ARBITRATION & ADR - UNITED KINGDOM

Unilateral option clauses – what about Brexit?

March 23 2017 | Contributed by Clifford Chance LLP

AUTHORS

Marie Berard

Anna Kirkpatrick

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 – known as 'unilateral option clauses' – are a common feature in many transaction documents. In light of the result of the United Kingdom's June 23 2016 referendum on membership of the European Union, it is worth considering whether unilateral option clauses remain fit for purpose.

Unilateral option clauses

Unilateral option clauses (also known as 'one-sided' or 'asymmetric' clauses) provide for one method of dispute resolution, but also give one party only the right to elect to refer a particular dispute to another dispute resolution forum. This update focuses on clauses which provide for arbitration as the default dispute resolution mechanism, but which give one party only the right to bring the dispute to the national courts instead.

The choice is made once the dispute has arisen. Once it is known where the assets are located and the nature of the dispute, it is possible to make an informed decision about which method of dispute resolution is the most suitable.

Such clauses are a common feature in many international transaction documents and often feature in finance documents where the negotiating power to suggest provisions that favour one party only usually lies with the finance parties (and not the borrowers).

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 EU Regulation 44/2001 (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 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 effectiveness of such clauses in EU member states was called into question by the decision in *Mme X v Société Banque Privé Edmond de Rothschild* (September 26 2012). In this case, the French Court of Cassation ruled that asymmetric clauses could not qualify as valid jurisdiction clauses under Article 23 of the Brussels I Regulation. This was on the basis that the clauses were one-sided in nature. Though the judgment is not binding outside France, given that it concerned the Brussels I Regulation, it cast doubt on the effective of unilateral clauses in all EU member states.

Until recently, the point had not been directly considered by the English court. In *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm), Justice Cranston confirmed that unilateral clauses are valid under the EU Brussels (Recast) Regulation 1215/2012 (the successor to

Brussels I). The judge gave short shrift to arguments to the contrary.

This confirms that the attitude of the English courts has always been 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 UK referendum on EU membership 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 European Union for now – but it seems likely that the United Kingdom will leaving at some time in or after March 2019.

Leaving the European Union will not affect international arbitration in the United Kingdom in any significant way or the approach of the English courts to one-sided dispute resolution provisions. However, the European jurisdiction regime as set out in the Brussels (Recast) Regulation will probably cease to apply in the English courts. Uncertainty remains 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 or something else altogether? This uncertainty may be relevant if it is important that any court judgment or arbitral award be readily enforceable throughout the European Union (although cross-border enforcement of judgments remains rare in practice).

If, for example, no substitute for the European regime is agreed, it is likely that an English court judgment will still be capable of enforcement in many EU member states (although this must be assessed on a state-by-state basis); but enforcement may not be as quick or easy as intended under the European regime. If rapid enforcement throughout the European Union is important, arbitration – or at least the option of arbitration – may become an even more attractive alternative, because the United Kingdom and EU member states will all remain parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides for the mutual enforcement of arbitral awards. Unilateral option clauses can help to preserve this flexibility.

For further information on this topic please contact Marie Berard or Anna Kirkpatrick at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or anna.kirkpatrick@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.
