Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion

Kluwer Arbitration Blog
May 7, 2019

Alexander Gridasov, Maria Dolotova (Herbert Smith Freehills LLP)

Please refer to this post as: Alexander Gridasov, Maria Dolotova, 'Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion', Kluwer Arbitration Blog, May 7 2019, http://arbitrationblog.kluwerarbitration.com/2019/05/07/unilateral-option-clauses-russian-supreme-court-puts-an-end-to-the-long-lasting-discussion/

Introduction

Unilateral option clauses (also known as "asymmetric" or "one-sided" clauses) are clauses which give both parties the right to refer disputes to a particular dispute resolution forum, but which simultaneously give one party an exclusive right to elect to refer a particular dispute to another forum. The classic example of a one-sided clause is a standard arbitration clause for both parties supplemented with an extra option for one of these parties to start the dispute with the state courts of the competent jurisdiction (the "prorogation" part of the clause).

Inclusion of such clauses into the agreement can be highly beneficial to the party enjoying the extra option. When a dispute arises, such party would be able to choose the forum which is most favourable in the circumstances.

As usual, there is more in this than meets the eye. The courts in some jurisdictions have shown a negative attitude to such clauses and even rendered them invalid in some cases.

Until the end of 2018, the position in Russia was not clear cut. It was evident that one-sided clauses would likely cause problems (although there were a few courts which took a different view). However, due to ambiguity in court practice, it was hard to foresee what "type" of problems one-sided clauses would cause in a particular case. As discussed below, the main risks were such clauses being rendered invalid (i) in full; (ii) only in respect of the prorogation part; or (iii) only to the extent that such clauses provided inequality in forum choice options (in the latter case the parties are put on an equal footing in terms of forum choice).

On 26 December 2018, the Presidium of the Russian Supreme Court put an end to this long-lasting discussion and issued a Digest of Court Practice Relating to Judicial Assistance and Control over Domestic and International Arbitration (the "**Digest**").

Below we will consider the attitude of the Russian courts to one-sided clauses in different periods of time and then the effect of the Digest.

Position of the Russian courts before 2012

Arguably, one-sided arbitration clauses were not an issue until 2012. The courts were guided by the decisions of the Federal Arbitrazh Court of the Moscow Circuit rendered in a series of disputes initiated by financial institutions under relevant facility agreements (*FC Eurocommerz ZAO* cases and the *Financial Leasing Company* case).

The agreements contained an arbitration clause and also provided for the right of the creditor to initiate proceedings in the courts of England or any other appropriate jurisdiction. In each particular case, the creditors initiated actions before the Arbitrazh Court of Moscow. The defendants requested that the proceedings be withdrawn by reference to the valid arbitration clauses. Although the courts of first instance in some of the cases upheld the defendants' approach and terminated the proceedings, the higher courts considered the claims on the merits and confirmed the validity of the unilateral option clauses in the agreements. Moreover, it was emphasised that a party bearing financial risks (a creditor) is lawfully vested with the right to choose the jurisdictional options contained in the agreement.

In 2012, this tolerant approach dramatically changed following the Ruling of the Presidium of the Supreme Arbitrazh Court of the Russian Federation in the widely known *Sony Ericsson* case.

Sony Ericsson case

The case concerned an action initiated by a Russian entity, Russkaya Telefonnaya Kompaniya (RTK), against a Russian subsidiary of Sony Ericsson over the quality of mobile phones supplied to RTK. The dispute resolution clause provided for all disputes to be resolved by ICC arbitration in London with an option vested in Sony Ericsson to apply to a court of competent jurisdiction.

In violation of the dispute resolution clause, RTK filed a claim with the Arbitrazh Court of Moscow which dismissed the claim without hearing. The court referred to the arbitration clause in the contract concluding that it had no jurisdiction to hear the case. The conclusion of the court of the first instance was upheld by the higher instance courts.

However the Presidium of the Supreme Arbitrazh Court of the Russian Federation set the rulings of the lower courts aside and remitted the case to the court of first instance.

It held that a one-sided option clause violated the principle of procedural equality of the parties. It further clarified that a unilateral option clause vesting the right to refer a dispute to a state court with one party to the agreement and depriving another party of this right is invalid. This meant the depriving party should have the right to apply to a competent court enjoying equal jurisdictional rights with its counterparty.

However the wording and consequently the effect of the ruling in the *Sony Ericsson* case was not entirely clear and resulted in ambiguity and inconsistent decisions as discussed below.

Age of ambiguity

Neither courts nor scholars could come to a unanimous opinion as to the consequences of the conclusions made by the Supreme Arbitrazh Court in the *Sony Ericsson* case.

According to the prevailing view a clause under which only one party has a right to refer a dispute to the state court and the second party is deprived of this right shall become bilateral or "symmetric" so that both parties (when acting as a claimant) have similar rights to choose between arbitration and state courts.

For example, in the 2015 case of *Piramida LLC v BOT LLC*, the court considered a one-sided option clause issue while enforcing an arbitral award. It agreed with the *Sony Ericsson* case's motif that a dispute resolution option clause should not vest the right to refer a dispute to a state court with only one of the parties. The court further stated that the impaired party should have an equal right to choose a competent court or tribunal between those determined under the unilateral provision in the contract.

An alternative approach found in the case law provides for invalidation of the "prorogation" part of the clause. Primarily this position is caused by the divergent approach to unilateral option clauses in different legal jurisdictions. For example, in the UK where one-sided clauses are deemed to be valid and enforceable, a claimant with a right to go to a state court will turn out to be in a better position in comparison with its counterparty that can only refer a dispute to arbitration. Meanwhile in Russia, the same dispute resolution agreement will be construed as violating the equality of the parties' rights. Such violation can be restored by granting parties the right to file a claim with a competent Russian state court in accordance with general jurisdictional rules resulting from the invalidation of the "prorogation" part of the dispute resolution provisions of the contract.

Finally, our analysis has revealed a few cases where the Russian court concluded that a unilateral option clause should be rendered invalid in full: both its arbitration and "prorogation" parts. In the 2016 case *Emerging Markets Structured Products B.V. v Zhilindustriya LLC and others,* the court considered a claim filed by a foreign creditor against Zhilindustriya LLC and other guarantors under a guarantee governed by English law. The claim was filed with the Arbitrazh Court of Moscow at the place of residence of one of the respondents. The claim was granted in full albeit the respondents tried to argue that it was to be dismissed without consideration on the merits due to the arbitration clause. The courts declared the dispute resolution clause (both the arbitration and "prorogation" parts) invalid referring to the *Sony Ericsson* case. They concluded that a one-sided option clause violates the principle of balance of rights vested in the parties which is deemed to be a directly applicable rule according to the courts considering this case. Having said this, the courts arrived at the decision that general jurisdictional rules provided by the Arbitrazh Procedure Code of the Russian Federation should apply to determine jurisdiction instead of the unilateral option clause agreed by the parties.

In another 2014 case, *Novokuznetsky cold-store combine OJSC v UMO LLC,* the court dismissed the application of Novokuznetsky cold-store combine OJSC to enforce an arbitral award rendered under a unilateral option clause.[fn]For the sake of clarity the court also found that the counterparty – UMO LLC was not properly notified about the arbitration hearing.[/fn] Referring to the *Sony Ericsson* case, the court concluded that the unilateral option clause was invalid as violating the equality of the parties' rights and the general principle of equality of the parties. The court failed to further substantiate the particular legal grounds under which it found the award unenforceable. However one can presume that a reference to violation of public policy as a ground to refuse enforcement was likely borne in mind by the court.

These two cases show there was a clear risk that the Russian courts might refuse to enforce an arbitral award rendered under a unilateral option clause.

Following the above practice a unilateral option clause also leaves open the possibility of a respondent in arbitration proceedings commenced under such clause, commencing proceedings

before the Russian courts as a claimant (provided the courts admit the existence of personal or territorial jurisdiction). Apart from additional expenses, such proceedings may jeopardize the possibility of enforcing the arbitration award in Russia at a later stage (if it is inconsistent with the Russian judgment).

End of discussions

At the end of 2018 the Supreme Court put an end to the above contradictory practice. In its Digest the court determined that a unilateral option clause violated the principles of competitiveness and equality of the parties, breached the equality of the parties' rights and was therefore invalid to the extent that such clause provided for inequality in forum choice options. As a consequence each party to the contract is deemed as having equal rights to choose a forum agreed in the option dispute resolution clause.

In spite of the fact that the Digest does not formally have a precedential value, it provides valuable guidance to the approach which the Russian courts will likely pursue in relation to unilateral option clauses.

Having said the above and taking into consideration the clarifications provided in the Digest, the application of unilateral option clauses in contracts with Russian counterparties, particularly when enforcement is expected to be sought in Russia, does not likely entail nullity of the dispute resolution option clause in full or refusal to enforce an arbitral award rendered under such clause, albeit it will not prevent the Russian party from filing a parallel claim with the Russian courts.

In this regard the parties should carefully assess whether the risks associated with one-sided option clauses in contracts with Russian counterparties override the potential benefits of flexibility which the claimant may have.