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Are Unilateral Option Clauses Valid?

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A unilateral option clause ("UOC") can take many forms. It may grant its beneficiary the exclusive right to choose between litigation and arbitration when a dispute arises, or to choose to litigate before a specific jurisdiction, while constraining the non-beneficiary to a specific forum or a specific mode of dispute settlement. Consequently, UOCs are undoubtedly exclusively advantageous to one of the parties and they are frequently used in specific industries, such as banking and construction.

Due to a lack of statutory guidance as well as judicial approaches that fall on opposite ends of the spectrum, the validity of UOCs remains susceptible to a great deal of uncertainty and debate. Courts that uphold their validity rely on party autonomy. Courts that reject such validity rely on a wide array of arguments. This essay briefly analyzes the arguments used by courts rejecting the validity of UOCs and concludes that none constitutes adequate basis for invalidation.

1. ***The potestative nature of an option clause***

The first argument for the invalidity of UOCs, and possibly the least convincing and most criticized, is that a UOC is *potestative*. The concept of "*caractère potestatif*" is used in French law to describe a situation where performance of a contract is subject to a condition precedent the fulfillment of which falls within the discretion of one of the contracting parties.

In 2012, the French *Cour de Cassation* in *Rothschild* held that a UOC is a *potestative* condition and invalidated it. The UOC in the case granted exclusive jurisdiction over any disputes to the courts of Luxembourg, while maintaining the bank's right to bring an action before the courts of the client's domicile or any other court of competent jurisdiction. The obligation of each party to submit to the jurisdiction of the contractually chosen court was not subject to any condition. Further, "the ability of one party to bring actions before any court which would otherwise have lawful jurisdiction over the other party does not impose any obligation on such other party." [1)] Additionally, the UOC cannot be considered to impose a condition upon which the performance of the contract is dependent.

In relying on the concept of *potestative*, the *Cour de Cassation* also used domestic legal principles to interpret the applicable EU provision where it had no basis to do so. In fact, this goes against the purpose of the Brussels Regulation, which is to provide a uniform and predictable legal framework.

2. ***Lack of mutuality (consideration)***

Consideration requires a 'bargained-for exchange.' "It is a common law doctrine of 'mutuality of obligation' that 'either both must be bound, or neither is bound.'"[2] While both parties must manifest assent for a contract to be formed, that manifestation need not be symmetric in time, place, or form. Contract provisions need not give the parties the same positions, and it is rather illogical to require this. It is enough that value be given on both sides. If the law required the terms of contracts to be symmetrical such that the parties merely traded the same thing for the other, no exchanges would take place.

The only context in which this argument would work is if the UOC is severed from the rest of the agreement when assessing consideration. This proposition is as absurd as requiring specific consideration for any other clause in the agreement.

The circumstances that one of the provisions in an integrated agreement grants certain rights to only one of the parties does not in other instances render that provision ineffective for lack of consideration or mutuality, as long as appropriate consideration can be found in other provisions of the agreement or elsewhere.There appears to be no good reason for deviating from this rule merely because an arbitration, rather than some other, clause is involved.[3]

However, courts rejecting the validity of unilateral arbitration agreements based on lack of mutuality seemingly adopt this specific approach. The clause is severed from the agreement and assessed separately. Inevitably, it is found lacking in consideration and, consequently, invalidated. "Severability" was developed in a different context for a different purpose and it is inapplicable in this respect. "It is a rule developed to effectuate the salvation, not the condemnation, of arbitration clauses." [4]

Ultimately,"it is sufficient to note that under general rules of contract law, consideration should be present, but need not be adequate … the unequal position[s] of the parties, including presumably the imbalanced consideration, should not be grounds for invalidity."[5]

3. ***Violation of EU law***

In addition to its reliance on the widely criticized *potestative*doctrine, the court in *Rothschild* held that UOCs were in violation of article 23 of the Brussels I Regulation concerning "prorogation of jurisdiction" (the equivalent of article 25 in the Recast Brussels Regulation). This interpretation was rejected by many and, although the issue has never been considered by the European Court of Justice ("ECJ"), some commentators are of the view that, had the matter been referred to the ECJ, it may well have concluded that the *Cour de Cassation* misinterpreted Article 23. The *Cour de Cassation* in *Rothschild*held that the UOC was contrary to "the finality of the extension of jurisdiction provided for in Article 23" and its objectives.[6]

The UOC exclusively enabled the bank to bring an action before the courts of the domicile of Mrs. X, the courts of Luxembourg or any other court of competent jurisdiction. Despite potentially being numerous, these options are both limited and foreseeable. Further, article 23 explicitly states that the parties may agree on conferring exclusive jurisdiction unto courts other than those of competent jurisdiction. In that sense, Article 23 is the "epitome of party autonomy, as declared in recital 14 to the Brussels I Regulation … [its] primary purpose … is to establish an avenue in favor of choosing a competent court other than the normally competent court under the rules of the

Regulation."[7] Therefore, the position of the *Cour de Cassation* that the clause in *Rothschild*was not compatible with the object and purpose of the Brussels I Regulation is based on a misinterpretation of the Brussels I Regulation.

4. ***Equality of treatment and unconscionability***

Prima facie a UOC is imbalanced, as it serves the interests of only one party. "This designation potentially follows the natural lack of balance between the parties, especially regarding their bargaining power. In effect, one of the parties to the clause has to 'adhere' to the unfavorable terms of the clause."[8] This gives way to two grounds for invalidity: imbalance between the parties and unconscionability.

With respect to the first ground for invalidity, it has been submitted that UOCs violate article 6 of the European Convention on Human Rights pertaining to the right to a fair trial. The Supreme Arbitrazh Court of Russia in the *Sony Ericsson* case has also implied that the "right to equality of arms" is violated by a UOC. In essence, the argument here, whether articulated in the contours of article 6 of the European Convention on human Rights or otherwise, pertains to the right to a fair trial. More specifically, the right to have equal opportunity to present one's case before a court. This argument is based on a misinterpretation or a misunderstanding of the concept in question. The principle of "a fair trial" means that the parties have equal procedural rights (due process) once the proceedings have begun. In other words, equal footing before a specific forum not with regards to the choice of forum.

The second ground for invalidity is that of unconscionability. It may be argued that it is unconscionable "for a party to exploit its economically powerful position or the ignorance of the party who agrees to a unilateral arbitration clause without understanding the unfair advantage it gives to its contract partner by insisting upon acceptance of a unilateral arbitration clause." [9] This argument is not convincing for a number of reasons. First, an agreement may include a number of imbalanced clauses and lack of balance is rarely a *per se* ground for invalidity. Secondly, submitting to this argument would lead to the absurd result of invalidating a great number of agreements simply because they contain a clause that is favorable to one of the parties. Finally, a defense of unconscionability requires both procedural and substantive unconscionability. Procedural unconscionability is manifested by unfair surprise. It is difficult to argue that such a condition is satisfied in the context of UOCs where both parties negotiated the agreement and accepted the UOC.

5. ***Conclusion***

Despite the variety of arguments, none constitutes acceptable grounds to invalidate UOCs. On the other hand, the argument for upholding their validity is well established. Neither arbitral tribunals nor courts deciding on the validity of a UOC should curb or contain party autonomy absent adequate grounds to do so. Without explicit statutory guidance, however, it seems that the debate will continue on.

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References

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?3 Hans Smit, The Unilateral Arbitration Clause: A Comparative Analysis, 20 American Rev. Int. A. 391, 401 (2009).

?4 Id.

?5 Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 J. Int'l Arb. 19, 41 (2014).

?6 *Supra* note 1.

?7 *Supra* note 5, at 37.

?8 *Supra* note 5, at 33.

?9 Smit, *supra* note 3, at 404.

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