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**C H A N C E**



**UNILATERAL OPTION CLAUSES SURVEY – 2021**

# UNILATERAL OPTION CLAUSES SURVEY – 2021

Welcome to the 2021 edition of the Clifford Chance unilateral option clauses survey.



Clifford Chance has updated and expanded its 2017 Survey on the current effectiveness of unilateral option clauses across the world.



The Survey now covers over

**95**

jurisdictions.



Our international arbitration specialists and selected local counsel have worked together to produce a snapshot of the treatment of unilateral option clauses in their home jurisdictions as of January 2021. We take this opportunity to thank our friends and colleagues at Clifford Chance and in other firms for their contributions. They are listed on pages 28 to 30.

As in the prior editions, the results are summarised in a 'traffic light' format, categorising the position across jurisdictions from green to red to reflect the risk associated with such clauses in certain jurisdictions.

Before setting out the results of over 95 jurisdictions, some of our international arbitration colleagues take a closer look at the position across six specific jurisdictions: England & Wales, France, Germany, Russia, Singapore and Hong Kong.

# UNILATERAL OPTION CLAUSES SURVEY – 2021

## What are unilateral option clauses?

- clauses providing for disputes to be referred to arbitration, but giving one party the exclusive right to elect to refer a dispute to litigation before the courts; or
- clauses providing for disputes to be referred to a court, but giving one party the right to elect to refer the dispute to arbitration instead.

**Parties should take care when considering whether to include unilateral option clauses in their agreements. Specialist advice should be sought on the enforceability of these clauses in the jurisdiction:**

- of the governing law of the agreement;
- of any proposed court or arbitration proceedings (if different from the 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 unilateral option clauses in agreements that are connected with a jurisdiction that considers them to be invalid can be severe. They can range from the clause being declared void (potentially resulting in local courts seizing jurisdiction over a dispute) through to inability to enforce an arbitral award.

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.

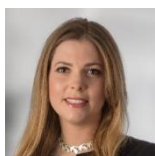
*This survey was produced to reflect the position as at January 2021. It does not seek to cover every aspect of the topics with which it deals, including the effect of an arbitral award being set aside by the courts of the seat of the arbitration or the impact of any arbitral challenge to the award before the courts where enforcement is sought.*

**For further information on the Survey please contact: Marie Berard, Melissa Brown or Nicole Mah**



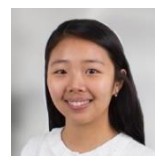
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Special thanks to **Jennifer Hwang** and **Olivia Ved** for their valuable contributions.

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1

FOCUS ON  
SPECIFIC  
JURISDICTIONS  
(PAGES 6-11)

---

2

HEAT MAP  
(PAGE 13)

---

3

FULL SURVEY  
(PAGES 15-26)

---

4

CONTRIBUTORS  
(PAGES 28-30)

---

5

GLOBAL  
ARBITRATION TEAM  
(PAGES 32-33)

---

1

FOCUS ON  
SPECIFIC  
JURISDICTIONS  
(PAGES 6-11)

---

2

HEAT MAP  
(PAGE 13)

---

3

FULL SURVEY  
(PAGES 15-26)

---

4

CONTRIBUTORS  
(PAGES 28-30)

---

5

GLOBAL  
ARBITRATION TEAM  
(PAGES 32-33)



### The English courts' attitude towards unilateral option clauses is well-established

The English courts consistently uphold unilateral option clauses giving one party the right to take a dispute to arbitration. They will even protect a party's right to exercise the option through a stay of proceedings if necessary.

In *NB Three Shipping v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm), the High Court upheld a unilateral option to arbitrate. In that case, the Defendant applied for a stay of court proceedings commenced by the Claimant, pending arbitration. The Court held that the relevant clause afforded the Defendant a right to determine that a dispute be arbitrated, even in a situation where the Claimant had already commenced litigation proceedings. On this basis the Court granted the stay.

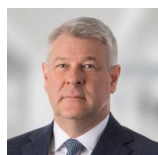
Similarly, in *Law Debenture Trust Corp v Elektrim Finance BV & Ors* [2005] EWHC 1412 (Ch), the High Court granted an injunction against one of the Defendants to prevent them from pursuing the dispute in arbitration. This was because, although the clause provided that disputes be referred to arbitration, it afforded the Claimant an exclusive right to refer the matter to the English courts. Again, it did not matter that that Defendant had already attempted to commence arbitration proceedings.

Although not the subject of this Survey, we note that the English courts take a similar approach in relation to asymmetric jurisdiction clauses which provide for the exclusive jurisdiction of particular courts, but also provide one party with the right to take its disputes to any other courts with jurisdiction.

In *Mauritius Commercial Bank v Hestia Holdings Limited* [2013] EWHC 1328 (Comm), the Commercial Court upheld an asymmetric jurisdiction clause which provided for the exclusive jurisdiction of the English courts but allowed the Lender to take proceedings to any other courts in any jurisdiction. The Court also commented that it was difficult to identify a rationale or policy reason to object to a prospective change in governing law, especially in the face of the countervailing principle of contractual autonomy. Moreover, such an agreement was not contrary to the parties' equal access to justice, since Article 6 ECHR is directed to access to justice within a chosen forum, not to the choice of forum.

The reasoning in *Mauritius Commercial Bank* was applied by the High Court in *Ourspace Ventures Limited v Halliwell* [2019] EWHC 3475 (Ch). The case concerned enforcement of a personal guarantee relating to a loan agreement. The guarantee provided for arbitration but gave the Claimant the option to litigate its dispute by written notice to the Defendant. The Claimant exercised this option, referring the dispute to the "English Courts". However, the option to litigate clause relied on was drafted in a contradictory manner, referring to both the "English Courts" and the "DIFC Courts". The judge determined that because there were more references in the clause to "DIFC" than "English", the reference to "English Courts" was the erroneous one. That being said, adopting the reasoning in *Mauritius Commercial Bank*, the judge accepted the Claimant's submission that the proper construction of the clause was to allow the Claimant to bring proceedings in any jurisdiction, including England – not only the DIFC.

It is clear that the English courts favour contractual autonomy. The Court of Appeal in *Etiha Airways PJSC v Flöther* [2020] EWCA Civ 1707 recently recognised the widespread use and legitimate commercial purpose of asymmetric jurisdiction clauses. Where an agreement provides greater flexibility for one party to determine the forum of dispute or jurisdiction of choice, the courts will not intervene to override this.



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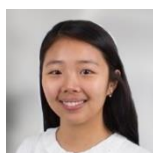
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## The French courts' treatment of options to litigate casts doubt on the likely validity of unilateral option clauses and parties should take care when drafting dispute resolution clauses

Pursuant to a well-established principle in the seminal 1993 *Dalico* case, the validity and enforceability of arbitration agreements is primarily determined by reference to the parties' "common intention". This "common intention" must satisfy a degree of certainty and foreseeability.

Clauses offering a choice between arbitration and litigation, i.e. unilateral option clauses, may alter the balance of these criteria. To date, the French Supreme Court and the Paris Court of Appeal (which is particularly authoritative in arbitration matters) have not yet ruled on the validity or enforceability of such clauses following the landmark decision of *Rothschild* in 2012, which solely addressed jurisdiction clauses. In these circumstances, parties should continue to exercise caution when drafting dispute-resolution provisions.

Recent case law regarding options to litigate includes:

- the abundantly commented (and criticised) **2012 *Rothschild* decision** (*Mme X v Banque Privée Edmond de Rothschild Europe*, n°11-26.022, 26 September 2012) in which the French Supreme Court determined that a dispute resolution clause referring all disputes to the courts of Luxembourg but granting one party the unilateral right to refer disputes to any other court of competent jurisdiction was not an agreement conferring jurisdiction within the meaning of Article 23 of the Brussels I regulation, but rather the imposition of terms by one party on the other.<sup>3</sup> Such an imposition qualified as a "*condition potestative*" and rendered one-sided jurisdiction clauses ineffective, thereby also casting doubt upon the French courts' attitude to unilateral option clauses.
- the **2015 *eBizzcuss/Apple* decision** (*Apple Sales International v eBizzcuss*, n°14-16.898, 7 October 2015), in which the French Supreme Court held that a "one-sided" jurisdiction clause (not a unilateral option clause per se as it did not refer to arbitration) satisfied the foreseeability requirement of Article 25 of the recast Brussels I Regulation (which the clause in *Rothschild* was held not to) and was therefore valid. The clause in question was more narrowly drafted than the one at issue in the *Rothschild* case.
- the **February 2018 *Crédit Suisse* decision** (*Sté Crédit Suisse v Sté Civile Immobilière ICH*, n°16-24497, 7 February 2018), in which the French Supreme Court held that the validity of a jurisdiction clause depends on whether the clause meets "*a requirement of precision in order to satisfy the objective of foreseeability and legal certainty (sécurité juridique)*" provided by the Lugano convention. The Supreme Court held that a jurisdiction clause providing one party with an option to litigate before "*any other competent court*" did not meet that requirement and was ineffective.
- the **October 2018 *Dexia* decision** (*Sté Saint Joseph v Dexia Banque Internationale*, n°17-21309, 3 October 2018), in which the French Supreme Court held as invalid a "one-sided" jurisdiction clause (i) providing that the Luxembourg courts had jurisdiction, but (ii) offering the beneficiary of the option the right to litigate before any other competent court. As in *Crédit Suisse*, the Court's decision was guided by the lack of a "*sufficiently precise and objective element*" which would allow it to determine which other courts were competent.

In light of the above cases (and uncertainties), those drafting arbitration agreements with a French nexus should be cautious to ensure not only that the existence of the option (to litigate or to arbitrate) does not itself render the intention to arbitrate uncertain, but also that the court(s) of competent jurisdiction can be determined on the basis of objective criteria.



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## The German courts continue to respect party autonomy, but parties should take care when implementing standard business terms

In German law, the general principle of party autonomy grants parties a large degree of freedom in tailoring arbitration agreements to their specific needs, for example by including a unilateral option clause. As long as the parties freely agree from the outset that one party shall be granted the option to initiate arbitration proceedings unilaterally, this is to be respected. German courts do not require a specific justification for using a unilateral option clause and the prevailing opinion amongst German legal commentators is that unilateral option clauses are generally valid (although some legal commentators suggest that unilateral option clauses should only be permitted if the legitimate interest of a party is at risk, e.g. due to a purchaser's bankruptcy or unwillingness to pay). The only limits to party autonomy in this respect are *boni mores* "good morals" (Section 138 of the German Civil Code) or domestic public policy (Section 1059 of the German Civil Procedure Code).

There is not much case law on the question of the validity of unilateral option clauses in Germany, and the few relevant cases that have been decided by German courts date back to the 1990s. In those cases, the courts distinguished between unilateral option clauses in favour of claimants and those in favour of respondents.

In 1991, the German Federal Court of Justice (Bundesgerichtshof, "BGH") held that unilateral option clauses in favour of claimants are generally admissible as long as the clause had been freely agreed beforehand. The reasoning being that a respondent is not considered to be unduly disadvantaged in such a scenario (BGH, 10.10.1991 - III ZR 141/90).

In contrast, unilateral option clauses in favour of respondents have been considered potentially problematic, but only in a scenario where the arbitration clause was a 'standard business term'. In one case the BGH considered a unilateral option clause to be invalid. The court found it to be disadvantageous to the claimant due to the following risk of abuse: if the claimant initiates arbitration, the respondent might invoke the unilateral option clause (by opting to litigate the matter in the ordinary courts instead), in which case the arbitral tribunal would have to dismiss the claim due to lack of jurisdiction. The claimant would have to bear the costs of the arbitration and would have to initiate litigation proceedings instead – leading to wasted time and costs. The opposite scenario is also possible: where the claimant initiates litigation proceedings and the respondent objects against the jurisdiction of the ordinary courts by opting for arbitration. This is why the BGH saw no option for the claimant to prevent this risk of abuse (BGH, 24.09.1998 - III ZR 133/97).

However, as already stated, the reasoning of the decision in BGH, 24.09.1998 - III ZR 133/97 was explicitly based on the strict requirements of standard business terms under German law. Thus, this decision is only considered to be relevant in factual circumstances involving standard business terms. This legal evaluation will be even more applicable to standard business terms vis-à-vis consumers because of the high consumer protection standards. In fact, the BGH decision dealt with such a factual scenario. Therefore, the prevailing opinion amongst German legal commentators is that other than in the case of standard business terms, no conclusions can be drawn regarding potential issues with unilateral option clauses in general. This underlines the position in German law that the requirements for permissible standard business terms are considerably stricter than the general principles of *boni mores* or public policy.

Some legal commentators take the view that the party not benefiting from the unilateral option clause should be granted a right to set a deadline for the counterparty to exercise the option clause. However, this is not yet reflected in any case law.

In conclusion, the prevailing view in Germany is that unilateral option clauses in both scenarios, i.e. in favour of claimants and respondents, are permissible. However, with regard to the latter, the relevant case law only relates to situations involving standard business terms.



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## The Russian courts have effectively converted a 'unilateral option' into a 'bilateral option'

Up until 2012, the Russian courts recognised unilateral option clauses as valid. After significant debate, that position has since changed.

In 2012, the Presidium of the Russian Supreme Arbitrazh Court found that a dispute resolution clause which gave only one party the right to choose between a court of competent jurisdiction and international arbitration was invalid. The rationale was that the clause violated the principle that parties should be afforded equal procedural rights. (*Russian Telephone Company CJSC v. Sony Ericsson Mobile Communications Rus LLC* (A40-49223/2011)).

The Presidium's position was debated by legal practitioners and scholars. The decision was unclear as to whether:

- 1) the entire unilateral option clause was invalid (both the jurisdiction and the arbitration clause);
- 2) the unilateral option clause was partially invalid (only the part of the clause which gave one party the ability to choose a court of competent jurisdiction was invalid); or
- 3) irrespective of whether the unilateral option clause was invalid in its entirety or only partially, the parties needed to be put on an equal footing (i.e. both parties should be afforded the right to choose arbitration or a competent court).

In 2015, the Economic Disputes Chamber of the Russian Supreme Court determined that approach (3) above was the correct one: parties need to be put on an equal footing. (*Ruling dated 27 May 2015 in case No. 310-ES14-5919*).

In December 2018, the Presidium of the Russian Supreme Court issued the "*Digest of Case Law Involving Judicial Assistance and Oversight in Relation to Domestic and International Arbitration*". The Digest contains guidance that optional dispute resolution clauses are valid if they provide the parties with equal rights to refer a dispute to arbitration or a competent court. If an optional dispute resolution clause provides only one party with the right to refer disputes arbitration or a competent court, then the other party will be conferred the same right.

A year later, in December 2019, the Plenum of the Russian Supreme Court issued "*Decree No. 53, On Fulfilment by Courts of the Russian Federation of the Functions of Assistance and Oversight in Respect of Arbitral Proceedings and International Commercial Arbitration*". The Decree crystallised the approach described above. It also clarified that it is acceptable to provide the claimant in an action with a choice between an arbitral tribunal and a court; between two or more arbitral institutions; between an institutional arbitration and an ad hoc arbitration, etc. A dispute resolution clause may also envisage the ability for one party to bring a claim in one arbitral tribunal or court named in the arbitration agreement, and the other party — in another arbitral tribunal or court.

In summary, the Russian courts have effectively converted a 'unilateral option' into a 'bilateral option'. Each party to a contract (including the 'deprived' party) has the right to choose between all the options which have been provided to the 'privileged' party.



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## Court of Appeal endorses use of unilateral option clauses in Singapore

The Singapore Court of Appeal confirmed in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32 that the Singapore courts will uphold a dispute resolution clause which gives only one party the right to arbitrate a dispute.

In our 2017 Survey, we covered the High Court decision in this case. To recap, the parties' dispute arose out of a contract for the provision of specialist engineering services, in which the 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.

The Court of Appeal agreed with the High Court that the underlying clause was, as a matter of principle, valid and binding. The Court noted that the clause: (a) entitled only one party to compel its counterparty to arbitrate a dispute (termed the "lack of mutuality" characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate (termed the "optionality" characteristic). Recognising the "weight of modern Commonwealth authority", the Court agreed that neither of these characteristics prevented the court from finding that there was a valid arbitration agreement between the parties.

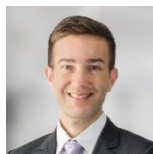
The Court of Appeal went on to find that the dispute did not fall within the scope of the clause, because the optionality of the clause would give rise to an arbitration agreement "only if and when [Dyna-Jet] elected to arbitrate a specific dispute in the future". As Dyna-Jet never elected to arbitrate the dispute and had instead elected otherwise by commencing court proceedings, the Court rejected Wilson Taylor's application for a stay of the court proceedings.

The Court of Appeal did not expressly consider arbitration agreements which make arbitration mandatory subject to an express right to opt for litigation. Nonetheless, based on the Court's reasoning, and given that the High Court had drawn no distinction between a unilateral option to arbitrate and other types of "asymmetric" dispute resolution agreement, the Court's decision can be interpreted as a broad endorsement of the validity of the most frequently used variations of "one-sided" dispute resolution clauses.



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## Unilateral option clauses remain valid and enforceable in Hong Kong

In 2020, the Hong Kong High Court (Court of First Instance) in *Suen Kawi Kam v China Dragon Select Growth Fund* [2020] HKCFI 69 considered a jurisdiction clause providing one party (the Defendant) with the right to commence litigation proceedings before any foreign court with jurisdiction. The asymmetric jurisdiction clause did not envisage arbitration proceedings.

The Plaintiff applied to the Hong Kong Court for an interim anti-suit injunction to restrain the Defendant from continuing with proceedings in Mainland China, or bringing proceedings in any other jurisdiction. Prior to bringing this claim, the Plaintiff had already attempted to challenge the jurisdiction of the Mainland Court, but this application had been dismissed by the Beijing Intermediate Court.

The Court: (i) refused to grant an anti-suit injunction; and (ii) refused to prevent the Defendant from bringing proceedings in any other jurisdiction. The clause in question gave the Defendant the right to elect to commence proceedings outside of Hong Kong, despite a provision stating that the parties would accept that the courts of Hong Kong are the most appropriate and convenient courts to settle any disputes arising from the contract in question.

In making its decision the Court made the following observations:

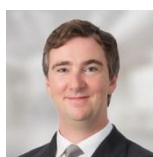
- In respect of the Defendant's unilateral option to pursue proceedings elsewhere "*to the extent allowed by law*", the Court did not accept the interpretation that this was a qualification on the Defendant's right to exercise this option. Given that the Plaintiff commenced the Hong Kong proceedings after the jurisdictional challenge in Mainland China failed, it was held that she could not be permitted to rely on the concurrent proceedings that she deliberately created as grounds to deprive the Defendant of its contractual right to continue with the Mainland proceedings.
- An anti-suit injunction on the basis of unconscionability was rejected. This was because the Defendant had a contractual right to commence and continue proceedings in Mainland China and further afield.

Whilst the clause in question was not a classic unilateral option clause (which is the subject of our Survey), the Court's treatment of the clause is interesting for our purposes. Courts in Hong Kong do not appear to draw a distinction between a unilateral option clause that provides for arbitration as opposed to a unilateral option clause providing for litigation. A Hong Kong Court can therefore be expected to enforce a unilateral option clause giving one party the right to arbitrate, as opposed to litigate, and vice versa.



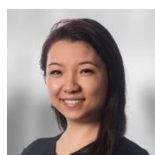
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1

FOCUS ON  
SPECIFIC  
JURISDICTIONS  
(PAGES 6-11)

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2

HEAT MAP  
(PAGE 13)

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3

FULL SURVEY  
(PAGES 15-26)

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4

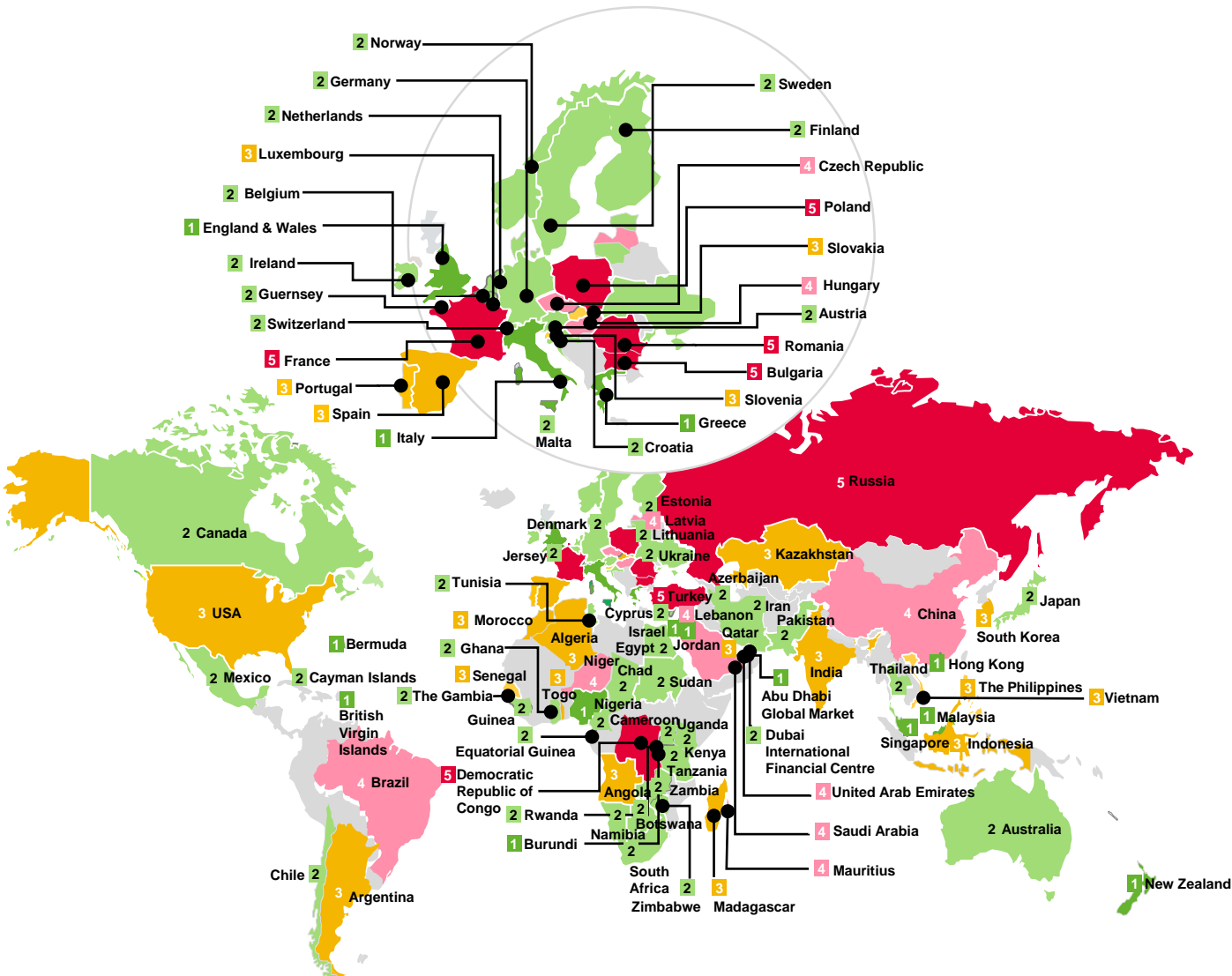
CONTRIBUTORS  
(PAGES 28-30)

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5

GLOBAL  
ARBITRATION TEAM  
(PAGES 32-33)

## UNILATERAL OPTION CLAUSES



## Key

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

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1

FOCUS ON  
SPECIFIC  
JURISDICTIONS  
(PAGES 6-11)

---

2

HEAT MAP  
(PAGE 13)

---

3

FULL SURVEY  
(PAGES 15-26)

---

4

CONTRIBUTORS  
(PAGES 28-30)

---

5

GLOBAL  
ARBITRATION TEAM  
(PAGES 32-33)











# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

	Generally no issues		Issues unlikely		Position uncertain		Potential issues		Issues likely
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<b>Abu Dhabi Global Market</b> 	<p>The Abu Dhabi Global Market (ADGM) courts have recently confirmed the validity of unilateral option clauses in the context of one party's right to replace the arbitration clause in an existing agreement with "reasonable alternative provisions".</p> <p>The ADGM courts have not considered the position specifically in relation to one party's exclusive right to opt for litigation in the context of a jurisdiction clause that provides for arbitration.</p> <p>The ADGM Arbitration Regulations 2015 were amended on 23 December 2020. New Article 14(6) clarified that an arbitration agreement which gives one party a unilateral or asymmetrical right to refer a dispute either to an arbitral tribunal or to a court does not contravene the ADGM Arbitration Regulations and therefore will not be rendered invalid for that reason.</p>
<b>Algeria</b> 	<p>The Algerian courts have not yet considered the validity of unilateral option clauses. There is a concern that the Algerian courts may find that unilateral option clauses are not sufficiently clear as to the parties' intent. The courts would carefully assess whether the clause came about as a result of undue influence or an unconscionable bargain. However, the courts may uphold the clause on the basis of principles set out in the Algerian Civil Code (freedom to contract and liberty to settle).</p>
<b>Angola</b> 	<p>The courts of Angola have not examined the validity of unilateral option clauses.</p>
<b>Argentina</b> 	<p>The Argentine courts have not yet examined the validity of unilateral option clauses <i>per se</i>. Therefore, it is uncertain whether these types of clauses would be enforceable under Argentine law. As a general principle, unilateral option clauses would be held valid on the basis of the principle of <i>pacta sunt servanda</i>, provided they meet the formal requirements under Argentine law and that they are drafted sufficiently clearly. However, it cannot be excluded that Argentine courts would conclude that unilateral option clauses violate the principle of equality and are therefore invalid; in particular, when there are significant differences in the bargaining power of the parties.</p>
<b>Australia</b> 	<p>Whilst the Australian courts have not examined the validity of unilateral option clauses <i>per se</i>, by reference to favourable court decisions in relation to similar clauses, it is likely that they would be held to be valid. Similarly, it is likely that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Australia.</p>
<b>Austria</b> 	<p>The Austrian courts have accepted the validity of unilateral option clauses in isolated cases. Austrian scholars concur that such clauses are binding. However, agreements which permit a party to exercise its option after the other party has already initiated proceedings may not be enforceable. The mechanisms to determine the competent forum need to be drafted carefully. It is anticipated that the Austrian courts would uphold an arbitral award rendered on the basis of a unilateral option clause.</p>
<b>Azerbaijan</b> 	<p>Whilst the courts of Azerbaijan have not examined the validity of unilateral option clauses <i>per se</i>, it is thought that they would be held valid as long as the parties' agreement did not violate Azerbaijani legislation which is applicable to certain specific disputes.</p>
<b>Belgium</b> 	<p>Whilst a lower court in Belgium has upheld the validity of a unilateral option clause, other courts in Belgium may be inclined to follow the approach of the French Cour de Cassation and thereby take a more conservative view of these clauses. Belgian commentators have argued in favour of the validity of unilateral option clauses, regardless of whether they allow a party to choose between courts or between arbitration and courts.</p>
<b>Bermuda</b> 	<p>Whilst the Bermudan courts have not examined the validity of unilateral option clauses <i>per se</i>, the law in Bermuda is heavily influenced by English law and, as in England, the legislature is pro-arbitration, having enacted the Arbitration Act 2013 based on the UNCITRAL Model Law. As such, the Bermudan courts will favour upholding whatever bargain has been struck by the parties in relation to jurisdiction and forum.</p>

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

	Generally no issues		Issues unlikely		Position uncertain		Potential issues		Issues likely
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<b>Botswana</b> 	Whilst the courts of Botswana have not examined the validity of unilateral option clauses <i>per se</i> , such clauses would nevertheless be held to be valid on the basis of <i>pacta sunt servanda</i> and provided that they are drafted in a clear, unambiguous way.
<b>Brazil</b> 	Whilst the Brazilian courts have not examined the validity of unilateral option clauses <i>per se</i> , Brazilian law requires the consent of all parties to submit a dispute to arbitration, such that there is a risk that Brazilian courts may not recognise the validity of unilateral option clauses.
<b>British Virgin Islands</b> 	Whilst the British Virgin Islands' (BVI) courts have not examined the validity of unilateral option clauses <i>per se</i> , the courts have upheld similar dispute resolution clauses in the past. The law in the BVI is heavily influenced by English law and, as in England, the legislature is pro-arbitration, having enacted the Arbitration Act 2013 based on the UNCITRAL Model Law. As such, the BVI courts will favour upholding whatever bargain has been struck by the parties in relation to jurisdiction and forum.
<b>Bulgaria</b> 	The Bulgarian courts have held that unilateral option clauses (containing either an option to litigate or arbitrate) are invalid on the basis that such dispute resolution clauses violate principles of equality. The Bulgarian Supreme Court of Cassation has also held, on a number of occasions, that arbitral awards rendered on the basis of unilateral option clauses should be set aside.
<b>Burundi</b> 	The courts of Burundi have held that unilateral option clauses are valid on the basis that they represent the will of the parties. Similarly, as long as an arbitral award is rendered following due procedure, it should be enforceable in Burundi.
<b>Cameroon</b> 	The courts of Cameroon have considered arbitration agreements which provide for both arbitration and litigation. Based on principles which provide parties with the freedom to contract, it is believed that the courts of Cameroon would uphold unilateral option clauses which provide one party with the right to refer a dispute to the courts, provided it was clearly drafted. There is also no reason to believe, based on prevailing legislation in Cameroon, that an arbitral award rendered on the basis of a unilateral option clause would not be enforced in Cameroon.
<b>Canada</b> 	Whilst the Canadian courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held to be valid provided they are drafted sufficiently clearly (although they may be considered to be unfair contract terms in a consumer or employment related context). Similarly, there is a <i>prima facie</i> presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Canada.
<b>Cayman Islands</b> 	The Cayman courts have not examined the validity of unilateral option clauses <i>per se</i> . However, it is likely that the Cayman courts would follow decisions of the English courts, which have upheld the validity of unilateral arbitration clauses. The Cayman courts have also not directly considered whether an arbitral award rendered on the basis of a unilateral option clause would be enforceable in the Cayman Islands. However, given that it is likely that the Cayman courts would be influenced by the English courts' approach, such an award would be enforceable.
<b>Chad</b> 	Whilst the courts of Chad have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held to be valid on the basis that they represent the will of the parties. Similarly, it is likely that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Chad.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

	Generally no issues		Issues unlikely		Position uncertain		Potential issues		Issues likely
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<b>Chile</b> 	The Chilean courts have not examined the unilateral option clause <i>per se</i> . However, the principle of autonomy of will (freedom of choice) in Chilean contract law suggests unilateral jurisdiction option clauses would be held valid in Chile. That being said, if the subject matter of the dispute is not arbitrable, due to public policy reasons, such a clause would not be valid.
<b>China</b> 	The Chinese courts have not formed a clear view on the validity of unilateral option clauses. There is some risk that such clauses would be held invalid on the basis that the requisite consensus to resolve disputes by arbitration is lacking. The invalidation of unilateral option clauses may lead to non-enforcement of any arbitral award rendered pursuant to such clauses.
<b>Croatia</b> 	The Croatian courts have not considered unilateral option clauses (containing either an option to litigate or arbitrate) in reported cases. Such clauses are used in practice, and, as a matter of principle, they are likely to be upheld in commercial contracts as an expression of party autonomy. A party may have reasonable grounds to challenge a unilateral option clause where such clause lacks specificity or is the result of a party's abuse of its exceptionally stronger negotiating position. Unilateral option clauses will generally not be valid in consumer contracts. Whether the courts of Croatia would uphold an arbitral award would depend on whether the option clause was considered valid.
<b>Cyprus</b> 	The Supreme Court of Cyprus has not specifically confirmed its position with respect to unilateral option clauses containing an option to litigate. However, there is a <i>prima facie</i> presumption that the Cypriot courts will insist on the parties honouring their bargain in cases where they have agreed resolution of disputes by a foreign court or by arbitration (assuming this does not conflict with mandatory provisions of law). There is no reason to believe options to arbitrate would be treated any differently. There is also no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Cyprus.
<b>Czech Republic</b> 	Whilst the Czech courts have not examined the validity of unilateral option clauses <i>per se</i> , the Constitutional Court has confirmed that clauses which provide both parties the option to choose between local courts and arbitration are valid. However, it cannot be excluded that the Czech courts would conclude that unilateral option clauses breach the principle of equal treatment and are therefore invalid. Furthermore, in a consumer context, such clauses would likely be struck down as an "unfair term".
<b>Democratic Republic of Congo</b> 	The courts of the Democratic Republic of Congo (DRC) have not examined the validity of unilateral option clauses. However, it is unlikely that such a clause would be considered valid in the DRC. Such a clause would be contrary to the laws of the DRC, which require that all parties to a contract must benefit from the same rights.
<b>Denmark</b> 	Whilst the Danish courts have not directly examined the validity of unilateral option clauses <i>per se</i> , case law suggests an implicit acceptance of such clauses' validity. Danish commentary also speaks in favour of validity. However, a unilateral option clause could in certain cases be changed or set aside if unreasonable or contrary to fair conduct. At present, it is unlikely that an arbitral award would be found unenforceable in Denmark, solely because the relevant arbitration agreement is a unilateral option clause.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

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<b>Dubai International Financial Centre</b> 	The courts of the Dubai International Financial Centre (DIFC) have upheld unilateral option clauses granting one party the right to refer disputes to arbitration, and have taken jurisdiction over claims that contain a unilateral option to litigate in the courts of other jurisdictions, but have not yet examined the validity of unilateral option clauses entitling one party to refer disputes to litigation (where the agreement provides for arbitration as the default dispute resolution mechanism).
<b>Egypt</b> 	Whilst the Egyptian courts have not examined the validity of unilateral option clauses <i>per se</i> , commentators believe that the Egyptian courts would, absent any ambiguity in the drafting of the clause, hold such clauses to be valid.
<b>England and Wales</b> 	The English courts have held that unilateral option clauses (containing either an option to litigate or arbitrate) are valid in respect of arbitration proceedings seated in England and Wales. Case law suggests that an arbitral award rendered on the basis of a unilateral option clause would also be enforceable in England and Wales.
<b>Equatorial Guinea</b> 	Whilst the courts of Equatorial Guinea have not examined the validity of unilateral option clauses <i>per se</i> , it is believed that these clauses would be upheld on the basis of the principle of sanctity of contract.
<b>Estonia</b> 	Whilst the Estonian courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held valid based on principles of freedom of contract. However, the Estonian courts may have reservations about upholding such a clause if one party were being treated extremely unequally. It is likely that an arbitral award rendered on the basis of a unilateral option clause would also be enforceable in Estonia.
<b>Finland</b> 	Whilst there is little relevant case law, unilateral option clauses are <i>prima facie</i> not prohibited, and are generally upheld in Finland. However, it should be noted that, according to Finnish case law, an arbitration agreement (whether containing a unilateral option clause or not) may be adjusted (in practice, disregarded) if considered unreasonable when assessed as a whole, taking into consideration the parties' position and other circumstances. For example, a unilateral option clause in a consumer contract, giving the non-consumer the right to exercise the option, could be considered unreasonable and therefore set aside.
<b>France</b> 	The French courts have not examined the validity or enforceability of unilateral option clauses. However, in respect of asymmetrical jurisdiction clauses (which provide for the exclusive jurisdiction of particular courts, but also provide one party with the right to take its disputes to any other courts with jurisdiction), they have changed their position a number of times. In recent years, the French courts have refused to give effect to these clauses while justifying their decision on a number of grounds. If these clauses are incorporated, they should be drafted in a precise and narrow manner in order to satisfy a test of certainty and legal foreseeability. In particular, the courts designated in the jurisdiction clause must be identifiable on the basis of objective and precise elements. By extension, similar care should be taken when incorporating and drafting unilateral option clauses.
<b>The Gambia</b> 	Whilst the Gambian courts have not examined unilateral option clauses <i>per se</i> , commentators believe that they are likely to find unilateral option clauses (containing either an option to litigate or arbitrate) valid and binding. There is, therefore, no reason to believe that arbitral awards rendered pursuant to these clauses will not be enforced in the Gambia.
<b>Germany</b> 	The German courts have held that unilateral option clauses are valid unless they violate <i>boni mores</i> (good morals) or represent an "unreasonable disadvantage" (if classifiable as standard contract terms). An unreasonable disadvantage may be found in exceptional cases, for instance, where the option clause enables its beneficiary to circumvent the application of mandatory law such as, for example, German law on unfair contract terms, or in which the jurisdiction of a competent state court could, once validly raised for the matter, then be obstructed.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

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<b>Ghana</b> 	Whilst the Ghanaian courts have not considered the validity of unilateral option clauses, it is thought that they would be held valid. The Ghanaian courts would likely approach the matter on the basis that both parties have accepted the arrangement, so that there is no lack of mutuality. English case law is persuasive authority in Ghana, and a Ghanaian court would likely take note that these clauses are valid in England and Wales. That being said, some commentators in Ghana have suggest that such clauses may not be valid. It is likely that an award rendered pursuant to such a clause would be enforceable in Ghana.
<b>Greece</b> 	The Greek courts have held that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Greece.
<b>Guernsey</b> 	Whilst the courts of Guernsey have not yet examined the validity of a unilateral option clauses <i>per se</i> , it is thought that the courts would uphold such clauses as valid following the approach adopted in England and Wales. Similarly, there is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Guernsey.
<b>Guinea</b> 	Whilst the Guinean courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would hold such clauses to be valid if they reflect the unambiguous agreement reached between professional parties. Similarly, there is a <i>prima facie</i> presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Guinea.
<b>Hashemite Kingdom of Jordan</b> 	The Jordanian Court of Cassation has recognised the existence of a unilateral option clause which allows one party the right to refer a dispute to arbitration. There is nothing to suggest that such clauses would not be upheld by Jordanian courts on the basis that they represent the will of the parties.
<b>Hong Kong</b> 	The Hong Kong courts have held that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Hong Kong.
<b>Hungary</b> 	Whilst the Hungarian courts have not examined the validity of unilateral option clauses <i>per se</i> , and such clauses are not expressly prohibited by Hungarian law, there is a risk that a unilateral option clause may not be considered sufficiently certain and may therefore be found invalid. The unequal bargaining position of the parties to a unilateral option clause is also likely to raise concerns from a Hungarian law perspective.
<b>India</b> 	Whilst the Indian courts have examined the validity of unilateral option clauses, the position remains uncertain. Although a unilateral option to arbitrate may be valid if the parties to a contract expressly agree upon it, a unilateral option to litigate that expressly restricts one party from exercising its rights to obtain any recourse before the Indian courts will, in contrast, be invalid.
<b>Indonesia</b> 	The Indonesian courts have not examined the validity of unilateral option clauses. In Indonesia agreements to arbitrate must be clearly drafted. However, even if a clause is clearly drafted, there is a risk that the Indonesian courts may not recognise the validity of unilateral option clauses, as such clauses might violate the principle of equality. In the same way, there is a risk that the courts of Indonesia may not be willing to uphold an award rendered pursuant to a unilateral option clause, if the clause itself was considered invalid.
<b>Iran</b> 	Whilst the courts of Iran have not explicitly confirmed the validity of unilateral option clauses, available case law suggests that the courts would uphold such clauses, if properly drafted. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Iran.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

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<b>Ireland</b> 	Whilst the Irish courts have not considered the validity of unilateral option clauses, an Irish court would be likely to adopt the position that such clauses are valid. An Irish court would be expected to take this approach on the basis that both parties have accepted the arrangement, so that there is no lack of mutuality. This approach by the court would be subject to any arguments regarding issues such as ambiguity, undue influence or unconscionable bargain. English case law is of persuasive authority in Ireland, and an Irish court should take note that these clauses are valid in England and Wales. The fact that the parties have agreed that disputes might be referred to arbitration (even by unilateral option clause) should constitute a valid and binding arbitration agreement under Irish law. Similarly, it is likely that an award rendered under such a clause would be enforceable in Ireland.
<b>Israel</b> 	The Israel Supreme Court has held that unilateral option clauses are valid on the basis of <i>pacta sunt servanda</i> , and there is no reason to believe that they would not uphold these clauses in the future. Whilst Israeli courts have not examined an arbitral award rendered pursuant to a unilateral option clause, there is no reason to believe that such an award would not be enforced.
<b>Italy</b> 	The Italian courts have held that unilateral option clauses are valid. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Italy.
<b>Japan</b> 	Whilst the Japanese courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would hold such clauses to be valid on the basis that they reflect the agreement reached by the parties.
<b>Jersey</b> 	Whilst the Jersey courts have not, to our knowledge, considered the validity of unilateral option clauses <i>per se</i> , a Jersey court would likely adopt the position that such clauses are valid, provided that they are clearly drafted. This is on the basis that, in Jersey, matters agreed by commercial parties with capacity on reasonable commercial terms should be respected without intervention by the Jersey courts, adopting the principle of " <i>la convention fait la loi des parties</i> ", which has been enshrined in Jersey law for centuries. There are certain limited exceptions to this, such as where enforcing the term is contrary to Jersey public policy or falls foul of a mandatory provision of Jersey law, for example a matter which is expressly required in Jersey law to be done, or adjudicated, in the Jersey courts rather than by way of arbitration.
<b>Kazakhstan</b> 	The Kazakh courts have not examined the validity of unilateral option clauses <i>per se</i> . Even if, for any reason, a court in Kazakhstan invalidated a unilateral arbitration clause, this would not have a binding effect on other courts. Commentators believe that the Kazakh courts may follow the approach taken in Russia. However, in 2011 Article 8 of Kazakhstan's Civil Code was amended to provide that parties are free to dispose of their rights, including the right to protection; therefore, it is possible that a unilateral option clause represents the form of disposal of rights to protection.
<b>Kenya</b> 	The courts of Kenya have not examined the validity of unilateral option clauses <i>per se</i> . However, it is thought that they would be held valid. Kenyan courts generally uphold the sanctity of contracts, as long as a clause reflects the intention of the parties and a contract is freely entered into and is not illegal, immoral or contrary to public policy. Similarly, it is likely that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Kenya.
<b>Latvia</b> 	Although the Latvian courts have not examined the validity of unilateral option clauses <i>per se</i> , it cannot be excluded that Latvian courts would consider unilateral option clauses as being contrary to the principle of equal treatment and therefore invalid and unenforceable. Furthermore, in a consumer context, even clauses that provide both parties with an option to choose between national courts and arbitration, have been considered as unfair by Latvian courts, and as therefore invalid and unenforceable.



# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

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<b>Lebanon</b> 	The courts of Lebanon have not examined the validity of unilateral option clauses. Whilst the Lebanese courts have affirmed the principle of non-interference with arbitral proceedings, it is believed that unilateral option clauses are likely to be found to violate the principles of mutuality as they do not afford parties equal rights. This could result in any arbitral award rendered on the basis of a unilateral option clause being held unenforceable. When considering unilateral option clauses, the courts of Lebanon are likely to be influenced by jurisprudence of the French courts.
<b>Lithuania</b> 	Whilst the Lithuanian courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held valid. The Lithuanian courts have held that a unilateral option clause which contains an exclusive right for one party to refer a dispute to any competent court is valid. The courts have also held that an arbitration clause which grants both parties the option to refer a dispute to a court or arbitration is valid. There is also no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Lithuania.
<b>Luxembourg</b> 	Whilst the Luxembourg courts have not examined the validity of unilateral arbitration option clauses <i>per se</i> , they have previously held unilateral or asymmetric jurisdiction option clauses to be valid. Given that the Luxembourg courts traditionally tend to turn to French case law for guidance, they may now take the view that unilateral option clauses may be invalid if they confer too wide a discretion on one party. Provided the underlying option clause is not held to be invalid for this reason, there is at this stage no reason to believe that an arbitral award rendered pursuant to a unilateral option clause would not be enforceable in Luxembourg.
<b>Madagascar</b> 	The Malagasy courts have not yet examined the validity of unilateral option clauses <i>per se</i> . It is thought that such a clause would be held valid, provided that it was drafted sufficiently clearly to show the parties' consent and was not contrary to the public interest. However, Malagasy courts tend to turn to French jurisprudence for guidance; therefore, the prevailing view of the French courts may influence the decision of a local Malagasy court. There is a <i>prima facie</i> presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Madagascar.
<b>Malaysia</b> 	The Malaysian courts have held that unilateral option clauses (containing an option to arbitrate) are valid in respect of arbitration proceedings seated in Malaysia. There does not appear to be any reason why a unilateral option clause containing an option to litigate would also not be held to be valid. However, the clause must give both parties the option to refer a dispute to some forum, whether that be litigation or arbitration. There is no reason to believe an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Malaysia.
<b>Malta</b> 	Maltese courts have not, to date, examined the validity of a unilateral option clause. However, it is expected that a Maltese court would follow the English law approach in this regard, as judgments from the courts of England and Wales are often referred to for guidance in this area of law. Moreover, such unilateral option clauses are regularly used in legal drafting, particularly in finance documents, even where the governing law is Maltese law and at least one of the jurisdictions chosen is Malta. It is therefore highly likely that a unilateral option clause would be considered as valid and enforceable in Malta. Consequently, it is highly likely that an arbitral award rendered pursuant to a unilateral option clause would be enforceable in Malta, even though the Maltese courts have not yet had the opportunity to examine the issue.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

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<b>Mauritius</b> 	Whilst the Mauritian courts have not examined the validity of unilateral option clauses <i>per se</i> , it is believed that such clauses would be deemed potestative and rendered invalid. However, there is no reason to believe that the enforcement of an arbitral award rendered on the basis of a unilateral option clause would not be possible if the foreign law governing the contract permits such clauses, the more so as such a clause would not offend international public order.
<b>Mexico</b> 	Whilst the Mexican courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held to be valid, provided they were drafted sufficiently clearly. Similarly, there is a <i>prima facie</i> presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Mexico.
<b>Morocco</b> 	The courts of Morocco have not examined the validity of unilateral option clauses, and the validity of such clauses under Moroccan law is uncertain. A Moroccan court may hold that a jurisdiction clause giving only one party, or one group of parties, the choice of jurisdiction is potestative and, as such, the courts may consider such a clause to be ineffective. Significant caution should be exercised if such clauses are intended to be incorporated into agreements. If such clauses are incorporated, they should be drafted in a precise and narrow manner in order to satisfy a test of certainty and legal foreseeability.
<b>Namibia</b> 	Whilst the courts of Namibia have not examined unilateral option clauses <i>per se</i> , it is believed that such clauses would be upheld as valid, binding and enforceable as long as the clause had been agreed to in writing by both parties and drafted in clear, unambiguous language.
<b>Netherlands</b> 	Whilst the courts of the Netherlands have not examined the validity of unilateral option clauses <i>per se</i> , such clauses have previously been upheld. There is, therefore, no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in the Netherlands.
<b>New Zealand</b> 	The High Court of New Zealand has recently (in 2019) upheld a unilateral option clause, citing English authority. It is likely that any award based on an arbitration pursuant to a unilateral option clause will be enforceable under New Zealand law.
<b>Niger</b> 	The Niger courts have not yet considered the validity of unilateral option clauses. However it is likely that the Niger courts would follow the approach taken by the French courts, meaning that there is a significant risk that a unilateral option clause would not be upheld in Niger. Nevertheless, the Niger courts would most likely allow enforcement of an arbitral award rendered on the basis of a unilateral option clause, if it was not contrary to international public policy.
<b>Nigeria</b> 	The Nigerian courts have upheld unilateral option clauses, and there is no reason to believe that they would not uphold these clauses in the future. There is also no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Nigeria.
<b>Norway</b> 	To the best of our knowledge, the Norwegian courts have not examined the validity of unilateral option clauses <i>per se</i> . Absent " <i>special circumstances</i> ", unilateral option clauses will probably be held valid by the Norwegian courts. Special circumstances may arise where there is a significant imbalance between the parties at the conclusion of the contract, or there is an obstructive exercise of the option. Particular emphasis should be placed on drafting a clear and unequivocal unilateral option clause. Similarly, it is anticipated that an arbitral award rendered pursuant to a unilateral option clause would be enforceable in Norway.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

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<b>Pakistan</b> 	Whilst the Pakistani courts have not yet examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would likely be held to be valid on the basis of the principle of <i>pacta sunt servanda</i> , unless such a clause fell within the ambit of Section 28 of the Contract Act 1872. Pursuant to Section 28, any agreement according to which a party is subject either to an absolute restriction from enforcing its rights under such agreement by the usual legal channels or under which the time within which it may thus enforce its rights is limited, is void to that extent. However, the Pakistani courts would nevertheless allow the enforcement in Pakistan of an arbitral award rendered on the basis of a unilateral option clause (in part, in reliance on the approach of the courts in other common law jurisdictions).
<b>The Philippines</b> 	The courts of the Philippines have not examined the validity of unilateral option clauses. The position in the Philippines is therefore uncertain.
<b>Poland</b> 	Polish law expressly prohibits the use of provisions in arbitration agreements which violate the principle of equality of the parties, such as unilateral option clauses. A recent decision of a Polish appellate court deemed a unilateral option clause ineffective. For this reason, it is very likely that the enforcement of an arbitral award rendered on the basis of a unilateral option clause would be refused.
<b>Portugal</b> 	The Portuguese courts have repeatedly held that bilateral option clauses are valid, however the position regarding unilateral option clauses is uncertain. Whilst a few commentators have contended that such clauses are valid, to our knowledge, the courts have not yet examined these clauses. In July 2012, the Lisbon Court of Appeal recognised an award rendered in an arbitration seated in France and based on a unilateral option clause, but the court did not specifically consider the validity of the unilateral option.
<b>Qatar</b> 	Whilst the Qatari courts have not examined the validity of unilateral option clauses <i>per se</i> , the Qatari courts have expressed a preference in favour of the courts rather than arbitration. As stated by the Court of Cassation (in judgment No.164 of 2014), " <i>Arbitration is an exceptional method to resolve disputes</i> ". Nevertheless, the courts of Qatar will decline to accept jurisdiction in case of a clear mandatory arbitration clause. There is, however, no reason to believe that an arbitral award rendered pursuant to a unilateral option clause would not be enforceable in Qatar.
<b>Romania</b> 	<p>Whilst the Romanian courts have not examined the validity of unilateral option clauses <i>per se</i>, it is believed that such clauses would be held to be ineffective. Pursuant to certain provisions of the Romanian Civil Procedure Code, an arbitration clause will be invalid if it provides only one party with the option to choose between arbitration and litigation, with the dispute in question falling to be decided by the Romanian courts by default. Similarly, the enforcement of arbitral awards rendered on the basis of a unilateral option clause may be challenged before the Romanian courts on the same grounds. Arbitration clauses which exclude the jurisdiction of the Romanian courts should therefore be used.</p> <p>However, recent case law considers that bilateral option clauses (which allow both sides to choose whether the disputes should be resolved by either arbitration or litigation) are valid. A plaintiff has the right to choose which forum to bring its claim in, and clauses providing for such choice will be upheld by the Romanian courts.</p>
<b>Russia</b> 	Russian courts commonly consider that unilateral option clauses violate the principle of equal procedural rights. The prevailing view is that unilateral option clauses should be converted into a bilateral option clause, giving both parties (and not only a single party) the option to choose the forum.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

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<b>Rwanda</b> 	Whilst the Rwandan courts have not examined unilateral option clauses <i>per se</i> , it is thought that they would be held valid. The Rwandan Contract Act respects parties' freedom to contract, whilst requiring clear and specific contractual terms. To ensure the best chance of a unilateral option clause being upheld the clause should be drafted in a clear and concise manner.
<b>Saudi Arabia</b> 	Whilst the courts of Saudi Arabia have not (to our knowledge) examined the validity of unilateral option clauses which purport to give only one party the right to choose a forum, such clauses are unlikely to be upheld on grounds of unfairness.
<b>Senegal</b> 	Whilst the courts of Senegal have not yet examined unilateral option clauses <i>per se</i> , they may follow the jurisprudence of the French courts and hold such a clause invalid. However, the courts of Senegal do not always follow the approach of the French courts.
<b>Singapore</b> 	The Singapore Court of Appeal has confirmed the validity of a unilateral option clause which conferred a right enjoyed by only one party to the agreement to elect whether to arbitrate a future dispute. The decision can be interpreted as a broad endorsement of the validity of the most frequently used variations of "one-sided" dispute resolution clauses.
<b>Slovakia</b> 	The Slovakian courts have not excluded the validity of unilateral option clauses in a commercial context <i>per se</i> ; however, in a consumer context it is believed that the courts are likely to take a negative view of dispute resolution clauses which are restrictive to one party.
<b>Slovenia</b> 	The Slovenian courts have not yet examined the validity of unilateral option clauses. The position in Slovenia is therefore uncertain.
<b>South Africa</b> 	Whilst the South African courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held to be valid, provided that the contract in question was freely entered into and not illegal, immoral or contrary to public interest – following the principle of <i>pacta sunt servanda</i> . Similarly, there is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in South Africa.
<b>South Korea</b> 	Whilst the Korean courts have examined unilateral option clauses, the position remains uncertain. In a number of cases decided between 2002 and 2004, lower courts held that option clauses were valid and enforceable. However, in a more recent series of decisions dealing with a particular group of option clauses appearing in contracts to which the Korean government or a Korean state entity was party, the Supreme Court has held that the option clauses at issue were unenforceable as arbitration agreements in the absence of a waiver of objections to arbitral jurisdiction or implied consent to arbitrate.
<b>Spain</b> 	The Spanish courts have held that bilateral option clauses are valid. However, unilateral option clauses have not been directly examined so the position is uncertain. In principle, there is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Spain, but it is a topic that is yet to be decided by the Spanish courts.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

	Generally no issues		Issues unlikely		Position uncertain		Potential issues		Issues likely
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<b>Sudan</b> 	Although the Sudanese courts have not examined the validity of unilateral option clauses <i>per se</i> , there is no reason to believe that they would be held invalid, based on the freedom of contracting, provided they are carefully drafted, absent any ambiguity.
<b>Sweden</b> 	Whilst the Swedish courts have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would hold such clauses to be valid. The limited exception to this would be if such a clause could be shown to be unconscionable or unreasonable (most likely to occur in a consumer context), in which case such a clause could be set aside. There is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Sweden.
<b>Switzerland</b> 	Whilst there is little relevant case law, it is generally accepted that unilateral option clauses are valid, at least in a commercial context with parties of equal bargaining strength. Unilateral option clauses may be more difficult to accept in the context of consumer or employment disputes where parties have unequal bargaining power. Similarly, we believe that awards rendered on the basis of unilateral option clauses are enforceable in Switzerland in a commercial context.
<b>Tanzania</b> 	Whilst the courts of Tanzania have not examined unilateral option clauses <i>per se</i> , it is believed that they would be upheld as valid and enforceable provided they were drafted in a sufficiently clear manner by parties of equal bargaining power. In transactions where parties are not at arm's length, the likely position is less clear.
<b>Thailand</b> 	Although the Thai courts have not directly declared that unilateral option clauses are valid, they have analysed the validity of unilateral option clauses on several occasions and implied an acceptance of their validity. Moreover, an arbitration clause where one party has a unilateral option to either litigate or arbitrate is not prohibited under the Thai Arbitration Act. The Thai courts have also affirmed the enforceability of an arbitral award rendered pursuant to a unilateral option clause. It is important to note that exclusive jurisdiction clauses are ineffective in litigation in Thailand, as Thai courts can always accept jurisdiction to the extent permitted by Thai laws.
<b>Togo</b> 	The courts in Togo have not examined the validity of the unilateral option clauses (to our knowledge). However, if the clause has been agreed with the parties' mutual consent, it is anticipated that the courts will uphold such a clause. That being said, such a clause may raise questions as to the need for equal treatment of the parties. However, on balance, it is expected that the Togolese courts would uphold an arbitral award rendered on the basis of a unilateral option clause.
<b>Tunisia</b> 	Whilst the Tunisian courts have not examined unilateral option clauses <i>per se</i> , it is thought that they may enforce unilateral option clauses, since contractual agreements made between two parties are strictly enforced.
<b>Turkey</b> 	In Turkey, choice of arbitration must be in written form and expressly stated. A choice of arbitration that co-exists with a submission to a court or other dispute settlement method would be considered null and void. In this respect, 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, would not be upheld by Turkish courts.
<b>Uganda</b> 	Whilst the Ugandan courts have not examined the validity of unilateral option clauses <i>per se</i> , there is no reason to believe that they would be invalid, provided the clause reflected the intention of the parties. There is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Uganda.

# UNILATERAL OPTION CLAUSES

## JURISDICTION BY JURISDICTION

### Key

	Generally no issues		Issues unlikely		Position uncertain		Potential issues		Issues likely
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<b>Ukraine</b> 	The Ukrainian courts have analysed the validity of unilateral option clauses on several occasions, and the courts have consistently held that such clauses are compatible with parties' freedom to select the manner in which to protect their rights as provided by the Ukrainian Constitution. There is, however, a remote risk that a Ukrainian court could find, in specific circumstances, that such a clause breaches Ukrainian public policy (if it can be said to breach principles of equality and fair treatment).
<b>United Arab Emirates</b> 	Whilst the courts of the United Arab Emirates have not (to our knowledge) examined the validity of unilateral option clauses, there is a risk (particularly with respect to clauses granting one party the option to refer disputes to arbitration) that they might not be upheld on the basis that they are contrary to public policy and/or the obligation of good faith.
<b>USA</b> 	Courts in the United States do not take a uniform approach to the validity of unilateral option clauses. Many courts have upheld unilateral option clauses as valid, including on grounds that the clause is not so one-sided as to be unconscionable. However, other courts have held unilateral option clauses invalid (in particular, in domestic disputes involving consumers or employees) on grounds of unconscionability and/or lack of mutuality (i.e. the requirement that there be mutuality of remedy among the parties).
<b>Vietnam</b> 	Whilst the Vietnamese courts have not examined the validity of unilateral option clauses <i>per se</i> , they will recognise the validity of bilateral option clauses, as well as the validity of unilateral option clauses which provide a consumer with the unilateral option to take a dispute to arbitration under Article 17 of the 2010 Law on Commercial Arbitration of Vietnam. The validity of clauses providing a unilateral option to non-consumers is unpredictable and might violate the principle of equality under Article 3.1 of the 2015 Civil Code of Vietnam.
<b>Zambia</b> 	Whilst the courts of Zambia have not examined the validity of unilateral option clauses <i>per se</i> , it is thought that they would be held to be valid based on the principle that competent parties should be afforded the opportunity to contract freely. The courts in Zambia would also be guided by principles of English law.
<b>Zimbabwe</b> 	Whilst the Zimbabwean courts have not examined the validity of unilateral option clauses, they recognise the sanctity of contracts (when parties contract freely). It is therefore likely that Zimbabwean courts would uphold unilateral option clauses. The Zimbabwe Arbitration Act (Chapter 7:15) does not consider the enforcement of a unilateral option clause as a ground for invalidating an arbitral award; therefore, there is no reason to believe that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Zimbabwe.



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1

FOCUS ON  
SPECIFIC  
JURISDICTIONS  
(PAGES 6-11)

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2

HEAT MAP  
(PAGE 13)

---

3

FULL SURVEY  
(PAGES 15-26)

---

4

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(PAGES 28-30)

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5

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(PAGES 32-33)

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1

FOCUS ON  
SPECIFIC  
JURISDICTIONS  
(PAGES 6-11)

---

2

HEAT MAP  
(PAGE 13)

---

3

FULL SURVEY  
(PAGES 15-26)

---

4

CONTRIBUTORS  
(PAGES 28-30)

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5

GLOBAL  
ARBITRATION TEAM  
(PAGES 32-33)

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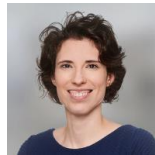
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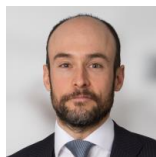
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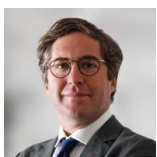
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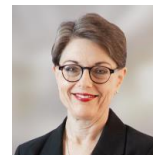
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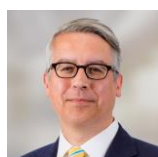
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1. Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

2. Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

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