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UNILATERAL OPTION CLAUSES – 2017 SURVEY

# UNILATERAL OPTION CLAUSES – 2017 SURVEY

Dispute resolution clauses providing for arbitration but giving one party the exclusive right to elect to refer a particular dispute to litigation before the courts – also known as “unilateral option clauses” – have remained a common feature in many transaction documents since we carried out our last survey in 2014.<sup>1</sup>

Following recent decisions in France and Singapore – and in light of the result of the United Kingdom’s referendum of 23 June 2016 on its membership of the European Union (the “EU”) – the time is right to re-visit the topic to see if such unilateral option clauses remain ‘fit for purpose’.

Clifford Chance has therefore refreshed and expanded its survey as to their effectiveness. The survey now covers over 60 jurisdictions, 21 of which are included for the first time (including 14 African jurisdictions).

## England & Wales

### English courts continue to uphold unilateral option clauses

The attitude of the English courts to “one-sided” dispute resolution clauses is well-settled.

In cases such as *NB Three Shipping v Harebell Shipping* [2004] EWHC 2001 (Comm) and *Law Debenture Trust Corp plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), the English courts have upheld unilateral option clauses giving one party the choice to take the case to arbitration.

Similarly, in *Mauritius Commercial Bank v Hestia Holdings Limited* [2013] EWHC 1328 (Comm) (a case to which the Brussels I Regulation did not apply), the English courts upheld a “one-sided” dispute resolution clause which provided for the exclusive jurisdiction of the English courts but which also stated that the Claimant bank should not “*be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction*”.

The attitude of the English courts is that the parties’ agreement as to dispute resolution – however that agreement may be structured – should be upheld. If the parties decide to bestow greater flexibility on one party than on the other, that is their choice and the courts will not intervene to override that decision.

### What about ‘Brexit’?

There is no reason to think that the English courts will change their approach to dispute resolution provisions – but the outcome of the United Kingdom’s referendum on its membership of the EU is one factor that may influence the parties’ approach to their dispute resolution regime or the exercise of any rights conferred by that regime. The referendum vote in favour of ‘Brexit’ has no immediate impact – the United Kingdom remains a member of the EU for the time being – but it seems likely that it will lead to the United Kingdom leaving the EU at some time in or after March 2019.

Leaving the EU will not affect international arbitration in the United Kingdom in any significant way, nor the approach of the English courts to one-sided dispute resolution provisions. However, the EU’s Brussels I regime will probably cease to apply in the English courts. There is currently uncertainty as to what, if anything, will replace that regime – an equivalent agreement (as is the case with Denmark), the Lugano Convention, the Hague Convention on exclusive choice of court agreements and/or something else altogether?

This uncertainty may be relevant if it is important that any court judgment or arbitral award is readily enforceable throughout the EU (although cross-border enforcement of judgments remains rare in practice).

If, for example, no substitute for the Brussels I regime is agreed, it is likely that an English court judgment will still be capable of being enforced in many EU Member States (though this must be assessed on a state-by-state basis), but enforcement may not be as quick or easy as intended under the Brussels I regime.

If rapid enforcement throughout the EU is important, then arbitration – or at least the option of arbitration – may be an attractive alternative because the United Kingdom and the EU’s member states will all remain parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), which provides for the mutual enforcement of arbitral awards. Unilateral option clauses can help preserve this flexibility.

<sup>1</sup> See “*Unilateral option clauses in arbitration: an international overview*”, Practical Law (<http://uk.practicallaw.com/7-535-3743>). See also the 2013 edition of our survey.

# UNILATERAL OPTION CLAUSES – 2017 SURVEY (CONTINUED)

## Continental Europe

Whilst the legal position regarding “one-sided” dispute resolution or unilateral option clauses is settled in England & Wales, the position is less certain in continental Europe, where different jurisdictions’ attitudes to similarly-worded clauses vary widely.

### French Cour de Cassation – 2012 Rothschild decision

Perhaps most notable is the September 2012 decision of the French *Cour de Cassation* in the case of *Mme X v Banque Privée Edmond de Rothschild Europe* No. 11-26.022 [2013] ILPr.

In that case, the *Cour de Cassation* found that a “one-sided” dispute resolution clause (of the same kind seen in the English case of *Mauritius Commercial Bank*) referring all disputes to the courts of Luxembourg but granting one party the unilateral ability to refer disputes to any other court with jurisdiction was not an agreement conferring jurisdiction within the meaning of Article 23 of the Brussels I regime,<sup>2</sup> but rather the imposition of terms by one party on the other.

Although its decision was based purely on EU law – and notwithstanding that the Brussels I regime is *prima facie* of no application to arbitration proceedings – the *Cour de Cassation* stated that such an imposition would be contrary to the French law concept of ‘*conditions potestatives*’ which render “one-sided” contractual provisions ineffective, thereby also casting doubt upon the French courts’ attitude to unilateral option clauses.<sup>3</sup>

This decision – which remains in line with the prevailing attitude of the courts of the Czech Republic, Hungary, Poland, Romania and Russia – was heavily criticised by many commentators on the bases that:

- there is nothing in the Brussels I regime that permits a court to reject an agreement as to jurisdiction if that agreement confers greater rights on one party than on the other; and
- the decision was also seen as undermining the principle of sanctity of contract.

### Italian & Spanish Courts – before and after Rothschild

Conversely, however – and barely a year before *Rothschild* – the Milan Court of Appeal reached the opposite conclusion in the case of *Sportal Italia v Microsoft Corporation*, holding such clauses to be valid.

Some six months after that decision, so too did the Italian Supreme Court (in Case No. 5705, *Grinka in liquidazione v Intesa San Paolo, Simest, HSBC*) whilst holding that such clauses were entirely consistent with Article 23 (as was) of the Brussels I regime.

So too have the Spanish courts come down in favour of such clauses. Whilst at the time of the first edition of our survey they had not been called upon to examine the issue, the Madrid Court of Appeal (in the case of *Camimalaga S.A.U. v DAF Vehiculos Industriales S.A. and DAF Truck N.V.* – and in overturning the decision of the court of first instance) held that a clause allowing the Claimant to elect to refer disputes either to arbitration under the arbitration rules of the Netherlands Arbitration Institute or to specified Dutch courts was valid and binding on the bases that:

- as a matter of Spanish law, there was nothing to prevent the parties consenting to arbitration and other forms of dispute resolution; and
- this was in keeping with practice in other jurisdictions.

### French Cour de Cassation – 2015 decision upholds “one-sided” dispute resolution clause

The distance between the positions taken by, on the one hand, the courts of France and, on the other, those of Italy and Spain appeared, however, to have narrowed in the October 2015 case of *eBizzcuss/Apple*.

In this case, the French *Cour de Cassation* held – on the basis that the clause in question was more narrowly drafted than the one that was in issue in *Rothschild* – that a “one-sided” dispute resolution clause (providing Apple with the choice of forum) did indeed satisfy the foreseeability requirement of Article 25 of the recast Brussels I regime (which the clause in *Rothschild* was held not to) and was therefore valid (albeit that the clause in question only offered a choice between different courts, rather than between arbitration and the courts and was not therefore a unilateral option clause *per se*).

### French Cour de Cassation – 2016 decision brings back uncertainty

However, in 2016, the French courts have again moved back more towards the position originally taken in *Rothschild*.

<sup>2</sup>As from 10 January 2015, now Article 25 of the recast Brussels I regime, which applies to all jurisdiction clauses (regardless of when they were agreed) where the parties have agreed that a court or courts of a EU Member State are to have jurisdiction irrespective of the domicile of the parties in question (i.e. removing the requirement that at least one of the parties to the agreement is domiciled in an EU Member State).

<sup>3</sup>Article 25 (recast Article 23) of the Brussels I regime may nevertheless be relevant to unilateral option clauses in arbitration if such clauses also include a jurisdiction clause.



## UNILATERAL OPTION CLAUSES – 2017 SURVEY (CONTINUED)

In April 2016, the case of *Société Générale SA v M. Nicolas Y. and Société Civile ICH and Société NJRH Management Ltd and SELARL AJ Partenaires* was heard in the Rennes Court of Appeal. The case, again, examined a “one-sided” dispute resolution clause (not a unilateral option clause *per se* as it did not refer to arbitration) which referred disputes to the courts of Zurich, but also gave the bank the option to refer the dispute to any other “*tribunal compétent*.”

A claim was originally commenced by Société Civile ICH before the courts of Angers – however, both the court of first instance and the Court of Appeal in Angers declined jurisdiction (as the English courts would have done in their position) on the grounds that:

- only the bank, not Société Civile ICH, could elect to exercise the “option” in the “one-sided” dispute resolution clause; and
- as Angers had not been specified by the parties, the dispute should properly be heard before the courts of Zurich (i.e. the forum the parties had specified).

The decision of the Angers Court of Appeal was appealed before the French *Cour de Cassation*. The *Cour de Cassation* referred the case back to the Court of Appeal in Rennes on the basis that the Angers Court of Appeal had failed to take into account the “one-sided” or uneven nature of the dispute resolution clause when reaching its decision.

Ultimately, the Rennes Court of Appeal determined (in reliance on Article 6 of the Lugano Convention 2000) that the case should be heard in Paris (Société Générale’s domicile).

Unfortunately, this decision does little to clarify the attitude of the French courts. Whilst, on one view, Société Générale was successful in its arguments to have the dispute heard in Paris, this was not achieved pursuant to the election of a Claimant in proceedings;

and (notwithstanding the decisions of the courts in Angers which sought to uphold the parties’ agreement) nor was the dispute heard in Zurich, which was clearly intended to be the ‘default’ jurisdiction.

In light of the varied – and changing – court practices illustrated by the above cases, if parties are intending to incorporate “one-sided” clauses (including unilateral option clauses) into their agreements, such clauses should:

- be drafted in as precise and narrow a manner as possible; and

- ensure that the designated tribunal(s) / court(s) are capable of being identified clearly on the basis of objective and precise elements;

in order to reduce their susceptibility to challenge and, in the context of an EU Member State, satisfy the requirements of foreseeability and certainty required for the Brussels I regime.

### **Singapore**

Once outside of the EU, the number of jurisdictions whose courts have been explicitly requested to address the question of the validity of unilateral option or “one-sided” dispute resolution clauses decreases markedly – although, whilst jurisdictions such as Brazil, Saudi Arabia, India, Indonesia, China and South Korea remain sceptical, it is thought likely that many others are, in principle, willing to uphold such clauses.

Singapore is one such jurisdiction that had not been explicitly asked to consider the validity of unilateral option clauses when the last edition of our survey was compiled – although at the time it was thought likely that the Singaporean courts would have regard to the attitude of the English courts were the issue to arise before them.

The issue has, however, now been considered by the Singaporean High court in the recent 2016 case of *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2016] SGHC 23.

The parties’ dispute concerned a contract for the installation of underwater anodes on Diego Garcia, the largest of the islands in the Chagos Archipelago in the Indian Ocean.

The contractually-agreed dispute resolution clause provided as follows:

*“Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law, and held in Singapore”.*

Accordingly, on the face of the clause, only Dyna-Jet (and not Wilson Taylor) had the right to refer any dispute to arbitration in Singapore. Nonetheless, Dyna-Jet commenced proceedings before the Singapore High Court. Wilson Taylor then applied for a permanent stay of those court proceedings in an attempt to compel Dyna-Jet to exercise its option to refer the dispute to arbitration instead.

## UNILATERAL OPTION CLAUSES – 2017 SURVEY (CONTINUED)

The Singapore High Court held – having considered “*the overwhelming weight*” of modern Commonwealth authority – that the underlying clause was, as a matter of principle, valid and binding, on the bases that:

- mutuality of the right to elect to arbitrate is not a requirement for the purposes of concluding an “*arbitration agreement*” within the meaning of the Singapore International Arbitration Act; and
- the only material mutuality was the mutual consent of the parties at the point when they entered into a dispute resolution agreement (i.e. even if that agreement was unilateral or “one-sided” in nature).

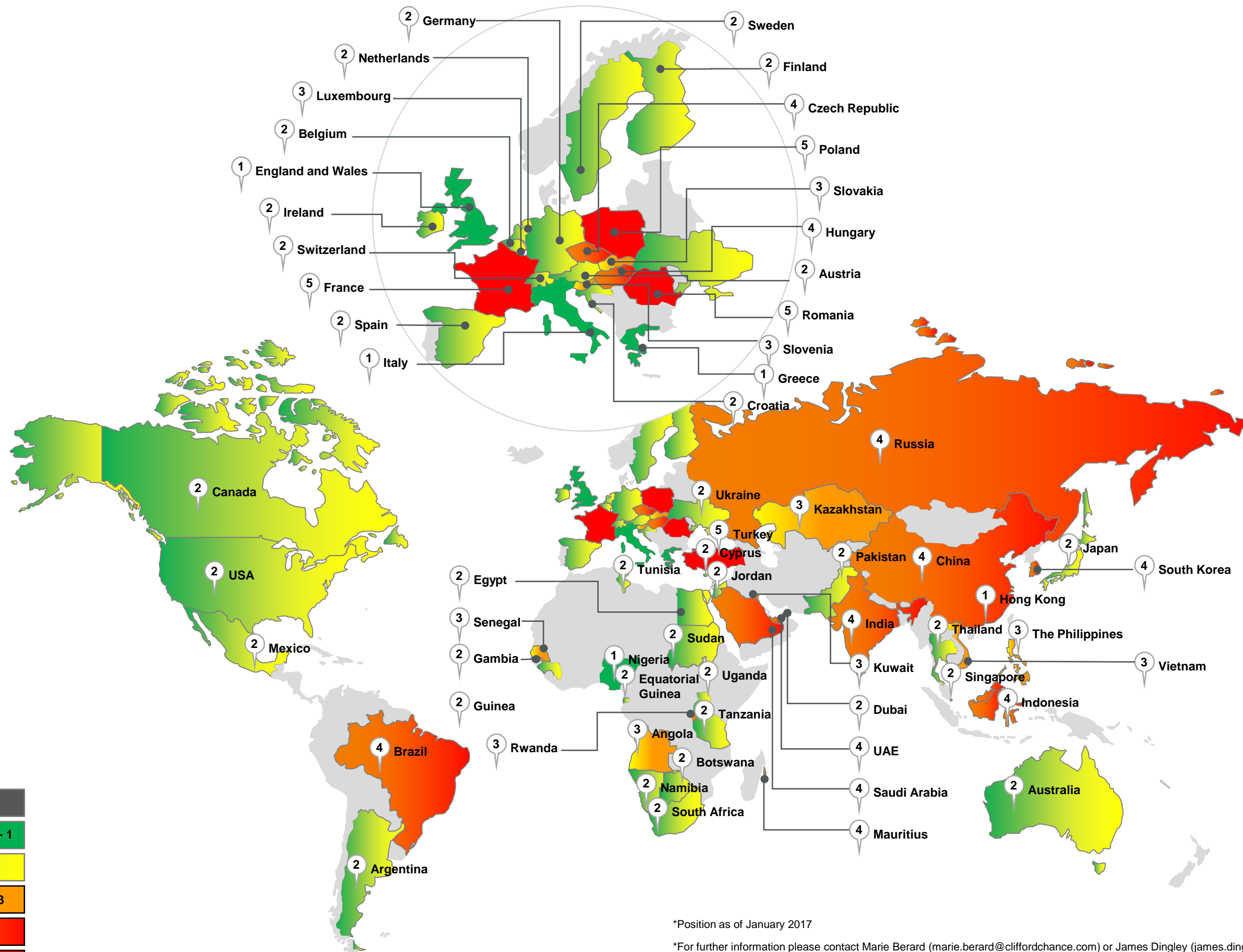
Whilst this particular decision was concerned with a clause providing a unilateral option to arbitrate, the Singapore High Court also drew no distinction between other types of

“*asymmetric*” dispute resolution agreements, including arbitration agreements which make arbitration mandatory subject to an express right to opt for litigation. The decision in *Dyna-Jet* can therefore be interpreted as a broad endorsement of the validity of the most frequently used variations of “one-sided” dispute resolution clauses.

The *Dyna-Jet* decision provides a degree of certainty – although the Singapore High Court did grant Wilson Taylor leave to appeal the decision on the basis that the case presented important issues of principle, which the judge noted “*are novel not just for Singapore law but for international arbitration in general*”.

The importance of this appeal for the wider international arbitration and business communities should therefore not be underestimated.<sup>4</sup>

<sup>4</sup>The appeal has not been listed at the time of publishing (January 2017).



Key	
1	Generally no issues - 1
2	Issues unlikely - 2
3	Position uncertain - 3
4	Potential issues - 4
5	Issues likely - 5

\*Position as of January 2017

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# UNILATERAL OPTION CLAUSES – 2017 SURVEY: RESULTS

Our international arbitration specialists and selected local counsel (listed in full on the back page of this briefing) have worked together to produce a snapshot of the treatment of unilateral option clauses in their home jurisdiction as at January 2017.

As a reminder, what we have termed “unilateral option clauses” are dispute resolution clauses providing for disputes to be referred:

- to arbitration but giving one party the exclusive right to elect to refer a particular dispute to litigation before the courts; or
- to a court, but giving one party only the right to elect to refer the dispute to arbitration instead.

As before, the results are summarised in “traffic light” format, ranking from green to red, via various shades of amber depending on the local courts’ stated – or, absent applicable case law, likely – position on unilateral option clauses.

Our key message remains: parties should take care when considering whether to incorporate unilateral option clauses

into their agreements and should seek specialist advice on the enforceability of unilateral option clauses not only in the jurisdiction to whose governing law their agreement is subjected, but also in the jurisdiction:

- of any proposed court or arbitration proceedings (to the extent different from jurisdiction of the governing law);
- in which contractual counterparties are domiciled; and
- in which contractual counterparties’ assets are located (i.e. where any award or judgment would need to be enforced if not voluntarily satisfied).

The consequences of including a unilateral option clause in transaction documents that are connected with a jurisdiction that does not regard them as valid can be severe. They can range from the clause being declared void (potentially resulting in local courts seizing jurisdiction over a dispute) through to enforcement of an arbitral award being refused.

For this reason, each transaction should be approached on a case-by-case basis and specialist advice should be sought when seeking to determine the most advantageous dispute resolution regime.

For further information or a copy of the summary of our survey, please contact **Marie Berard** or **James Dingley**.

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Jurisdiction-by-jurisdiction summary reflects the position at January 2017. This summary does not necessarily deal with every important topic or cover every aspect of the topics with which it deals, including a) the effect of an arbitral award being set aside by the courts of the seat of the arbitration or b) the impact of any arbitral challenge to the award before the courts where enforcement is sought on the grounds of e.g. illegality or public policy pursuant to Article V of the New York Convention.

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