Kluwer Arbitration Blog

Unilateral Option Clauses to Arbitration: The Debate Continues

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Introduction[1)]

In this year's Willem C. Vis International Commercial Arbitration Moot (the "**2020 Vis Moot**"), arbitration practitioners and academics will look in depth at the validity of unilateral option clauses ("**UOCs**"). UOCs allow one party some element of choice whilst the other party is bound to resolve a dispute in a specific forum. UOCs can be important in international transactions, particularly in finance transactions where financial institutions may wish to retain flexibility in forum selection.

Whether UOCs should be recognised as valid and enforceable is not a settled question. National courts in different jurisdictions have in varying degrees upheld or refused to enforce UOCs. The courts in common law jurisdictions have generally upheld the validity of UOCs. In unfriendly jurisdictions, UOCs may be invalidated in their entirety or in part. Parties can mitigate this risk by designating a UOC friendly governing law and seat of arbitration. However any resulting arbitral award may not be enforceable in jurisdictions that consider UOCs to be against public policy. The risk in using UOCs therefore remains latent.

The conflict between two principles of international arbitration, party autonomy and equality of treatment, lies at the heart of this debate. This blog sets out (a) an overview of the characteristics of UOCs in the context of the principles of party autonomy and equality of treatment; (b) the positions in England, Hong Kong and Singapore; and (c) an overview of potential equality concerns.

A. Unilateral Option Clauses, Party Autonomy and Equality Of Treatment

A UOC preserves flexibility for just one party to elect a forum that it deems appropriate for resolution of a particular dispute. For example, in international finance transactions, a financial institution might be entitled to elect for: (a) national courts in jurisdictions with a default or summary judgment mechanism for a straightforward debt claim; or (b) arbitration seated in New York Convention

jurisdictions to facilitate recovery of monies and assets in other New York Convention jurisdictions. In essence, a UOC mitigates the risks inherent in international commercial transactions for one party by allowing that party to make an informed election of a dispute resolution forum after a dispute arises.

From the party autonomy perspective, a UOC is a part of the parties' bargain, a reflection of their respective bargaining power and, especially for sophisticated parties, the resulting commercial compromise that they have contracted into willingly.

From the equality of treatment perspective, by providing just one party with choices around dispute resolution forum, a UOC is inherently imbalanced. However there are always imbalanced clauses in a commercial contract. Obviously, the principle of equality of treatment cannot have the effect of rendering all such clauses invalid. Public policy or other considerations in some jurisdictions may dictate that certain types of 'one-sided' provisions around access to dispute resolution procedures are unfair. Where is the line to be drawn?

B. Positions in England, Hong Kong and Singapore

Under English law, UOCs are generally valid and enforceable. In *Mauritius Commercial Bank v Hestia Holdings Limited and another [2013] EWHC 1328 (Comm)*, Popplewell J considered the argument that UOCs infringe the principle of equal access to justice and held:

> 43… If… the true intention of the parties expressed in the [UOC] is that MCB should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect. **The public policy to which that was said to be inimical was "equal access to justice" as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum.** No forum was identified in which the Defendants' access to justice would be unequal to that of MCB merely because MCB had the option of choosing the forum. (**Emphasis** added).

The position is the same under Hong Kong and Singaporean law; UOCs are generally valid and enforceable.[2)]

Both Hong Kong and Singapore have adopted the UNCITRAL Model Law on International Commercial Arbitration ("ML") which sets out in Article 18 the principle of equality of treatment: "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*"[3)] Article 18 of the ML is contained in 'Chapter V. Conduct of Arbitral Proceedings' and, therefore, can be said to apply only to treatment and conduct during arbitral proceedings. This seems to be the understanding of Hong Kong and Singaporean courts as their judgments on UOCs do not generally turn to the question of equality of treatment or Article 18 ML. In

Wilson Taylor, Sundaresh Menon CJ recognised that there is a 'lack of mutuality' with UOCs but held in [13] that: *"[o]n the weight of modern Commonwealth authority… neither of these features[, including the 'lack of mutuality',] prevented the court from finding that there was a valid arbitration agreement between the present parties."*

C. Potential Equality Concerns

Common law courts have generally upheld UOCs by proceeding on the basis that the scope of the relevant principle of equality only extends to treatment or conduct within the forum or during the proceedings. However, the use of UOCs can nonetheless remain problematic in jurisdictions where the relevant principle of equality of treatment is broad in scope or multifaceted.

Equality Concerns in Russia

In Russia, the Supreme Commercial Court in *CJSC Russian Telephone Company v Sony Ericsson Mobile Telecommunications Rus LLC* held that a UOC to arbitration violated the principle that parties to a dispute should have equal rights to present their cases. The Russian Supreme Commercial Court appears to have relied upon a principle of equal access to justice similar to that set out in Article 6 of the ECHR. This would be in stark contrast to the English *Mauritius Commercial Bank* case mentioned above. Unfortunately, the Russian Supreme Commercial Court did not provide any reasoning for its holding.

The *Sony Ericsson* decision lacks clarity and further Russian decisions on UOCs have been inconsistent. In 2018, in its Digest, the Russian Supreme Commercial Court held that UOCs violated the principles of competitiveness and equality of the parties; Russian courts will therefore deem UOCs to have given each party equal right to elect a forum. Although the Digest does not have any official precedential value, it provides valuable guidance to the approach Russian courts would take with respect to UOCs.

Equality Concerns in France

In France, the French Supreme Court in *Mme X v Banque Privée Edmond de Rothschild* held that a UOC is 'potestative' and therefore invalid.[4)] A 'potestative' condition is one where satisfaction of the condition is completely within the power of just one party. However it is difficult to see how UOCs impose a condition. UOCs only require disputes to be resolved in a forum selected by the entitled party. There's no condition imposed upon the other party's performance of the contract.

The French Supreme Court further clarified in 2015 that UOCs that can objectively identify competent forums are valid and enforceable under French law. The UOC in that case allowed the entitled party to commence proceedings in (a) France, where the other party is registered; or (b) any other jurisdictions within which the entitled party

suffered a loss.

Internationally, the validity and enforceability of UOCs remain uncertain. In addition to the above two examples, courts in China, Japan, India and some states in the US have invalidated UOCs for a variety of concerns: equality, mutuality, unconscionability and public policy.

Parties must keep that uncertainty in mind. Parties entering into a UOC should ensure that the UOC: (a) is governed by the law of a UOC-friendly jurisdiction; and (b) provides for UOC friendly jurisdictions and seats of arbitration. Further, parties should also consider where potential arbitration awards may be enforced. In some jurisdictions, relevant principles of equality may rise to the level of public policy under Article V(2)(b) of the New York Convention. This may bar enforcement of the award in that jurisdiction.

Conclusion

Despite their widespread adoption in international commercial transactions, UOCs' validity and enforceability remain uncertain internationally. In some jurisdictions, courts appear to have held UOCs to be invalid and unenforceable as a matter of law. This seems at odds with international commercial reality, especially with respect to complex and negotiated transactions entered into by sophisticated parties.

It is also worth reviewing the practice and jurisprudence in investment arbitration. Consent to arbitration as contained in investment treaties is the bedrock of investment arbitration. The operation of such arbitration agreements is conceptually similar to that of UOCs. Consent to arbitration in an investment treaty is a 'standing offer to arbitrate'. The foreign investor accepts the state's offer to arbitrate by filing for arbitration. In other words, the foreign investor can elect to either pursue its claims in the national courts of the state (or other available forums) or through investment arbitration. Some such consents to arbitrate provide that a foreign investor's election of one forum is a waiver of the right to proceed in the other. UOCs are different in form but have the same substantive effect. If UOCs are invalid and unenforceable as a matter of law because they are imbalanced, the same considerations should apply to consents to arbitration in investment treaties. Of course, that would be an absurd result.

With the spotlight from the 2020 Vis Moot, this debate will continue. New insights may surface following the competition. In any case, as with all dispute resolution and arbitration clauses, a problem users of UOCs should be alive to is poor drafting. In addition to requirements specific to particular jurisdictions, UOCs should set out in clear terms: (a) when and how the entitled party can elect; and (b) the consequences to any parallel proceedings once an election has been made. It will remain prudent for parties to keep the above issues in mind and seek specialist legal advice when entering into and electing under UOCs.

For further information on UOCs in India and the UAE, see here and here, respectively

**BCLP have long supported and participated in the Vis Moot. BCLP have previously sponsored the Vis East Moot in Hong Kong. Carol Mulcahy from the London office, Glenn Haley from the Hong Kong office and Ryan Reetz from the Miami office will take part in the 2020 Vis Moot as arbitrators. Glenn was involved in the founding of the Vis East Moot as Chairman of the East Asia Branch of CIArb and is recognised by the Vis East Moot as a 'Star Arbitrator'.*

References

↑1 Kevin is a member of BCLP's International Arbitration and Construction Disputes team in London. He is due to be admitted as a Hong Kong solicitor and currently has no right to practice as a solicitor in England & Wales or Hong Kong.

↑2 *See* decision by the Hong Kong Court of Appeal ([2001] 3 HKC 580) and decision by the Singapore Court of Appeal ([2017] SGCA 32).

↑3 Please note that in Hong Kong Article 18 ML is substituted with Section 46(2) & 46(3) of Part 7 'Conduct of Arbitral Proceedings' of the Arbitration Ordinance CAP. 609. Section 46(2) reads: "*The parties must be treated with equality.*"

↑4 Please note that the French Supreme Court in this decision and further decisions on UOCs also applied the Brussel I Regulation and the Lugano Convention. Arbitration agreements and therefore UOCs to arbitration are outside the scope of the Lugano Convention, Brussel I Regulation and its successor, Recast Brussels Regulation.

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