other judge having jurisdiction pursuant to international conventions", whereas the other party was bound to refer disputes only to English courts.<sup>81</sup> In another case, *Sportal Italia vs. Microsoft Corp.* (2011), Corte D'Appello di Milano refused to invalidate the clause, according to which one party was entitled to file a claim only within the court of Washington, while the other party had additional option to refer to Italian courts. Likewise in *Rothschild*, both cases involved the application of the Brussels I Regulation. However, the conclusions made by Italian Courts are diametrically opposed, emphasizing that there is nothing in the Regulation undermining the effect of unilateral clauses.

### Spain

A recent decision of the Spanish Court of Appeal in Madrid upheld the unilateral arbitration clause included in the agreement between Spanish and Dutch companies. The clause provided for a choice between arbitration in the Dutch Arbitration Institute and litigation in the Netherlands. Relying on the principle of party autonomy in international commercial arbitration, the Spanish courts held that they lacked jurisdiction to hear the dispute.<sup>82</sup>

Summarizing the Second Chapter, it can be concluded that:

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<sup>79</sup> Duarte Gorjao Henriques – Asymmetrical Arbitration Clauses under the Portuguese Law.

<sup>80</sup> Corte di Cassazione judgement No. 2906, October 22, 1970.

<sup>81</sup> Corte di Cassazione judgement in case No. 5705, April 11, 2012.

<sup>82</sup> Decision of the Court of Appeal of Madrid of 18 October 2013.

- 1) Unilateral arbitration clauses are not treated the same manner in different countries. While there is no direct dependency on the system of law, countries of the common law jurisdictions are more likely to uphold unilateral clauses;
- 2) The main arguments used by the courts invalidating the clause include: unequal balance of the parties' rights, lack of mutuality, potestative condition, etc. All could be attributed to the general principle of the parties' equality or equal treatment;
- 3) There is no universal approach as to rejection or acceptance of the unilateral arbitration clause, which makes the issue even more controversial. Interpretations may vary even in one jurisdiction;
- 4) As a general rule, it is more likely that an arbitration clause will be held void in cases involving consumers (or employees), where considerations of consumer protection law would be applicable (unilateral clauses are generally considered as unfair terms). However, the case law (See *Rothschild*) showed that courts tend to disregard the particular positions of the parties and base their decisions on the nature and effect of the unilateral clause.

The following chapter will consider the analysis made above and present the overview of the grounds for invalidation of unilateral arbitration clauses, including the comparison of the two major principles involved – party autonomy and equality of treatment.

## PART III PARTY AUTONOMY VS. EQUAL TREATMENT

What makes arbitration so attractive to business parties? The answer is – flexibility of the arbitral proceedings. Arbitration provides the parties with significant amount of flexibility to tailor the procedure to suit their particular needs, including alternative forum selection. However, the more freedom provided, the more potential negative consequences may occur, and this is the case with unilateral arbitration clauses. This Chapter will focus on the analysis of the two principles: equality of treatment – the one which gives grounds for concerns with regard to admissibility of unilateral arbitration clauses, and the principle of party autonomy – the basis of procedural flexibility and fundamental principle of international commercial arbitration, the “father” of unilateral arbitration clauses.

### 3.1 Party Autonomy

If an arbitration agreement is regarded as the foundation stone of international commercial arbitration, then the principle of party autonomy is its “heart”. Indeed, arbitration owes its reputation to the principle of party autonomy as it brings flexibility – the main advantage of arbitration over litigation.<sup>83</sup>

The principle of party autonomy originated from the principle of freedom of contract. In the frames of international contract law, the party autonomy provides the choice of law in the agreement. In international commercial arbitration, however, the principle has broader meaning, i.e. it allows the parties to freely submit their disputes to arbitration and to tailor the “rules of the game” to their specific needs.<sup>84</sup>

Martin Hunter and Alan Redfern describe the principle: *“Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition...”* They go on in describing the principle stating that international commercial arbitration being a paramount expression of parties’ autonomy should be freed from the constraints of national laws and be denationalized.

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<sup>83</sup> Ar. Gör. Şeyda Dursun – A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent.

<sup>84</sup> Report of the Secretary-General of UNCITRAL: possible features of a model law on international commercial arbitration (A/CN.9/207).

Moving from the theory to practice, within the framework of the principle of party autonomy, the parties are entitled to:

- ✓ choose the law applicable to the substance (the parties may rely on national laws, transnational laws, *lex mercatoria*, general principles of law, etc.)
- ✓ choose the law applicable to arbitration agreement;
- ✓ determine the composition of the arbitral tribunal, including the appointment of arbitrators, their powers and duties;
- ✓ arrange the timetable of the proceedings (i.e. the submissions due dates and the dates of the hearings);
- ✓ choose the language of arbitration;
- ✓ choose the place of arbitration (the seat could be anywhere regardless of the parties' nationalities);
- ✓ provide other issues relating to conduct of the arbitral proceedings.

In exercising their autonomy, the parties may choose formal or informal methods of conducting the arbitration, documentary or oral methods of presenting evidence, and so on. In other words, the principle of party autonomy enables the parties to define all the essential (and minor) elements of arbitration. The parties can exercise this freedom at every stage of arbitration, including before and after the commencement of the proceedings.

The principle of party autonomy has gained acceptance in international law and has also received recognition in majority of institutional arbitration rules and national jurisdictions. For instance, the New York Convention in Article V (1)(d) explicitly refers to the parties' right to provide composition of the arbitral authority and arbitral procedure in the arbitration agreement.

Article 19(1) of the UNCITRAL Model Law stipulates:

*"Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".*

The ICC Rules of Arbitration provide:

*"The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where the Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal, may settle."*<sup>85</sup>

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<sup>85</sup> International Chamber of Commerce Rules of Arbitration, Article 15(1).

Following the same approach, the London Court of International Arbitration (LCIA) state:

*“The parties may agree on the conduct of their arbitral proceedings, and they are encouraged to do so...”*<sup>86</sup>

The Arbitration law of the Russian Federation, describe the principle in the following way:

*“...Being an integral part of the contract, arbitration clause must be construed as an agreement which does not depend on the other terms and conditions of the contract than the will of the parties to it...”*<sup>87</sup>

The question which may arise, whether the unilateral option in the arbitration agreement falls within the scope of the principle of party autonomy?

Commentators supporting the use of unilateral arbitration clauses tend to believe that the scope of the principle is much broader than just the *“procedure to be followed by the arbitral tribunal”*. Indeed, the principle of party autonomy is certainly broader. This assumption follows from the overall context of the UNCITRAL Model Law, which frequently uses the words *“unless otherwise agreed by the parties”*.<sup>88</sup> Although never explicitly provided, the unilateral option clearly corresponds to the nature of the principle of party autonomy and the flexibility it provides the parties with.

However, there are certain limits intending to restrict the autonomy of the parties, which might jeopardize the use of unilateral clauses. This will be further discussed.

#### *Limitations to party autonomy*

Based on the abovementioned, the principle of party autonomy is an effective tool in promoting and protecting the interests of parties to international commercial arbitration. While so much has been said in retaining this principle, it should be noted that “party autonomy” is not synonymous to “complete autonomy”. This leads to another important question, which follows from the previous one. What are the limits to party autonomy?

To begin with, it is an arbitration agreement that reflects the autonomy of the parties. Thus, it is essential for the arbitration agreement to be valid in accordance with the law which governs it. The inability to meet the basic validity requirements, therefore, constitutes ***the first limitation*** to party autonomy. Among these mandatory requirements are:

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<sup>86</sup> LCIA Rules, Article 14(1).

<sup>87</sup> Federal Law of the Russian Federation on International Commercial Arbitration, 1993.

<sup>88</sup> See, for instance, Article 3 of the UNCITRAL Model Law.

- ✓ the form of the arbitration agreement (the New York Conventions requires an arbitration agreement to be in writing);
- ✓ the dispute must arise out of legal relationships whether contractual or not;<sup>89</sup>
- ✓ the subject matter of arbitration agreement must be capable of being settled by arbitration;<sup>90</sup>
- ✓ the parties to the agreement must have legal capacity to enter into the agreement.<sup>91</sup>

The **second limitation** concerns the issue relating to third parties. This restriction implies that an arbitration agreement should bind only its parties, hence it cannot provide terms which can affect the other parties. This applies to matters of substance as well as procedure. For instance, during the proceedings an arbitral tribunal may ask the parties to provide particular documents, to attend the hearings, or to submit examination, but it has no power to compel third parties to do so, even if the parties to the arbitration agreement explicitly confer such a power on the tribunal. The participation of third parties is only possible by means of approaching the national court of competent jurisdiction.<sup>92</sup>

The **third limitation** on party autonomy arises when the parties select institutional arbitration with the respective arbitration rules. Such rules usually contain several mandatory provisions in relation to the conduct of the proceedings. For example, the UNCITRAL Arbitration Rules provides the following:

- ✓ the parties must be treated with equality and at an appropriate stage of the proceedings each party must be given a reasonable opportunity of presenting his case;<sup>93</sup>
- ✓ the tribunal must hold a hearing if either party requests one;<sup>94</sup>
- ✓ there must be one consecutive exchange of written submissions which must include certain features;<sup>95</sup>
- ✓ if the Tribunal appoints an expert, it must give the parties the opportunities the question that expert at a hearing, and the parties must be given an opportunity to present their own expert witness on the points at issue.<sup>96</sup>

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<sup>89</sup> The New York Convention, Article II (1).

<sup>90</sup> The New York Convention, Article II (1) and V (2); UNITRAL Model Law, Article 36(1)(b)(i).

<sup>91</sup> The New York Convention, Article II (3) and V (1); UNCITRAL Model Law, Article 8(1) and 36(1).

<sup>92</sup> N. Blackaby, C. Partasides, A. Redfern, M. Hunter – Redfern and Hunter on International Arbitration, 2009.

<sup>93</sup> UNCITRAL Arbitration Rules, Article 17.

<sup>94</sup> Ibid.

<sup>95</sup> UNCITRAL Arbitration Rules, Articles 20 and 21.

<sup>96</sup> UNCITRAL Arbitration Rules, Article 29.



This limitation also finds its application in cases where parties attempt to alter the rules of the administrative body in a way which is unacceptable for this administrative body. For example, if the parties provided for arbitration in accordance with the ICC Rules of Arbitration and attempt to waive application of Article 27 of the Rules (which deals with scrutiny of awards by the ICC arbitral tribunal), it is likely that the ICC Court would not accept the case at all.<sup>97</sup>

The principle of public policy, the **fourth limitation**, is considered to be the most commonly observed. This principle is based on the sovereignty and is generally accepted as the fundamental conceptions of legal order in any given country.<sup>98</sup> For instance, the principle of public policy can be considered during the recognition and enforcement procedure of an arbitral award in the state court, which can refuse the enforcement if it is contrary to public policy of that country. This principle serves well in cases when parties are trying to abuse their autonomy, e.g. it prevents parties from using arbitration to legitimize illegal and immoral agreements.<sup>99</sup>

However, as it might be noticed, the principle of public policy is rather vague in nature. Therefore, the principle of parties' equality (equal treatment), which has already been reflected in the third limitation, usually stands out as another limitation to party autonomy (**the fifth limitation**). It is this principle which forms the basis of majority of the assumptions with regard to inadmissibility of unilateral arbitration clauses. Whenever the state court or arbitral tribunal invalidates the unilateral arbitration court, it is presumed that the autonomy of the parties is limited in that regard. A detailed analysis of the principal of equal treatment and its correlation with the principle of party autonomy is going to be further discussed.

### 3.2 Equality of Treatment<sup>100</sup>

Equality of treatment is a fundamental principle of civil justice, not to mention international commercial arbitration, and its importance is not questioned. What is questionable, however, is its scope and the way it interacts with the principle of party autonomy. But

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<sup>97</sup> Michael Pryles – Limits to Party Autonomy in Arbitral Procedure.

<sup>98</sup> Martin Hunter and Gui Conde E. Silva – Transactional Public Policy and its Application in Investment Arbitrations. Available at <http://www.arbitration.icca.org>

<sup>99</sup> Egbedi Tamara - An Analysis of the Effect of Public Policy on Party Autonomy in International Arbitration.

<sup>100</sup> This term, for the purposes of this study, encompasses the following concepts: parties' equality, equality of arms, mutuality of obligations.

before addressing this issue, let us consider how the principle of parties' equality is reflected within the frames of international commercial arbitration.

If party autonomy is the first principle to be applied in international commercial arbitration, equality of treatment is the second. This principle is endorsed not only by national laws, but also by international instruments, such as the New York Convention and the UNCITRAL Model Law.

According to the New York Convention, the recognition or enforcement of the award may be refused *"if the party against whom the award is invoked was unable to present his case."*<sup>101</sup> UNCITRAL Model Law expressly address the principle of equal treatment in a separate article:

*"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."*<sup>102</sup>

UNCITRAL Model Law goes on in describing the principle. Article 24 stipulates that party shall be given notice of any hearing and be sent any materials supplied to the arbitral tribunal by the other party, while Article 31 provides that an award shall be in writing, stating its date and place and that it be delivered to each party. The national arbitration laws correspondingly recognize the principle of equal treatment.

### *Analysis*

An application of the principle of equal treatment could be demonstrated in the following example. A provision of an arbitration agreement that only one party should be heard by the arbitral tribunal might be considered void as violating the principle of equal treatment, even if both parties had agreed to it.<sup>103</sup> This example is evident. It is unacceptable to deprive the party of its right to equal access to justice. Quite a different situation with respect to unilateral arbitration clauses, requiring thorough weighing of the two principles: the party autonomy and equal treatment.

The UNCITRAL Secretariat recognized the dilemma in its report prepared for the Model Law:

*"... it will be one of the more delicate and complex problem of the preparation of a Model Law to strike a balance between the interests of the parties to freely determine the procedure to be followed and interests of the legal system expressed to give recognition and effect thereto".*

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<sup>101</sup> The New York Convention, Article V (1)(b).

<sup>102</sup> UNCITRAL Model Law, Article 18.

<sup>103</sup> N. Blackaby, C. Partasides, A. Redfern, M. Hunter – Redfern and Hunter on International Arbitration, 2009.

This dilemma was clearly demonstrated in the Second Chapter. The case law in both continental and common law jurisdictions has considered unilateral arbitration clauses as putting parties in unequal positions, thus giving rise to application of the principle of equal treatment and further invalidation of the clause.

For instance, the position taken in *Sony Ericsson* case implies that unilateral arbitration clause directly contradicts the principle of parties' equality as a general principle of fair trial. The right to a fair trial is provided for by the Article 6 of the European Convention on Human Rights (hereinafter – European Convention). The Russian Court subsequently relied on the case law of the ECHR, where the principle of equal treatment is referred to as the principle of equality of arms.

However, it must be noted that the proper meaning of the principle implies its application to a procedure that has already begun.<sup>104</sup> The unilateral choice option is exercisable before the commencement of the arbitral proceedings and has no effect with respect to the rights of the parties during the course of proceedings.<sup>105</sup> This position was supported by the English High Court in *Mauritius Commercial Bank Ltd vs. Hestia Holdings Ltd*:

*“The public policy to which that was said to be inimical was ‘equal access to justice’ as reflected in Article 6 of the ECHR [The European Convention]. But Article 6 is directed to access to justice within the forum chosen by the parties, not the choice of forum.”*

In *Sony Ericsson*, however, The Russian Supreme Commercial Court relied on the case law, where violations of the principle of equal treatment were associated not with the existence of unilateral arbitration clauses, but with violations of the procedural rights of one of the parties during the course of the proceedings, e.g. inability of a person to attend an oral hearing due to being imprisoned; denial of free legal aid to defendants that had been made available in the country in question under other categories of cases; initiation of civil proceedings by the prosecutor general against an individual in the interests of a legal entity.

In addition to this, the European Commission on Human Rights in *Nordstrom-Janzon vs. The Netherlands* case pointed out the following:

*“The Commission observes that the grounds on which arbitral awards may be challenged before national courts differ among the Contracting States and considers that it cannot be required under the Convention that national courts must ensure that arbitral proceedings have been in conformity with Article 6 of the Convention. In some respects - in particular as regards publicity*

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<sup>104</sup> *Dambo Beheer B.V. vs. The Netherlands*, European Court of Human Rights, 1993.

<sup>105</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

- it is clear that arbitral proceedings are often not even intended to be in conformity with Article 6, and the arbitration agreement entails a renunciation of the full application of that Article. The Commission therefore considers that an arbitral award does not necessarily have to be quashed because the parties have not enjoyed all the guarantees of Article 6..."<sup>106</sup>

This raises doubts about the reasoning underlying the *Sony Ericsson* case, and concern as to what extent does the principle of equal treatment is applicable to unilateral arbitration clauses.

#### *Other arguments*

The principle of parties' equality spawned a considerable number of legal doctrines, which were also used by national courts for the purpose of invalidating the unilateral arbitration clauses.

In some cases, the courts have adopted the unconscionability (or the lack of mutuality) doctrine as a ground for invalidation the clause. An unconscionable agreement is the one, which is extremely one-sided in favor of one party. The agreement is so unjust, that no person would ever enter into it. Therefore, unconscionable clauses usually result from the exploitation of the 'weaker' parties (employees or consumers). This doctrine, however, seems to have already faded, since the U.S. courts, which first establish this doctrine, changed their line of argument. Unilateral provisions are becoming a common feature of a business contract. A party may oblige itself to provide a benefit for another party as long as this is a subject of his own declaration.<sup>107</sup> Hence, the mutuality of obligations should not be required for a clause to be enforceable and unequal position of the parties is no longer the ground for invalidation the clause.<sup>108</sup> Another argument used by the courts involves the application of the 'potestative condition' doctrine. As described in the *Rothschild* case, potestative condition is the one, fulfillment of which is entirely under control of one of the parties to the agreement. But how could a forum selection right be considered as a condition? The unilateral clause merely contains an option, which is exercised by one of the parties. Hence, it is also questionable to what extent this legal doctrine is applicable to unilateral clauses.

Summarizing the Third Chapter, it can be concluded that:

- 1) Party autonomy is the foundational principle of international commercial arbitration which gives the right to existence of unilateral arbitration clauses;

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<sup>106</sup> 18 European Human Rights Report 213, Para. 33 available at <http://hudoc.echr.coe.int/eng?i=001-3400>

<sup>107</sup> Deyan Draguiev – Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability.

<sup>108</sup> Ibid.

- 2) The principle, however, is not a synonym to “absolute authority” and has its limits. One of such limitations is the principle of parties’ equality. Application of this principle to unilateral arbitration clauses in the light of presented case law is questionable.
- 3) Which principle should prevail within the context of international commercial arbitration – is still an open question. The author of this study identified a trend, according to which arbitral tribunals generally favor the principle of party autonomy since the entire arbitration is a paramount expression of this principle, whereas national courts evaluate arbitration agreement through the prism of the principle parties’ equality first, so the outcome could be different, as demonstrated in the case law analysis;
- 4) This, however, does not change the whole picture, since an award made by the arbitral tribunal on the basis of the unilateral arbitration clause and full reliance on the principle of party autonomy might be further refused the enforcement by the national court relying on the principle of parties’ equality.

## CONCLUSION

Unilateral arbitration clause has become an attractive tool for business parties, offering a significant degree of flexibility. It enables the party with an option to use advantages of both avenues, arbitration and litigation, and decide which one suits best in a particular dispute scenario. Unilateral arbitration clauses are a common feature in financial agreements: given the heightened risk of a lender, it brings some additional security and enables the beneficiary of an option to peruse the assets of the debtor more efficiently and conveniently. Hence, the business rationale of the use of unilateral arbitration clause is sufficiently substantiated.

Based on that, one could ask why challenge a unilateral clause being mutually agreed upon by the parties? The present study has demonstrated that unilateral arbitration clause is a paramount expression of the principle of party autonomy, which is in turn regarded as the fundamental principal of international commercial arbitration.

However, things are not that simple, and it would be naive to suppose that the principle of party autonomy gives the parties absolute authority to decide on any matter. More specifically, there are certain so-called limitations to the principle of party autonomy, one of which is the principle of parties' equality. This brings us to the analysis of the balance of powers between the parties, and one may attempt to argue that an asymmetrical distribution of rights is manifestly unjust as it provides unreasonable advantage to one of the parties to make a forum selection, thus violating the principle of parties' equality.

Indeed, a unilateral arbitration clause serves the commercial and practical interests of only one of the parties, and thus is *prima facie* imbalanced. Such imbalance, however, follows from the commercial nature of the relationships, when often one of the parties is stronger from the economic standpoint and holds more bargaining power which enables to negotiate more favorable terms of the agreement. Does this necessarily mean that such an agreement is hopelessly unfair and violates the principle of parties' equality?

It is a common practice when a commercial agreement provides for likewise imbalanced clauses. For instance, a drag-along right, frequently added in shareholders' agreements, is granted only to majority shareholders, enabling them to force the minority to sell their stake in a sale of a company. Just like in case of unilateral arbitration clause intended to protect the interests of the creditor in a loan agreement, the drag-along right designed to protect the interests of majority of shareholders, which also has its business rationale since some buyers are only looking for a complete ownership in a company.

Furthermore, a unilateral arbitration clause is a mutually negotiated term of the main agreement, and to be considered unfair, the party without a selection opportunity must be left with an unreasonably unfair option. In other words, considering the loan agreement, if a creditor is having a unilateral right of the forum selection, a debtor is not inevitably worse off, since it still has its venue to bring the claim for settlement. In that case, once a dispute has arisen and forum selection being made by one of the parties in accordance with the clause, the imbalance is “effectively cured”.

Regardless of these considerations, the present study has demonstrated that there is an established judicial practice in several jurisdictions invalidating unilateral arbitration clauses. The consequences from the invalidity of unilateral arbitration clauses might be severe:

1. If a unilateral arbitration clause is considered invalid **at an early stage** (e.g. the application stage or during the proceedings), the parties will be forced to refer to authority competent under the rules of international private law (which was sought to be prevented);
2. If a unilateral arbitration clause is considered invalid at a **later stage** (e.g. when an award subject to enforcement under the New York Convention has been rendered), that award could be refused enforcement by the national court, making the entire proceedings a waste of time and money;
3. There is a possibility of having **parallel proceedings**, when, for instance, one party initiates proceedings within arbitration or litigation, while the other refers to another forum relying on the assumption that the unilateral arbitration clause is void.

Therefore, a careful thought should be given as to inclusion and drafting of unilateral arbitration clauses. This requires a thorough consideration of the laws of several jurisdictions, including:

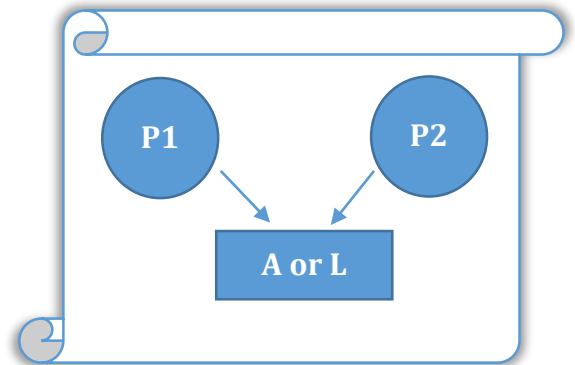
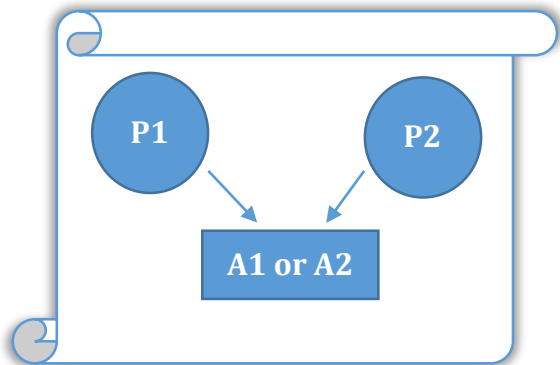
- ✓ the law governing the arbitration agreement;
- ✓ the law of the seat of the arbitration (in case the parties did not expressly choose the law governing the arbitration agreement);
- ✓ the law of any country in which enforcement might be sought (such as the law of the country where the assets of the counterparty are located).

In cases where one of the jurisdictions with the established practice of invalidating unilateral arbitration clauses is involved, the parties should consider whether theoretical flexibility outweighs the potential risk.

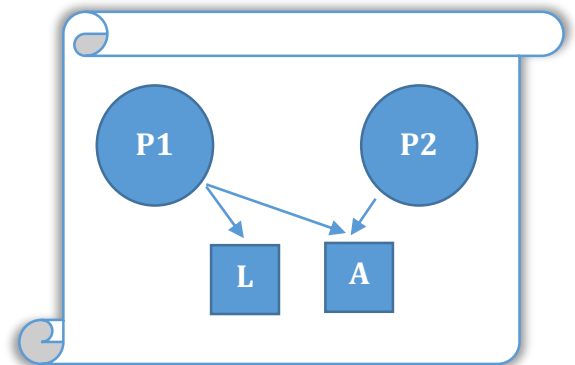
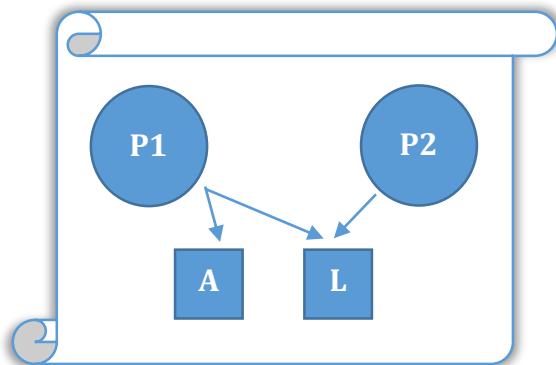


## APPENDIX 1

### *Alternative Arbitration Clauses*



### *Unilateral Arbitration Clauses*



**P** - Party

**A** - Arbitration

**L** - Litigation

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