

# Kluwer Arbitration Blog

## Unilateral Option Clauses: A Threat to Mutual Consent in Arbitration? An Egyptian Perspective

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Unilateral option clauses (“UOCs”), also known as asymmetric or split arbitration clauses, grant one party the exclusive right to choose between litigation and arbitration while binding the other party to a single dispute resolution mechanism. These clauses are particularly common in financial and commercial contracts, where they are often employed by the stronger party to secure a strategic advantage.

While English law generally upholds UOCs as an exercise of party autonomy under the freedom of contract, concerns about fairness and imbalance in bargaining power have led courts in several jurisdictions, including France (*Court of Cassation, Case No. 11-26.022* (2012)), Russia (*Supreme Court, Case No. VAS-1831/12* (2012)), and most recently Dubai (*Court of Cassation, Case No. 735/2024* (2024)), to rule against their enforceability.

This article examines the position of Egyptian courts on UOCs, particularly in light of judicial interpretations of arbitration as an exceptional dispute resolution mechanism and the broader principle of mutual consent in arbitration agreements.

### Summary of the Recent Dubai Court Decision on Unilateral Option Clauses

Appeal No. 735 of 2024 (discussed [here](#)) concerned a subcontractor who sued a main contractor before the Dubai Court of First Instance over unpaid sums under two subcontracts containing identical UOCs. Each contract allowed the contractor to decide whether disputes would go to arbitration or to the local UAE courts: “In the event of a dispute arising from the interpretation or execution of any of the provisions of this agreement, such dispute shall be settled amicably by mutual agreement between the parties. In absence thereof, the dispute shall be referred either to (a) arbitration in the Dubai Chamber of Commerce or (b) the local courts of the UAE. The Contractor shall choose the method to be used.”

After being sued before the local courts, the contractor objected to the jurisdiction of the local courts based on the UOC. Both the Dubai Court of First Instance and the Dubai Court of Appeal rejected this argument. On appeal, the Dubai Court of Cassation ruled that a binding arbitration agreement requires the unequivocal consent of both parties. Because the UOC merely offered an elective choice without definitive commitment, and because it prevented the subcontractor from referring the dispute until the contractor chose a forum, the Dubai Court of Cassation held that the UOC did not create a binding arbitration agreement.

## The Enforceability of UOCs in Egypt

### Arbitration is an Exceptional Mechanism in Egypt

Under Egyptian law, like in the UAE, arbitration is considered an exceptional mechanism that requires unequivocal mutual consent from both parties. Arbitration serves as an alternative to court proceedings, meaning that both parties must expressly and freely opt for arbitration in their contract.

The Egyptian Supreme Constitutional Court laid down this principle in *Case No. 65 JY 18 (2001)*: “Arbitration, therefore, functions as a technical mechanism with a judicial nature, intended to resolve disputes based on a legal relationship between the parties, with its foundation being a special agreement from which arbitrators derive their powers—not from the state. Consequently, arbitration is considered an alternative system to litigation that cannot coexist with the jurisdiction of the courts. By agreeing to arbitration, parties exclude national courts from adjudicating the matters covered by the arbitration agreement, constituting an exception to their general jurisdiction.”

Applying this reasoning to UOCs, it follows that if one party lacks a genuine and equal choice, the requisite mutual consent is compromised. The discretionary power granted to one party alone contradicts the core rationale of arbitration in Egypt, which is to provide an unconditional and unequivocal mutually agreed dispute resolution process. Egypt, thus, like France and the UAE, would be in the camp that is skeptical of UOCs, seeing a risk that asymmetric dispute clauses undermine consent, which is the foundation of arbitration.

### Optional Arbitration Agreements: A Relevant Analogy

Egyptian courts have previously examined Optional Arbitration Agreements (“OAAs”), which, while distinct from UOCs, share certain similarities that allow for legal analogies. In an OAA, both litigation and arbitration are included as potential dispute resolution mechanisms, granting all parties the right to choose between the two. Hence, OAAs provide for an elective right, similar to UOCs, but equally for both parties.

In *Challenge No. 6791, JY 86 (2017)*, the Egyptian Court of Cassation scrutinised an OAA and reaffirmed that arbitration is an exceptional mechanism that must be interpreted narrowly. The court emphasised that unequivocal and unconditional consent is required to exclude the jurisdiction of Egyptian courts. Since an OAA lacks such unequivocal and unconditional consent, the Egyptian Court of Cassation declared the arbitration clause invalid and upheld the jurisdiction of domestic courts.

Applying the same reasoning, UOCs similarly lack unequivocal and unconditional consent, as they grant only one party the right to elect between arbitration and litigation. This means that the party benefiting from the clause has not provided absolute consent to arbitration.

### Egyptian Court of Cassation on Unilateral Option Clauses

In *Challenge No. 15530, JY 85 (2017)*, the Egyptian Court of Cassation considered a UOC in a dispute between a supplier (Appellant) and a distributor (Respondent) over USD 30,910,000.65 in outstanding payments under a 2005 supply agreement. The dispute resolution clause provided for arbitration in the first paragraph before introducing the following UOC in the next: “2-The

Supplier shall be entitled to refer any disputes, as well as to recover debts, before the courts of the agreed jurisdiction or any other local courts. Should the Supplier exercise this right, the Distributor agrees not to challenge the jurisdiction of the court or to bring any counterclaim or set-off before any other forum.”

Initially, the Cairo Economic Court declined jurisdiction and dismissed the case, given the presence of an arbitration clause. The Appellant challenged this decision, arguing that the court did not assess the dispute resolution clause in its entirety. It was argued that the arbitration clause was part of a UOC that granted the Appellant the right to litigate in Egyptian courts.

The Egyptian Court of Cassation ruled in favour of the Appellant, reaffirming the principle of party autonomy. It found that the wording of paragraph 2 is clear and it granted the Appellant the right to refer disputes either to arbitration or to local courts. Moreover, the contract explicitly required the Respondent to accept the jurisdiction of local courts without objection if the Appellant exercised its right to litigate.

The Egyptian Court of Cassation found that the lower court had erred by focusing solely on the arbitration provision, ignoring the UOC, which granted the Appellant the unilateral right to litigate. The Egyptian Court of Cassation held that:

1. Dispute resolution clauses must be read and interpreted as a whole. The lower court inaccurately placed weight on the arbitration provision without considering the UOC in paragraph 2 and its implications.
2. The clause explicitly provided a unilateral advantage to the Appellant, meaning that arbitration was not mandatory.

As a result, the Egyptian Court of Cassation overturned the lower court’s ruling and remitted the case back to the Cairo Economic Court for substantive adjudication.

However, the court did not directly address the validity of the arbitration agreement within the UOC. Accordingly, the scenario where a party resorts to arbitration based on a UOC, and the other party challenges the tribunal’s jurisdiction is yet to be tested in Egypt.

## **Conclusion & Key Takeaways**

The takeaways from the Egyptian Court decisions above are:

- Arbitration in Egypt is an exceptional mechanism, requiring unequivocal and unconditional consent from both parties. Any ambiguity may result in courts retaining jurisdiction.
- OAAs are invalid under Egyptian law, as they fail to provide absolute commitment to arbitration. This principle can be extended to UOCs, which similarly lack mutual consent and absolute commitment, making them susceptible to invalidation.
- A UOC grants one party the option to litigate, thereby rendering the arbitration clause non-exclusive. The resulting imbalance may undermine fair access to justice, providing a further ground to be unenforceable.

Ultimately, it is important to note that the Egyptian legal system does not adhere to the principle of stare decisis, which is a fundamental feature of common law jurisdictions, where courts are bound by precedent. Instead, high court decisions in Egypt serve as a persuasive authority rather than binding precedent, meaning that while past rulings carry strong supportive value, they do not have

the same decisive effect as in common law systems. Consequently, Egyptian courts can interpret and apply legal principles based on the specific circumstances of each case, rather than being strictly bound by previous judgments. This flexibility means that while previous court decisions and the general legal trend suggests that UOCs are likely to be deemed invalid in Egypt, courts may still reach different conclusions depending on the precise wording of the clause and the context of the dispute, allowing for potential exceptions in certain cases.

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