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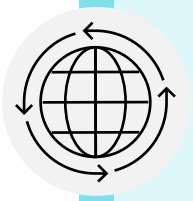
UNILATERAL OPTION CLAUSES SURVEY – 2024

WELCOME TO THE 2024 EDITION OF THE CLIFFORD CHANCE UNILATERAL OPTION CLAUSES SURVEY

Clifford Chance has updated and expanded its 2021 Survey on the current effectiveness of unilateral option clauses across the world.



The Survey now covers

120

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 November 2024.

We take this opportunity to thank our friends and colleagues at Clifford Chance and at other firms for their contributions. They are listed on pages 42 to 44.

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 each jurisdiction.

Before setting out the results of the 120 jurisdictions, some of our international arbitration colleagues take a closer look at the position across seven jurisdictions: England & Wales, the People's Republic of China, France, Germany, Singapore, the United Arab Emirates and the United States of America.

This survey was produced to reflect the position as at 1 November 2024. It does not seek to cover every aspect of the topics with which it deals.

In August 2024, the French Supreme Court referred several questions to the CJEU in respect of the validity of asymmetrical jurisdiction clauses. While this is not the subject matter of this Survey, this decision may have implications for the validity of unilateral option clauses which would impact all EU Member States.

UNILATERAL OPTION CLAUSES SURVEY – 2024

WHAT ARE UNILATERAL OPTION CLAUSES?

1 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

2 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 which are connected with a jurisdiction that considers them to be invalid can be severe.

These can range from the clauses 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.

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Special thanks to Nichol Yesuthasan, Caitlin Maxwell and Chloe Hanmore, as well as Louise Fernando and Sabiha Wahid for their valuable contributions.

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ENGLAND & WALES

THE ENGLISH COURTS HAVE A WELL-ESTABLISHED POSITION UPHOLDING UNILATERAL OPTION CLAUSES, CONSISTENTLY FAVOURING CONTRACTUAL AUTONOMY.

The English courts consistently uphold unilateral option clauses giving only one party the right to take a dispute to arbitration. The courts will also protect a party's right to exercise the option through a stay of proceedings if necessary. Recently, the English High Court reaffirmed that parties with the benefit of a unilateral option clause need only make an "*unequivocal statement*" requiring the other to arbitrate. This statement alone is sufficient, without needing to initiate further procedural steps – such as commencing the arbitration itself – to exercise the option.

- The courts upheld the validity of unilateral option clauses in *Aiteo Eastern E&P Company Limited v Shell Western Supply & Trading*[1]. In dismissing a jurisdictional challenge to two awards under section 67 of the Arbitration Act 1996, the High Court found that a party had successfully exercised its unilateral option to arbitrate by actively challenging the jurisdiction of national courts in favour of arbitration. The Court confirmed that the only requirement for an election to arbitrate to be effective was the making of an "*unequivocal statement*" by one party requiring the other to arbitrate the identified dispute; such a statement could be made by serving a request for arbitration, seeking a stay or through some other communication. Consequently, the jurisdictional challenges under section 67 were dismissed.

- In *NB Three Shipping v Harebell Shipping Ltd* [2], 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*[3], 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 may 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.

[1] [2022] EWHC 2912 (Comm)
[2] [2004] EWHC 2001 (Comm)
[3] [2005] EWHC 1412 (Ch)

ENGLAND & WALES

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*[4] 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*[5], which involved a personal guarantee for 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 clause providing for the option to litigate 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 ruled that the clause permitted the Claimant to bring proceedings in any jurisdiction, including England.
- It is clear that the English courts favour contractual autonomy. The Court of Appeal in *Etihad Airways PJSC v Flöther*[6] 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.
- Most recently, the High Court in *Barclays Bank PLC v PJSC Sovcombank & Anor*[7] granted anti-suit and anti-enforcement injunctions preventing the respondents from pursuing proceedings in the Russian courts in contravention of an asymmetric jurisdiction clause in the underlying facility agreement. The clause granted the English court exclusive jurisdiction in relation to any action brought by the respondents (Sovcombank). This case demonstrates the English courts' willingness to grant injunctive relief in order to protect the effect of asymmetric jurisdiction clauses.

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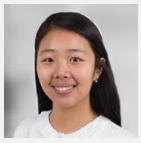

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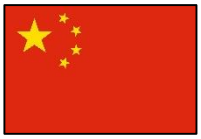
[4] [2013] EWHC 1328 (Comm)
[5] [2019] EWHC 3475 (Ch)
[6] [2020] EWCA Civ 1707
[7] [2024] EWHC 1338 (Comm)

PEOPLE'S REPUBLIC OF CHINA



THE CHINESE COURTS DO NOT HAVE A CONSISTENT APPROACH TO THE VALIDITY OF UNILATERAL OPTION CLAUSES. SUCH CLAUSES MAY BE INVALIDATED IF FOUND TO LACK THE REQUISITE CONSENSUS TO ARBITRATE.

The Chinese courts have not adopted a consistent approach to the validity of unilateral option clauses. There is some risk that such clauses would be held to be 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.

Under the law of the People's Republic of China ("PRC"), there is no express statutory prohibition against unilateral option clauses *per se*. That said, in practice, the Chinese courts have not adopted a consistent approach to the validity of unilateral option clauses. The approach taken by Chinese courts has been either to (i) uphold the validity of unilateral option clauses; or (ii) partially invalidate the arbitration agreement contained in the clause. Each approach is discussed below.

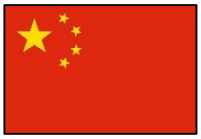
- **Upholding the validity of unilateral option clauses**. In the case *(2016) Hu 01 Min Zhong No. 3337*[1], the dispute resolution clause in question provided that the seller may choose to submit disputes either to the courts in Zug, Switzerland or to the ICC arbitration seated in Zug, Switzerland. The Shanghai Court identified this clause as a unilateral option clause and upheld it as valid.

- **Partially invalidating the arbitration agreements contained in unilateral option clauses**. In the case *(2016) Jing 02 Min Te No.*93[2], the dispute resolution clause in question provided that the parties (the guarantors and the creditor) agreed to submit all disputes to CIETAC arbitration seated in Shanghai, without prejudice to the creditor's rights to commence legal proceedings before any other competent dispute resolution institution. The Beijing Court held that the arbitration agreement amounted to an "arbitration or litigation clause" (*i.e.* where a dispute may be submitted to an arbitral institution for arbitration or to a competent court for litigation). Such clauses are invalid under PRC law as they lack the requisite clear consensus between the parties to resolve disputes by arbitration, as they confer conflicting jurisdiction over the same dispute to both arbitration and litigation.

  In the case *(2020) Qiong Min Xia No. 2*[3], a similar arbitration clause was held to be invalid.

[1] Civil ruling rendered by Shanghai No.1 Intermediate People's Court on 14 April 2016
[2] Civil ruling rendered by Beijing No.2 Intermediate People's Court on 29 June 2016
[3] Civil ruling rendered by Hainan Province High People's Court on 2 March 2020

PEOPLE'S REPUBLIC OF CHINA



Recent Developments: The 2022 Beijing Financial Court Ruling

Against this background, a recent decision in the case *(2022) Jing 74 Min Te No. 4*[4] which upheld the validity of unilateral option clauses has attracted widespread attention among arbitration practitioners in the PRC.

This case arose out of a Pledge Agreement, which provided, *inter alia*, that:

> *23. Dispute Resolution*
>
> *23.1 Unless the Pledgee chooses otherwise, any dispute […] shall be referred to and finally resolved by arbitration administered by the China International Economic and Trade Arbitration Commission (CIETAC) under the CIETAC Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Beijing. […]*
>
> *23.2 Despite Clause 23.1, if the Pledgee chooses, the parties will submit to the non-exclusive jurisdiction of the courts of Cambodia.*

The Court upheld the validity of the unilateral option clause and also provided detailed reasoning for its decision (which is uncommon):

- The clause satisfied the requirements of a valid arbitration agreement under the PRC Arbitration Law, namely: (i) a clear expression of intention to arbitrate; (ii) the subject matter to be submitted to arbitration; and (iii) a designated arbitration institution.
- The clause differed from the so-called "arbitration or litigation clauses" discussed above. In this case, the clause in question did not result in conflicting jurisdiction as the Pledgee's choice between arbitration and litigation crystallised jurisdiction at the time of its election between CIETAC arbitration or litigation before Cambodian courts. Here, the Pledgee had commenced arbitration at CIETAC and thereby expressly waived its right to commence litigation. In such circumstances, the parties' intention to resolve the disputes by arbitration is definite and exclusive, avoiding the issues typically associated with "arbitration or litigation clauses".
- The clause resulted from the parties' negotiation, and it was not manifestly unfair with regard to the rights and obligations of the parties. Therefore, party autonomy should be respected.

This case, and its detailed reasoning, reflects a pro-arbitration approach in the PRC and has been welcomed by the PRC's arbitration practitioners. However, since the PRC does not follow the common law doctrine of *stare decisis*, this case may not be regarded as establishing a uniform precedent for all PRC courts. The risk remains that other PRC courts may still invalidate unilateral option clauses.

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[4] Civil ruling rendered by Beijing Financial Court on 31 October 2022

FRANCE

THE FRENCH COURTS' STANCE ON THE VALIDITY OF UNILATERAL OPTION CLAUSES REMAINS UNCERTAIN. CAUTION SHOULD BE EXERCISED WHEN DRAFTING SUCH 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 disrupt 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 specifically ruled on the validity or enforceability of such clauses. The recent referral by the French Supreme Court of preliminary questions regarding the validity of asymmetrical jurisdiction clauses (*i.e.* those which provide for the exclusive jurisdiction of specific courts, but allow one party the option to bring a dispute in any other courts with jurisdiction) to the Court of Justice of the European Union (CJEU) might clarify the criteria by which to assess the validity of such clauses. However, the solution that the CJEU will provide may be confined to the Brussels Regulation Recast – which does not apply to arbitration – and asymmetrical jurisdiction clauses, potentially leaving the issues raised by unilateral option clauses unresolved. In light of this uncertainty, parties should continue to exercise caution when drafting dispute-resolution provisions.

Before turning to recent case law, it is worth recalling the landmark 2012 case of *Ms. X v. Banque Privée Edmond de Rothschild*.[1] In this case, the French Cour de Cassation invalidated a jurisdiction agreement that granted exclusive authority to Luxembourg courts while allowing the bank the unilateral option to initiate proceedings in the courts of the borrower's residence or any other competent court. The court determined that this clause was "potestative", rendering it null and void under French law because it made the outcome dependent upon an event in the control of only one of the parties.

[1] 26 September 2012; 11-26.022

FRANCE

Recent developments in French jurisprudence since the *Rothschild* decision in 2012 include:

- In a May 2017 decision (*Diemme Enologia v. Établissement Chambon et Fils*[2]), the French Supreme Court overturned a decision of the Paris Court of Appeal, which had declared an asymmetrical jurisdiction clause null and void on the grounds that it was "potestative". The clause (i) designated the Court of Appeal of Ravenna as having exclusive jurisdiction, but (ii) offered the beneficiary of the clause the right to seize any competent court "*in accordance with the rules of procedural law*". Consistent with *Rothschild*, the Court's decision was guided by considerations regarding the common intention of the parties to include an asymmetrical jurisdiction clause in their contract and it did not matter that only one party was bound to litigate before the designated jurisdiction.
- In an April 2023 decision (*Societa Italiana Lastre SPA v. Société Agora*[3]), the French Supreme Court suspended the proceedings in order to refer several questions to the CJEU regarding the validity of an asymmetrical jurisdiction clause. The clause (i) designated the Court of Brescia as having exclusive jurisdiction but (ii) allowed the beneficiary of the option the right to proceed before *any* other competent court in Italy or abroad.
- In August 2023, the French Supreme Court referred the following questions to the CJEU:
  - Is the question of validity of an asymmetric jurisdiction clause to be determined by reference to the national law of the Member State court chosen in accordance with Article 25(1) of the Brussels Regulation Recast?
  - If Article 25(1) applies, would an asymmetric clause permitting one party only to seize any competent court be enforceable?
  - If the question is one of substantive validity, how is Article 25(1) to be interpreted? Which chosen Member State law should be applied, when multiple jurisdictions are designated by the clause at the option of one party?

As at the time of publication, the CJEU decision remains awaited. The CJEU's decision interpretating the Brussels Regulation Recast will be binding on the Member States as regards asymmetrical jurisdiction clauses. As indicated above, once rendered, this decision might provide guidance regarding asymmetrical jurisdiction clauses, but may leave a number of questions regarding the validity and enforceability of clauses offering an option between litigation and arbitration. 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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[2] 11 May 2017, 15-18.758
[3] 13 April 2023, 22-12.965

GERMANY

THE GERMAN COURTS RESPECT PARTY AUTONOMY BUT CAUTION SHOULD BE EXERCISED WHEN UNILATERAL OPTION CLAUSES ARE INCLUDED IN 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 (with potential restrictions discussed only at an academic level). Subject to the discussion below, the only limits to party autonomy in this respect are *boni mores*, *i.e.* 'good morals' (Section 138 of the German Civil Code), or domestic public policy reasons (Section 1059 of the German Civil Procedure Code).

There is only very limited 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[1].

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' drafted and provided by a respondent (who has the right to exercise the unilateral option). In one case, the BGH found a unilateral option clause to be invalid as it placed the claimant at a disadvantage due to the following risk of abuse: if the claimant initiated 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. Consequently, the claimant would have to bear the costs of the arbitration and initiate litigation proceedings instead – leading to wasted time and costs. The reverse scenario is also possible: where the claimant initiates litigation proceedings and the respondent objects to the jurisdiction of the ordinary courts by opting for arbitration instead. The BGH identified this risk of abuse and concluded that the only way to protect the claimant was to declare the clause invalid[2].

[1] BGH, 10.10.1991 - III ZR 141/90

[2] BGH, 24.09.1998 - III ZR 133/97

GERMANY

In the same case, however, the BGH also explained how a unilateral option clause in favour of a respondent can be designed so that it remains valid even if it qualifies as a 'standard business term'. The BGH ruled that a unilateral option clause remains valid where the risk of abuse is eliminated by granting a claimant the right to set a deadline for a respondent to exercise the option (such that a claimant has clarity before bringing an action). As previously stated, the reasoning of the BGH's decision in 1991[3] 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 analysis would be even more applicable to standard business terms vis-à-vis consumers, given the existence of high consumer protection standards. In fact, the BGH decision dealt with such a scenario.

Therefore, the prevailing view amongst German legal commentators and in German case law is that unilateral option clauses in both scenarios, *i.e.* in favour of both claimants and respondents, are permissible. However, in cases where a unilateral option clause constitutes a standard business term, the requirements for the exercise of such asymmetric clauses by respondents are considerably stricter than the general principles of *boni mores* or public policy.

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[3] 24.09.1998 - III ZR 133/97

SINGAPORE

THE SINGAPORE COURT OF APPEAL HAS EXPRESSLY UPHELD THE USE OF UNILATERAL OPTION CLAUSES.

In *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*[1], the Singapore Court of Appeal affirmed that Singapore courts will enforce a dispute resolution clause that grants only one party the right to initiate arbitration.

The dispute arose from a contract for the provision of specialised engineering services, which included a dispute resolution clause stating that:

> *"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."*

This clause effectively allowed only Dyna-Jet, and not Wilson Taylor, to refer disputes to arbitration in Singapore. Despite this, Dyna-Jet initiated court proceedings in the Singapore High Court, and in response, Wilson Taylor sought a permanent stay of these court proceedings, aiming to compel Dyna-Jet to opt for arbitration instead.

The Court of Appeal concurred with the High Court, affirming that the clause was valid and binding in principle. The Court highlighted two key features of the clause: (a) it allowed only one party to compel arbitration (referred to as the "*lack of mutuality*" characteristic); and (b) it made arbitration optional rather than obligatory (referred to as the "optionality" characteristic). Acknowledging the "*weight of modern Commonwealth authority*", the Court concluded that neither characteristic invalidated the arbitration agreement.

Furthermore, the Court of Appeal held that the dispute did not fall within the clause's scope; this was because the optionality of the clause inherently meant that an obligation to arbitrate would arise "*only if and when [Dyna-Jet] elected to arbitrate a specific dispute in the future*". Since Dyna-Jet had chosen to initiate court proceedings instead of electing for arbitration, the Court denied Wilson Taylor's application for a stay.

[1] [2017] SGCA 32

SINGAPORE

While the Court of Appeal did not explicitly address arbitration agreements that mandate arbitration but allow an option for litigation, the Court's reasoning, along with the High Court's non-differentiation between unilateral arbitration options and other "*asymmetric*" dispute resolution agreements, suggests a broad endorsement of the validity of various 'one-sided' dispute resolution clauses.

The decision in *Wilson Taylor v Dyna-Jet* has since been followed in *Ling Kong Henry v Tanglin Club*[2], where the High Court stressed that "*[i]f the clause seeks to avoid dispute resolution in a court setting by ultimately having a matter proceed to arbitration, this intention ought to be upheld. The object is to give full effect to parties' agreement*".

More recently, *Wilson Taylor v Dyna-Jet* was considered by the General Division of the High Court in *Cheung Teck Cheong Richard and others v LVND Investments Pte Ltd*[3]. While *Wilson Taylor v Dyna-Jet* was ultimately distinguished on the facts of the case, the Court nevertheless observed that clauses such as those as in *Wilson Taylor v Dyna-Jet* "*showed that the parties agreed that, once the right to elect to refer the dispute to arbitration is exercised, the parties are bound to submit the dispute to arbitration. The agreement to refer disputes arising from the contract to arbitration, once the relevant party has elected to do so, is clear and unqualified*".

In light of the above, it is likely that a unilateral option clause will be upheld by the Singapore courts, provided that it evinces an objectively-ascertained intention by the parties to resolve disputes in accordance with the resolution mechanisms prescribed within the relevant clause.

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[2] [2018] SGHC 153
[3] [2021] SGHC 28

UAE

THE UAE COURTS' APPROACH CASTS DOUBT ON THE VALIDITY OF UNILATERAL OPTION CLAUSES. CAUTION SHOULD BE EXERCISED WHEN DRAFTING SUCH CLAUSES.

There are very few examples of the onshore UAE Courts considering the enforceability of unilateral option clauses. While the courts of the Abu Dhabi Global Market (ADGM) and Dubai International Financial Centre (DIFC) freezones appear to have accepted the enforceability of unilateral option clauses, there is a considerable risk that they may not be enforced by the onshore UAE Courts.

In a Dubai Court of Cassation decision on 29 October 2024 (Commercial Appeal No. 735 of 2024), a clause providing one party with the power to decide whether disputes were referred to arbitration or litigation was found to be unenforceable.

The dispute arose out of contracts between a contractor and a subcontractor, which included the following dispute resolution clause: "*In the event of a dispute arising from the interpretation or implementation of any of the provisions of this agreement, this dispute shall be settled by mutual agreement between the parties. In the absence of such agreement, the dispute shall be referred either to (a) arbitration in the Dubai Chamber of Commerce or (b) the local court in the UAE, at the discretion of the Contractor*".

The Court specified that an arbitration clause must be clear, explicit and unambiguous to be binding. It found that the clause at hand, which provided the contractor alone with the option to choose the dispute resolution method, did not meet such criteria. The Court also noted that parties to a contract need to mutually agree, unequivocally, to refer disputes to arbitration.

While the judgment does not expressly state that unilateral option clauses of any sort will not be upheld by the onshore UAE Courts, the judgment seems to suggest that the onshore UAE Courts are likely to be less receptive to unilateral option clauses and may find such clauses to be invalid on the basis that they create an imbalance of interests and have the potential to violate the principle of equality between contracting parties. Additionally, the onshore UAE Courts may also invoke principles of public policy and good faith when assessing the validity of such clauses, placing a higher threshold on parties seeking to enforce these.

In contrast, last year, the Dubai Court of Cassation had found that an agreement to litigate disputes can be validly combined with a clause giving one or more parties the right to elect for court proceedings before a local court or arbitration, suggesting a potentially welcoming view towards unilateral option clauses (Commercial Appeal No. 179 of 2023).

Given these differing approaches, it remains unclear how the onshore UAE Courts will interpret the wording of a unilateral option clause. The clause in the 2024 judgment simply recorded two alternatives to be selected by the contractor. It is not entirely certain whether a clause purporting to present arbitration as having been agreed between the parties, subject only to an election by the contractor to refer a relevant dispute to the onshore UAE Courts, would satisfy the Court's requirement for a clear agreement to arbitrate. While the courts of the ADGM and DIFC freezones appear to have accepted the enforceability of unilateral option clauses, pending any further decisions by the onshore UAE Courts on this matter, parties should be cautious about introducing unilateral option clauses in contracts with UAE counterparties given that there is a considerable risk that they may not be enforced.

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USA

THE US COURTS DO NOT ADOPT A UNIFORM APPROACH TO THE VALIDITY OF UNILATERAL OPTION CLAUSES. SOME STATES MAY INVALIDATE SUCH CLAUSES ON GROUNDS OF UNCONSCIONABILITY.

In the US, it is the law of each individual state, rather than federal law, that governs the enforceability of arbitration clauses in contracts.

As such, courts in the US do not take a uniform approach to the validity of unilateral option clauses. Many courts have upheld such clauses as valid. However, others have held them to be 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).

The idea that contracting requires "mutuality of obligation" is an important consideration. As such, in early cases, unilateral option clauses were scrutinised for lacking such mutuality.[1]

However, in later decisions, courts have moved away from requiring mutuality for arbitration clauses. For example, in *Sablosky v. Edward S. Gordon Co.*[2], the New York State Court of Appeals held that "*mutuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement. . . Since . . . the validity of an arbitration agreement is to be determined by the law applicable to contracts generally . . . there is no reason for a different mutuality rule in arbitration cases*."

The recent trend of both state and federal US courts is therefore to uphold unilateral option clauses. For example, in *THI of New Mexico at Hobbs Ct. LLC v. Patton*[3], the United States Court of Appeals for the Tenth Circuit rejected the idea that lack of mutuality may render an asymmetric arbitration provision unconscionable and upheld the arbitration clause. There, in a wrongful death action brought by the estate of a deceased nursing home resident against the nursing home, the agreement at issue permitted the nursing home to litigate its most likely claims against residents (such as guardianship, collection, and eviction claims), but required arbitration for most likely claims against the nursing home (such as personal injury claims). The court upheld the arbitration clause, reasoning that "*the only way the arrangement [could] be deemed unfair or unconscionable [was] by assuming the inferiority of arbitration to litigation*", which was not the case.

[1] See *Deutsch v. Long Island Carpet Cleaning Co.*, 158 N.Y.S.2d 876 (N.Y. 1956)
[2] 535 N.E.2d 643, 646 (N.Y. 1989)
[3] 741 f.3d 1162m 1179 (10th Cir. 2014)

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Similarly, in *Price v. Taylor*[4], the United States District Court for the Northern District of Ohio noted that "*a valid arbitration clause does not fail for lack of mutuality, as long as consideration supports the contract*". In *Price*, a borrower brought action against a lender alleging that she was illegally extended a loan she could not afford to pay in violation of the Fair Housing Act. The court found that mutuality was not required and the lender was entitled to arbitrate the claims against it.

That is not to say that no circumstances could exist under which such a clause would be deemed unenforceable. Indeed, certain courts have struck down unilateral option clauses on grounds of unconscionability. Cases invoking the doctrine of unconscionability typically involve situations where the weaker party has a unilateral obligation to submit to arbitration while the more powerful party (often the drafter of the contract) has a unilateral option to resort to the courts for resolution of the dispute. In consumer law and employment transactions, some US courts – in particular, those in California – have applied a more stringent test, requiring that the unilateral option clause satisfies the substantive element of unconscionability.

One of those elements is that such clause has "*at least some reasonable justification based on business realities*". For example, in *Armendariz v. Found. Health Psychcare Servs. Inc.*[5], the Supreme Court held that: "*it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification (...) based on 'business realities*'". The court found that a "modicum of bilaterality" is required in an arbitration agreement.

CONTRIBUTORS

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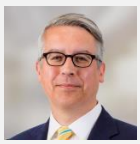

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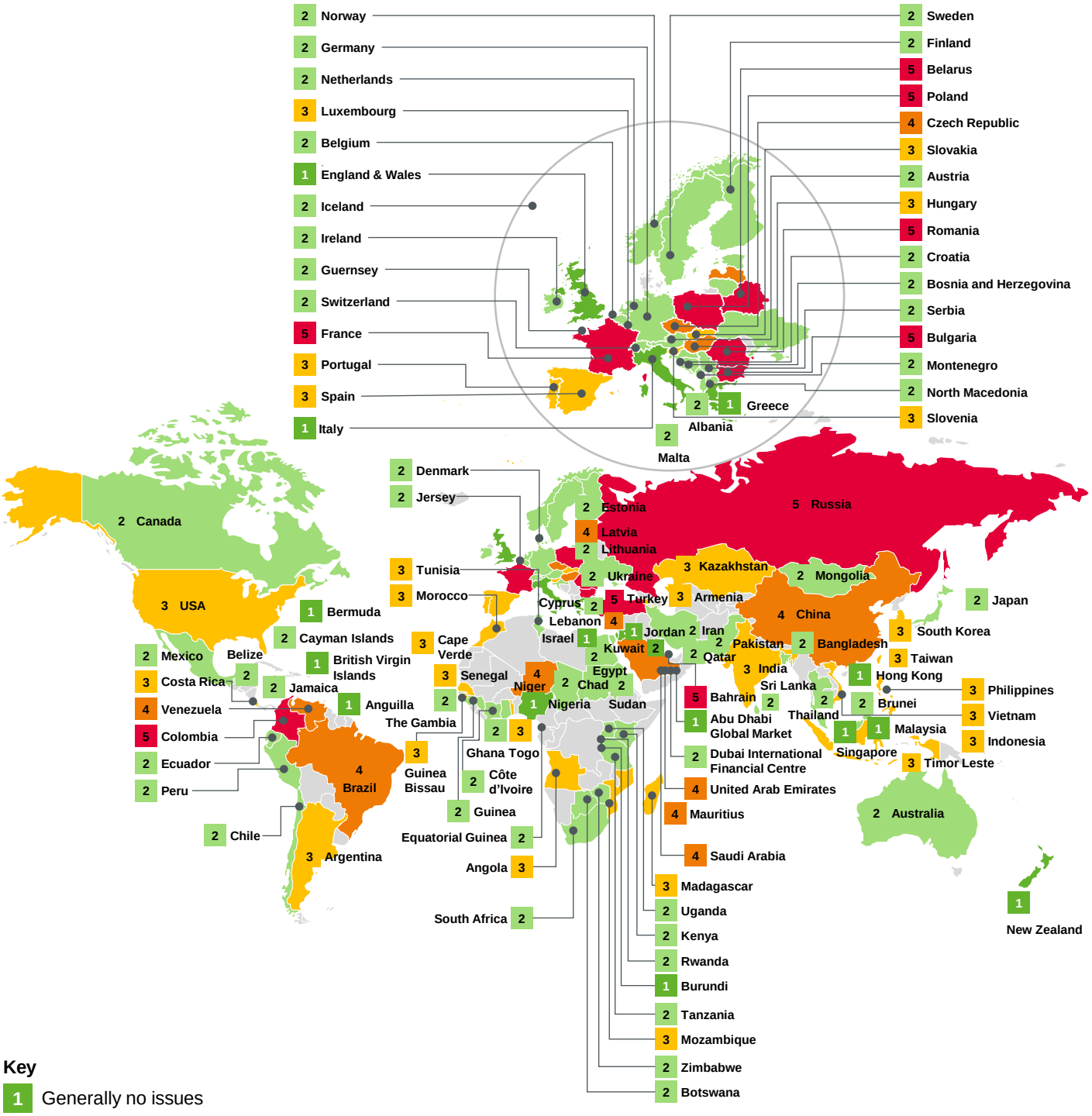
[4] 575 F. Supp. 2d 845, 853 (N.D. Ohio 2008)
[5] 6 P.3d 669, 692 (Cal. 2000)

UNILATERAL OPTION CLAUSES
HEAT MAP



Key

1 Generally no issues

2 Issues unlikely

3 Position uncertain

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Abu Dhabi Global Market

The Abu Dhabi Global Market (ADGM) courts have 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".

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.

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 an 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.

Albania

The Albanian courts have not addressed unilateral option clauses in published case law. Their validity will likely depend on general contract law principles, *i.e.* if the clause reflects both parties' intentions, is freely agreed upon, and does not violate laws or public policy, it should be valid. In consumer contracts, however, unilateral option clauses that force consumers into arbitration while allowing merchants a choice may be deemed unfair and invalid under local consumer protection law.

There is no known precedent in Albania where the courts have addressed the enforceability of an arbitral award rendered pursuant to a unilateral option clause. Therefore, the enforceability of such an award would likely depend on the validity of the clause and whether it aligns with Albanian public policy. In contracts involving consumers, the risk that such awards may not be recognised or enforced in Albania cannot be excluded.

Angola

The courts of Angola have not examined the validity of unilateral option clauses. Such clauses could be considered valid based on the principle of freedom of contract. Equally, the Angolan courts may take the view that such clauses violate the principle of equality between the parties, and are therefore invalid. The validity of these clauses would need to be analysed on a case-by-case basis, taking into account the specific terms of the arbitration clause, the nature of the parties involved and the context of the transaction.

Anguilla

The Anguillian courts have not examined the validity of unilateral option clauses *per se*, although they have upheld similar dispute resolution clauses in the past. The arbitration provisions in Anguilla are very close to English law: the effect of domestic legislation is to import the Arbitration Act 1996, as amended into Anguillian law. However, Anguilla is not a signatory to the New York Convention, although foreign arbitral awards are enforceable by way of appropriate extensions from the UK.

Argentina

The Argentine courts have not yet examined the validity of unilateral option clauses *per se*. Therefore, it remains uncertain whether these types of clauses would be enforced under Argentine law. As a general principle, unilateral option clauses would be held to be valid on the basis of the principle of *pacta sunt servanda*, provided that 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 both parties. This analysis should be made on a case-by-case basis, depending on the specific terms of the arbitration clause, the nature of the parties and the underlying transaction, among other factors.

Armenia

The Armenian courts have not considered the validity of unilateral option clauses (which provide either the possibility of litigation or arbitration) or the enforceability of arbitration awards rendered based on such clauses. Armenian legislation does not contain direct restrictions on entering into such agreements.

As a matter of principle, unilateral option clauses are expected to be considered valid by Armenian courts. However, it is likely that Armenian courts will refuse to enforce unilateral option arbitration clauses in cases where: (i) the "weaker party" to the contract (such as a consumer, a customer of a financial institution, etc.) did not have the opportunity to negotiate the contract and merely joined to a pre-prepared text of the agreement; and (ii) the option in the arbitration clause is granted only to the "stronger party" of the contract.

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Australia

While the Australian courts have not examined the validity of unilateral option clauses *per se*, 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.

Austria

There is no express jurisprudence of Austrian courts on this issue. The prevailing view generally considers unilateral option clauses to be valid. Whether an option clause is unilateral will be determined by contractual interpretation. Where it is not clear whether the option is unilateral, a court will likely interpret this in a manner to allow both parties to have the option. Parties may not be permitted to exercise their rights under a unilateral option clause to undermine proceedings which have already been initiated in accordance with the contract. Furthermore, unilateral option clauses may be void (in their entirety) if they are severely disadvantageous to the counterparty (e.g. if the party benefiting from the unilateral option clause has the exclusive right to appoint a sole arbitrator). In general, however, it is likely that the Austrian courts would uphold an arbitral award rendered on the basis of a unilateral option clause.

Bahrain

While the courts of the Kingdom of Bahrain have not yet addressed the validity of unilateral option clauses, the Bahraini courts have established through Cassation Court judgments that the default approach to resolving disputes is through court litigation, with arbitration being an exception based on the parties' agreement. Such exceptions are not to be interpreted broadly, and arbitration agreements must clearly reflect the parties' intent to pursue arbitration. If the agreement is ambiguous or provides the parties with the option to choose between court litigation or arbitration, there is a serious risk that the court may reject the enforcement of the arbitration agreement and assume jurisdiction over the case.

Bangladesh

The courts of Bangladesh have not yet considered the validity of unilateral option clauses nor the enforceability of arbitral awards rendered pursuant to such clauses.

A unilateral option clause is likely to be considered valid, provided that the other party which does not benefit from the option is not restricted absolutely from enforcing its rights through the usual legal proceedings (Section 28 Contract Act 1872); for example, in circumstances where the party with the option to refer the dispute to arbitration does not exercise that option. Furthermore, where the option to arbitrate is exercised, procedural fairness must be ensured in the arbitration process. For example, the forum of arbitration and/or the rules of arbitration should be specified in the dispute resolution provision, and the party without the option must have equal rights in relation to appointing the arbitral tribunal.

If an arbitral award is rendered by adhering to considerations of fairness, as discussed above, a court in Bangladesh is unlikely to treat the award as invalid solely on the ground that one of the parties had a unilateral option to invoke arbitration.

Belarus

While there is no reported court practice where Belarusian courts have examined unilateral option clauses *per se*, there is a tangible risk of such clauses being held to be invalid. There have been cases in which the Belarusian Supreme Economic Court considered an arbitration agreement as not concluded since the parties also stipulated a forum alternative to arbitration, thus creating uncertainty regarding the competent court.

The enforceability of relevant arbitral awards is also in question. There are no reported cases on this issue, but such awards may be unenforceable in Belarus due to being contrary to public policy, namely the principle of equality before the law and courts (even if a unilateral option clause is valid under the applicable law).

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Belgium

While 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.

Belize

Belizean courts have not yet ruled on the validity of unilateral option clauses but would likely draw on English jurisprudence due to Belize's shared common law foundation with the UK. English courts typically uphold such clauses if they are explicit and clearly drafted. Similarly, Belizean courts would likely enforce unilateral option clauses, provided they meet these requirements and reflect the parties' agreement.

Bermuda

While the Bermudan courts have not examined the validity of unilateral option clauses *per se*, 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.

Bosnia and Herzegovina

There is no published case law in Bosnia and Herzegovina on unilateral option clauses. Therefore, we believe that the court's interpretation would depend namely on the general principles of contract law which would be tested on a case-by-case basis (free will, true intentions and lack of illegality or immorality of all parts of the clause), the exception being consumer contracts in which fairness and advantage would be additionally assessed specifically in relation to pre-drafted contracts.

There is also no published case law or known precedent where the courts have specifically addressed the enforceability of an arbitral award rendered pursuant to a unilateral option clause; therefore, we believe that enforceability would depend on whether the clause aligns with public policy rules. In contracts involving consumers, the risk that such awards may not be recognised or enforced in Bosnia and Herzegovina cannot be excluded.

Botswana

While the courts of Botswana have not examined the validity of unilateral option clauses *per se*, such clauses would nevertheless be held to be valid on the basis of *pacta sunt servanda* and provided that they are drafted in a clear, unambiguous way.

Brazil

While the Brazilian courts have not examined the validity of unilateral option clauses *per se*, Brazilian law requires the consent of all parties to submit a dispute to arbitration. As such, there is a risk that the Brazilian courts may not recognise the validity of unilateral option clauses. In addition, conditional obligations that are subject to the pure discretion of one party (condição puramente potestativa) are prohibited pursuant to the Brazilian Civil Code. Absent a determination in this regard, it is uncertain whether unilateral option clauses may qualify as such, especially if the option provided for is ambiguous or creates uncertainty as to the parties' respective obligations.

British Virgin Islands

While the British Virgin Islands' (BVI) courts have not examined the validity of unilateral option clauses *per se*, 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.

Brunei

While the Bruneian courts have not, to date, specifically addressed the validity of unilateral option clauses, available case law suggests that such clauses would likely be deemed valid, provided that they are clearly drafted. The Bruneian courts are likely to adopt a practical approach when interpreting arbitration clauses, analysing the drafting and its literary meaning. There is no reason that an arbitral award based on a unilateral option clause would not be enforceable in Brunei.

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Bulgaria

The Bulgarian courts have held that unilateral option clauses (containing either an option to litigate or to 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.

Burundi

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.

Canada

While the Canadian courts have not examined the validity of unilateral option clauses *per se*, 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 *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Canada.

Cape Verde

Cape Verde courts have not yet addressed the validity of unilateral option clauses and there are no specific legal requirements in this respect. The position in Cape Verde is therefore uncertain.

Cayman Islands

The Cayman courts have not examined the validity of unilateral option clauses *per se*. However, it is likely that the Cayman courts would follow decisions of the English courts, which have upheld the validity of unilateral option 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.

Chad

While the courts of Chad have not examined the validity of unilateral option clauses *per se*, 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.

Chile

The Supreme Court of Chile has ruled that unilateral option clauses are generally valid, on the basis of the principle of autonomy of will (freedom of choice). However, a unilateral option clause could not submit to arbitration matters that Chilean law has classified as matters of public order, which are therefore not subject to negotiation or waiver by the parties, such as family or labour disputes. Similarly, it could not submit to ordinary jurisdiction matters that the law mandates to be resolved through mandatory arbitration (as outlined in Article 227 of the Organic Code of Courts of Chile).

China

The Chinese courts have not formed a consistent approach to the validity of unilateral option clauses. There is some risk that such clauses would be held to be 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.

Colombia

The courts of Colombia have not directly examined unilateral option clauses that allow one party to choose between litigation and arbitration. Nonetheless, the Council of State, when analysing ambiguous arbitration clauses that provide for the possibility of arbitration, has determined that the parties must unequivocally intend to subject their disputes to arbitration. Moreover, this court has stated that, pursuant to the Colombian Civil Code, obligations that depend on the exclusive will of one party are void. Therefore, according to the Council of State, arbitration clauses whose enforcement or fulfilment depends on the will of a single party are equally void.

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Costa Rica

Costa Rican courts have yet to examine the validity of unilateral option clauses head-on. On a general level, case law on arbitration affirms the validity of non-standard clauses, provided they are drafted clearly and unambiguously. This is based on the principles of *pacta sunt servanda* and party autonomy. Commentators also support this liberal view.

Nonetheless, issues might arise in the context of consumer and/or adhesion contracts. A unilateral clause might be considered unfair, thus violating the constitutional equality principle. In this sense, Costa Rican law prohibits clauses that "excessively or disproportionately" favour the contractual position of the predisposing party or entail waiver or restriction of the rights of the adherent/consumer. The outcome will depend on how the courts interpret the clause while balancing other relevant principles. Therefore, the position remains uncertain for the time being.

Côte d'Ivoire

In Côte d'Ivoire, unilateral option clauses do not appear to have been examined by the courts. However, based on the principle of freedom of contract, the Ivorian courts consider that the parties are free to agree the terms of their contract. It may be considered that this principle does not exclude unilateral option clauses, provided that they are lawful, consensual and clearly worded, so as to enable the arbitration or pleading option to be effectively implemented.

Croatia

The Croatian courts have not considered unilateral option clauses (containing either an option to litigate or to 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 is contained in general terms and conditions and was not specifically negotiated 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 unilateral option clause was considered valid.

Cyprus

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 *prima facie* 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 that 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.

Czech Republic

While the Czech courts have not examined the validity of unilateral option clauses *per se*, the Constitutional Court has confirmed that clauses which provide both parties with 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".

Denmark

Danish courts have confirmed the validity of unilateral option clauses providing for disputes to be referred to arbitration, but giving one party the exclusive right to refer a dispute to litigation before the courts. While the courts have not yet considered the reverse scenario where one party has the option to refer a dispute to arbitration which would otherwise be subject to court litigation, Danish commentary and practice speaks in favour of validity. However, unilateral option clauses that are found to be unreasonable or contrary to fair conduct could, in certain cases, be changed or set aside. It is currently unlikely that an arbitral award would be found to be unenforceable in Denmark solely because the relevant arbitration agreement is a unilateral option clause.

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Dubai International Financial Centre

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. In a recent case, the DIFC Court of Appeal upheld a unilateral jurisdiction clause entitling a bank to refer disputes to the DIFC Courts and cited that unilateral clauses "*are familiar as a matter of international banking practice and, in part at least, serve a legitimate commercial purpose*" (*Lara Basem Musa Khoury v Mashreq Bank Psc [2022] DIFC CA 007*; the validity of unilateral option clauses, in principle, was also later affirmed by *ARB 018/2023 (1) Nuriel (2) Naufil (3) Nishat v (1) Nuzhat (2) Nayaab)*. However, the DIFC Courts 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).

Ecuador

Ecuadorian courts have not examined the validity of unilateral option clauses. Nevertheless, they would most likely be held to be valid on the basis of two principles. First, under the principle of contractual freedom, parties are free to submit to a specific forum (court system or arbitration). Second, Ecuadorian law acknowledges the concept of concurrent jurisdiction, under which, if there are two or more forums that would have jurisdiction for a certain case, the plaintiff can choose the forum at their predilection. However, there are certain contracts (e.g. adhesion contracts) for which, in order to submit to arbitration (thereby waiving the right to go to the courts), special consent is required.

Furthermore, although courts in Ecuador have not enforced awards rendered pursuant to a unilateral option clause, it is also likely that such enforcement would be accepted. Ecuador's law is pro-arbitration, and the grounds to oppose enforcement do not include questioning the validity of the arbitration clause under which the award was rendered.

Egypt

While the Egyptian courts have not examined the validity of unilateral option clauses *per se*, commentators believe that the Egyptian courts would, absent any ambiguity in the drafting of the clause, hold such clauses to be valid.

England and Wales

The English courts have held that unilateral option clauses (containing either an option to litigate or to 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.

Equatorial Guinea

While the courts of Equatorial Guinea have not examined the validity of unilateral option clauses *per se*, it is believed that these clauses would be upheld on the basis of the principle of sanctity of contract.

Estonia

While the Estonian courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be valid in the case of non-consumer contracts, based on principles of freedom of contract. It is likely that an arbitral award rendered based on a unilateral option clause in the case of non-consumer contracts would also be enforceable in Estonia. However, the Estonian courts may have reservations about upholding such a clause if one party were being treated extremely unequally. In the case of consumer contracts, it is more likely that the court would, in certain circumstances, consider a unilateral option clause to be void.

Finland

While there is little relevant case law, unilateral option clauses are *prima facie* not prohibited and thus generally upheld. 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 franchising contract, giving the stronger contracting party, the franchisor, the right to exercise the option has, in certain circumstances, been considered unreasonable and therefore set aside.

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France

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), the courts 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. A referral of preliminary questions regarding the validity of asymmetrical jurisdiction clauses was recently made to the Court of Justice of the European Union, which could provide further clarity on the validity of these clauses.

The Gambia

The Gambia's legal framework, informed by English common law principles and local statutory provisions, suggests that unilateral option clauses are likely to be upheld. The Alternative Dispute Resolution Act 2005 reinforces this by supporting the enforceability of arbitration agreements more broadly. There are no recent developments or legal precedents indicating that arbitral awards based on these clauses would not be enforced in the Gambia.

Germany

The German courts have held that unilateral option clauses are valid unless they violate *boni mores* (good morals) or represent an "unreasonable disadvantage" (if classifiable as standard contract terms). Under German law, a violation of good morals is only assumed in very rare cases. Furthermore, so far, there is only one type of unilateral option clause, which is unequivocally rejected by German case law if it is classified as a standard contract term, namely a clause that grants the respondent a unilateral option right, while the claimant is not simultaneously granted the right to set a deadline for the respondent to exercise the option. The Federal Supreme Court ruled that if such a clause is classified as a standard contract term, it "unreasonably disadvantages" the other party and is therefore invalid.

Ghana

While the Ghanaian courts have not considered the validity of unilateral option clauses, it is thought that they would be held to be 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 suggested that such clauses may not be valid. It is likely that an award rendered pursuant to such a clause would be enforceable in Ghana.

Greece

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.

Guernsey

While the courts of Guernsey have not yet examined the validity of unilateral option clauses, it is thought that the courts would generally uphold such clauses as valid, following the approach adopted in England and Wales. However, a unilateral option clause in a consumer contract that gives the option to the non-consumer may be considered unfair, and therefore unenforceable against the consumer. 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.

Guinea

While the Guinean courts have not examined the validity of unilateral option clauses *per se*, 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 *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Guinea.

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Guinea Bissau

The courts of Guinea Bissau have not yet addressed the validity of unilateral option clauses and the issue is not directly addressed in the law. The position in Guinea Bissau is therefore uncertain.

However, it should be noted that Guinea Bissau law explicitly states that, in standard form contracts, an arbitration clause is only effective if the adhering party (i) takes the initiative to start the arbitration or (ii) expressly agrees to the arbitration procedure, with written consent provided in an attached document and a signature specifically acknowledging the arbitration clause.

Hashemite Kingdom of Jordan

In *Judgment No. 5944 of 2018* (5 September 2018), the Jordanian Court of Cassation recognised the validity of a unilateral option clause in a contract, which grants one party the exclusive right to refer disputes to arbitration, while denying the same right to the other party. This constitutes an exception to the general principle under the Jordanian Arbitration Law No. 31 of 2001, which requires mutual consent for referring a dispute to arbitration, whether incorporated into a clause in the original agreement, a separate agreement, or agreed upon after a dispute arises. The court found no reason to invalidate such a clause, as it reflects the parties' mutual consent and their intent at the time of signing the contract.

Hong Kong

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.

Hungary

Two aspects, based on Hungarian judicial practice, need to be considered in this context.

On the one hand, the number of judicial decisions available is rather limited, and courts have generally avoided determining the validity of unilateral option clauses under Hungarian law. However, there is a decision that explicitly states that a party's reservation of the right to bring an action before a court with jurisdiction, regardless of the arbitration clause, does not render the arbitration agreement illegal. A mandatory provision of law does not prohibit the conclusion of an arbitration agreement to that effect. Nevertheless, this remains an individual decision, and there is no uniform practice. Therefore, the unequal bargaining position of the parties to a unilateral option clause may still raise concerns from a Hungarian legal perspective.

The second aspect concerns whether a non-exclusive arbitration agreement can be considered a valid arbitration agreement at all. A unilateral option clause implies that the ordinary court operates alongside the arbitral tribunal as a forum with jurisdiction, in addition to the arbitral tribunal, or vice versa. For many years, Hungarian case law has favoured the exclusivity of arbitration agreements. However, a recent trend in Hungary emphasises party autonomy in determining whether submitting disputes to arbitration should exclude the jurisdiction of state courts. This view holds that the parties to a legal relationship, exercising their freedom of contract, are free to agree to arbitrate the disputes arising out of the contract, or a part thereof, in an optional manner. Consequently, case law is not uniform in this regard either, which may still raise concerns from a different perspective.

Iceland

The courts in Iceland have not examined unilateral option clauses, nor an arbitral award rendered pursuant to a unilateral option clause. However, on the basis of the principle of freedom of contract and as the Icelandic Arbitration Act is silent on these points, we would assume that the courts in Iceland would consider such clauses and awards to be valid.

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India

The Indian courts have not finally determined the validity of unilateral option clauses. A unilateral option to arbitrate will arguably be valid if the contract is unambiguous. A unilateral option to litigate that restricts a party from exercising its rights to obtain any recourse before the Indian courts will be invalid.

Given that court litigation in India can be long-drawn-out and arduous, it is advisable to avoid such clauses to obviate lengthy arguments and delay at the threshold of a dispute.

Indonesia

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.

Iran

While 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.

Ireland

While 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.

Israel

The Supreme Court of Israel has held that unilateral option clauses are valid on the basis of *pacta sunt servanda*, and there is no reason to believe that they would not uphold these clauses in the future. While 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.

Italy

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.

Jamaica

The Jamaican courts have not ruled specifically on the validity of unilateral option clauses. However, given Jamaica's arbitration framework (based on the UNCITRAL Model Law), the principle of party autonomy is respected by the courts. Jamaican courts, being influenced by English law, would likely consider such clauses valid, particularly in commercial contracts between sophisticated parties. However, the courts will likely find such clauses invalid if they aim to prevent judicial oversight, violate public policy principles or undermine mandatory statutory protections as set out in section 55 of the Arbitration Act. Given the strong tendency in Jamaica to enforce arbitration agreements and awards, it is likely that the courts would enforce an arbitral award rendered pursuant to a unilateral option clause, provided that the arbitration process adhered to the principles of fairness and due process, and the award does not fall within one of the grounds for refusal of enforcement under Section 57 of the Arbitration Act.

Japan

While the Japanese courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would hold such clauses to be valid on the basis that they reflect the agreement reached by the parties.

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Jersey

While the Jersey courts have not considered the validity of unilateral option clauses *per se*, 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 "*la convention fait la loi des parties*", 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.

Kazakhstan

The Kazakh courts have not examined the validity of unilateral option clauses *per se*. Even if, for any reason, a court in Kazakhstan invalidated a unilateral option 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 a form of disposal of rights to protection.

Kenya

The courts of Kenya have not examined the validity of unilateral option clauses *per se*. However, it is thought that they would be held to be 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.

Kuwait

While the Kuwaiti courts have not examined the validity of unilateral option clauses *per se*, we believe that the Kuwaiti courts would, absent any ambiguity in the drafting of the clause, hold such clauses to be 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 Kuwait.

Latvia

Although the Latvian courts have not examined the validity of unilateral option clauses *per se*, 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. In a commercial context, Latvian courts have recognised as valid and enforceable option clauses that allow either party to choose between national courts and arbitration. Arbitral awards rendered on the basis of such clauses have been held enforceable in Latvia. Conversely, in a consumer context, such clauses have been considered as unfair by Latvian courts, and therefore as invalid and unenforceable.

Lebanon

The courts of Lebanon have not examined the validity of unilateral option clauses. While 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.

Lithuania

While the Lithuanian courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be 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 to 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.

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Luxembourg

While the courts of Luxembourg have not examined the validity of unilateral option clauses *per se*, 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 that 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.

Madagascar

The Malagasy courts have not yet examined the validity of unilateral option clauses *per se*. 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 *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Madagascar.

Malaysia

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 that an arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Malaysia.

Malta

While the validity of unilateral option clauses has not been specifically challenged, Maltese courts consider such clauses valid and enforceable without issue. The English law approach is generally followed in this area of law, as judgments from the courts of England and Wales are often referred to for guidance. Moreover, 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.

Mauritius

While the Mauritian courts have not examined the validity of unilateral option clauses *per se*, it is believed that such clauses may 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, and more specifically if consent to arbitrate may be established under that law, and that such a clause would not offend international public order.

Mexico

While the Mexican courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would be held to be valid, provided that they were drafted sufficiently clearly. Similarly, there is a *prima facie* presumption that an arbitral award rendered on the basis of a unilateral option clause would be enforceable in Mexico.

Mongolia

The Mongolian law and courts have not specifically addressed the validity and legality of unilateral option clauses *per se*. The law in general may allow unilateral option clauses as long as (i) the clause was agreed by both of the parties as per the principle of party autonomy; and (ii) the contractual relation does not concern matters of Mongolian courts' special jurisdiction.

Montenegro

There is no published court practice in Montenegro on the validity of unilateral option clauses. Montenegrin courts would likely uphold such clauses, given their high regard for party autonomy. However unilateral option clauses are not permitted in consumer contracts due to protections under the Montenegrin Law on Consumer Protection.

There is no court practice concerning the enforcement of an award rendered on the basis of a unilateral option clause. Nonetheless, there is no reason to believe that a domestic arbitral award rendered on the basis of such a clause would be unenforceable, provided that: (i) there are no procedural issues; (ii) the foreign award does not conflict with Montenegrin public policy; and (iii) there are no issues with arbitrability under Montenegrin law. Given that case law interprets public policy very narrowly, it is unlikely that significant issues would arise in this context.

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Morocco

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.

Mozambique

The Mozambique courts have not yet addressed the validity of unilateral option clauses. The position in Mozambique is therefore uncertain.

However, it should be noted that Mozambican law explicitly states that, in standard form contracts, an arbitration clause is only effective if the adhering party (i) takes the initiative to start the arbitration or (ii) expressly agrees to the arbitration procedure.

Netherlands

While the courts of the Netherlands have not examined the validity of unilateral option clauses *per se*, 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.

New Zealand

In 2019, the High Court of New Zealand 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.

Niger

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 the enforcement of an arbitral award rendered on the basis of a unilateral option clause, if it was not contrary to international public policy.

Nigeria

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.

North Macedonia

There is no published case law in North Macedonia where courts or arbitral tribunals have examined the validity of unilateral option clauses. There is no reason to believe that such clauses would be deemed invalid if they are well-drafted, as party autonomy is a fundamental principle in Macedonian law. As long as both parties have equal procedural rights once the proceedings commence, granting one party the unilateral right to choose between litigation and arbitration shall not disrupt the balance.

Furthermore, the enforceability of arbitration agreements relies on the principle of “mutual and clear consent”, which is a key aspect of party autonomy. Therefore, where a clause granting one party the unilateral right to initiate arbitration was negotiated and agreed upon in advance, this agreement shall be respected and binding. The “mutual and clear consent” in such cases shall remain effective and shall not be limited merely by the passage of time or a subsequent change of mind by the parties involved.

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Norway

The Norwegian courts have not examined the validity of unilateral option clauses *per se*. Absent "special circumstances", 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.

Pakistan

While the Pakistani courts have not yet examined the validity of unilateral option clauses *per se*, it is thought that they would likely be held to be valid on the basis of the principle of *pacta sunt servanda*, 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).

Peru

Unilateral option clauses are valid in respect of arbitration proceedings seated in Peru. It is unlikely that a party may successfully rely on the Civil Code's provisions on validity of contracts based solely on the facultative and unilateral nature of that clause, even if it is included in a commercial contract form. The Peruvian Courts have not addressed the validity of unilateral option clauses. Nonetheless, unilateral option clauses should be carefully drafted to avoid enforceability problems that could restrict the right of access to jurisdiction or to present defences to a claim.

Some issues should be considered in different types of contracts. In the context of consumer contracts, the Consumer Protection Act grants consumers the option to decide between arbitration and administrative courts when the supplier offers arbitration as a dispute resolution method. In the context of insurance contracts, a unilateral option clause, like any arbitration agreement, is valid only if it is agreed upon after the incident occurs.

Philippines

The courts of the Philippines have not examined the validity of unilateral option clauses. The position in the Philippines is therefore uncertain.

Poland

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. In the past, Polish courts have 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.

Portugal

The Portuguese courts have repeatedly held that bilateral option clauses are valid. However, the position regarding unilateral option clauses is uncertain. While a few commentators have contended that such clauses are valid, the courts have not yet examined these clauses specifically.

In July 2012, the Lisbon Court of Appeal confirmed a First Instance decision, recognising an award rendered in an arbitration seated in France and based on a unilateral option clause, but did not specifically consider the validity of the unilateral option (as the issue was not raised and the Court did not discuss it on its own motion).

Qatar

While the Qatari courts have not examined the validity of unilateral option clauses *per se*, 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), "*Arbitration is an exceptional method to resolve disputes*". Nevertheless, the courts of Qatar will decline to accept jurisdiction in cases of a clear mandatory arbitration clause, which would also include a unilateral option clause. There is no reason to believe that an arbitral award rendered pursuant to a unilateral option clause would not be enforceable in Qatar.

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Romania

While the Romanian courts have not examined the validity of unilateral option clauses *per se*, 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.

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.

Russia

The settled approach in Russian jurisprudence is that a unilateral option clause will be invalid in that part which deprives one of the parties of an opportunity to choose the same dispute resolution mechanisms as the other party. The courts find that such clauses violate the principle of equal procedural rights for the parties. The Supreme Court of the Russian Federation has clarified that, where there is a unilateral option clause, it should be considered a bilateral option clause, granting both parties the right to choose the dispute resolution mechanisms provided for in it.

Rwanda

The concept of unilateral option clauses has not yet been examined by Rwandan courts nor explicitly provided for in Rwandan laws regulating arbitration or related laws. However, Rwandan jurisprudence strongly upholds the principle of party autonomy in contract formation. This means that parties are free to choose how they wish to resolve disputes, whether through the courts or by arbitration, and the terms agreed upon will be binding on the parties in accordance with article 64 of the Law Governing Contracts in Rwanda. As such, unilateral option clauses are likely to be considered valid in Rwanda. However, the Rwandan courts would refuse recognition and enforcement of a foreign award rendered pursuant to a unilateral option clause if the arbitration agreement itself is invalid under the law to which the parties have subjected it, in accordance with article 51 of Rwanda's Arbitration Law.

Saudi Arabia

While the courts of Saudi Arabia have not 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.

Senegal

While the courts of Senegal have not yet examined unilateral option clauses *per se*, they may follow the jurisprudence of the French courts and hold such a clause to be invalid. However, the courts of Senegal do not always follow the approach of the French courts.

Serbia

There is no published court practice in the Republic of Serbia where courts have decided on the validity of unilateral option clauses. However, the practice of local arbitral institutions shows a clear preference for party autonomy, favouring the validity of unilateral clauses. Serbian courts would therefore likely uphold unilateral option clauses. Such clauses would not be allowed in consumer contracts due to protections under the Serbian Law on the Protection of Consumer Rights.

There is no court practice as to the enforcement of the award where the unilateral option clause was agreed between the parties. There is no reason to believe that a domestic arbitral award rendered on the basis of a unilateral option clause would not be enforceable in Serbia. It would have to be assessed whether such a clause is in line with Serbian public policy rules. Case law is unanimous in interpreting public policy very narrowly, so we would consider that there would be no significant issues with this.

Singapore

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.

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Slovakia

The Slovakian courts have not examined the validity of unilateral option clauses in a commercial context *per se*; 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.

Slovenia

The Slovenian courts have not yet examined the validity of unilateral option clauses. The position in Slovenia is therefore uncertain.

South Africa

While the South African courts have not examined the validity of unilateral option clauses *per se*, it is anticipated 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 or policy – following the principle of *pacta sunt servanda*. 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.

South Korea

While 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 unilateral option clauses were valid and enforceable. However, in a more recent series of decisions dealing with a particular group of unilateral option clauses appearing in contracts to which the Korean government or a Korean state entity was party, the Supreme Court has held that the unilateral 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.

Spain

The Spanish courts have held that bilateral option clauses are valid. However, unilateral option clauses have not been directly examined. It must be noted that Spanish courts may consider that the exclusive right of one party to decide jurisdiction might be contrary to good faith principles by disrupting the balance of possibilities between the contracting parties. In principle, there is no case law which leads to the conclusion 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.

Sri Lanka

There is no judicial precedent on the acceptability of unilateral option clauses in Sri Lanka and they are uncommon. However, under the present Arbitration Act No. 11 of 1995 (the “Act”), party autonomy is a fundamental principle of arbitration. As such, where parties mutually agree to adopt a unilateral option clause, it is likely to be upheld by a Sri Lankan court. Section 5 of the Act imposes a limitation on a court’s jurisdiction to hear and determine a matter where parties have agreed to refer a dispute to arbitration. However, this limitation is contingent upon whether there is an objection to the jurisdiction of the court. Hence, if parties agree to submit themselves to the jurisdiction of a court, the court has jurisdiction to hear the matter and the limitation imposed under section 5 will not apply. In respect of enforcement, as long as an arbitral award is made pursuant to a valid arbitration agreement and does not fall within the provisions set out in Sections 32 or 34 of the Act, it will be enforced by the Sri Lankan courts. As such, it is immaterial whether an award was rendered pursuant to a unilateral option clause.

Sudan

Although the Sudanese courts have not examined the validity of unilateral option clauses *per se*, there is no reason to believe that they would be held to be invalid, based on the freedom of contracting, provided that they are carefully drafted and absent any ambiguity.

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Sweden

While the Swedish courts have not examined the validity of unilateral option clauses *per se*, it is thought that they would hold such clauses to be valid. The limited exception would be if the clause could be shown to be unconscionable or unreasonable (most likely to occur in a consumer context or where there is otherwise a clear imbalance of power between the parties), 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.

Switzerland

While 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.

Taiwan

The Taiwanese courts honour the principles of party autonomy and *in favorem validitatis*. Unilateral option clauses may be deemed valid if the doctrine of equality is abided by, although the interpretation of such clauses and the enforceability of the awards rendered thereunder in future case law remain to be seen. Parties should be mindful when there are significant differences in the bargaining power of the parties. The Taiwanese courts maintain an open attitude in favour of arbitration. But the enforceability of awards rendered pursuant to unilateral option clauses has yet to be fully examined.

Tanzania

The validity of unilateral option clauses has yet to be determined *per se* by Tanzanian Courts. However, following the judgment of the Court of Appeal in *National Bank of Commerce Limited vs. Mapele Enterprises Company Limited & 2 others (Civil appeal no. 381 of 2019)* [2023] TZCA 17281 (26 May 2023) Tanzlii, wherein the court stated that "*[t]he sanctity of contract is established upon adherence to the cardinal principle of the law of contract in that parties are bound by the terms of the agreement they freely entered into*", it is safe to say that they would be held to be valid. Courts have generally upheld 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 Tanzania.

Thailand

Although the Thai courts have not explicitly declared unilateral option clauses as valid, they have analysed their validity on several occasions and have implicitly accepted them. The Thai courts have also affirmed the enforceability of an arbitral award rendered pursuant to a unilateral option clause. Additionally, parties have the freedom to include a unilateral option clause in their contracts, and the Thai Arbitration Act does not prohibit such clauses.

Timor-Leste

The Timorese courts have not yet examined the validity of unilateral option clauses. Timor-Leste's Arbitration Legislation is based on the UNCITRAL Model Law. Although there are arguments in favour of the validity and enforceability of such clauses, and no apparent reason to doubt that an arbitral award issued under a unilateral option clause would be enforceable in Timor-Leste, the debate centres on the conflict between two principles: party autonomy and equal treatment. Until the Court of Appeal has the opportunity to address these clauses, parties should remain aware of the existing uncertainty.

Togo

The courts in Togo have not examined the validity of the unilateral option clauses. However, if the clause has been agreed with the parties' mutual consent, it is anticipated that the courts will uphold such a clause. However, such a clause may raise questions as to the need for equal treatment of the parties. On balance, it is expected that the Togolese courts would uphold an arbitral award rendered on the basis of a unilateral option clause.

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Tunisia

While the Tunisian courts have not examined unilateral option clauses *per se*, it is thought that the Tunisian courts may enforce unilateral option clauses as contractual agreements made between two parties are strictly enforced. However, the Tunisian courts may well adopt a similar position to that of the French courts, which take a more restrictive view of these clauses.

Turkey

In Turkey, the choice of arbitration must be expressly stated in written form. 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 the Turkish courts.

Uganda

While the Ugandan courts have not examined the validity of unilateral option clauses *per se*, there is no reason to believe that they would be invalid, provided that 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.

Ukraine

The Ukrainian courts have analysed the validity of unilateral option clauses (contemplating a binding arbitration for both parties with a unilateral right of one party to turn to a court) 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 that such a clause breaches Ukrainian public policy if it can be said to breach principles of equality and fair treatment. With respect to the unilateral clause providing for disputes to be referred to a court, but entitling one party to elect to refer the dispute to arbitration instead, there a risk that a Ukrainian court could find it, in specific circumstances, unenforceable (if it can be said to compromise the principle that the choice of arbitration must be unambiguous).

United Arab Emirates

Recent case law indicates that a unilateral option clause providing one party alone with the option to choose whether disputes should be referred to arbitration or litigation may not be enforceable. In the relevant case, the Dubai Court of Cassation emphasised that, to be enforceable, arbitration clauses need to be clear, explicit and unambiguous as to the contracting parties' mutual consent to arbitrate disputes (*Dubai Court of Cassation, Commercial Appeal No. 735 of 2024*). This judgment is in contrast to a previous court decision finding that an agreement to litigate disputes can be validly combined with a clause giving one or more parties the right to elect for court proceedings before a local court or arbitration (*Dubai Court of Cassation, Commercial Appeal No. 179 of 2023*). Given that there is no system of binding precedent in the UAE, there remains uncertainty and a considerable risk (particularly with respect to clauses granting one party the option to refer disputes to arbitration) that these clauses might not be upheld on the basis that (i) the contracting parties' mutual agreement to arbitrate is not clear enough or (ii) the clause is contrary to public policy and/or the obligation of good faith.

USA

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 to be 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).

UNILATERAL OPTION CLAUSES
JURISDICTION BY JURISDICTION

Key

- Generally no issues
- Issues unlikely
- Position uncertain
- Potential issues
- Issues likely

Venezuela

The Venezuelan courts have not specifically ruled on the validity of unilateral option clauses *per se*. It is therefore uncertain whether these clauses would be enforceable under Venezuelan law.

The Venezuelan courts could consider these clauses valid on the basis of fundamental legal principles contained in the Civil Code, such as *pacta sunt servanda* and freedom of contract. Conversely, it is likely that courts would decide that unilateral option clauses are invalid on the basis that these clauses do not reflect an unequivocal intent to arbitrate the dispute, which is essential for the validity of an arbitration agreement.

Similarly, arbitral awards made pursuant to a unilateral option clause have not been reviewed by Venezuelan courts and it is uncertain whether they are enforceable. Nevertheless, Article 49.g of the Venezuelan Arbitration Law provides that enforcement of awards made pursuant to invalid arbitration agreements may be refused. Thus, Venezuelan courts could refuse to enforce such an award based on an agreement that evidences an unclear intent to arbitrate.

Vietnam

While the Vietnamese courts have not examined the validity of unilateral option clauses *per se*, they 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.

Zimbabwe

While 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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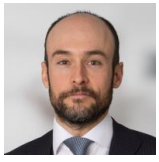

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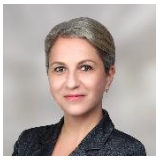

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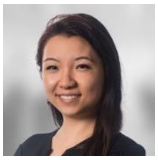

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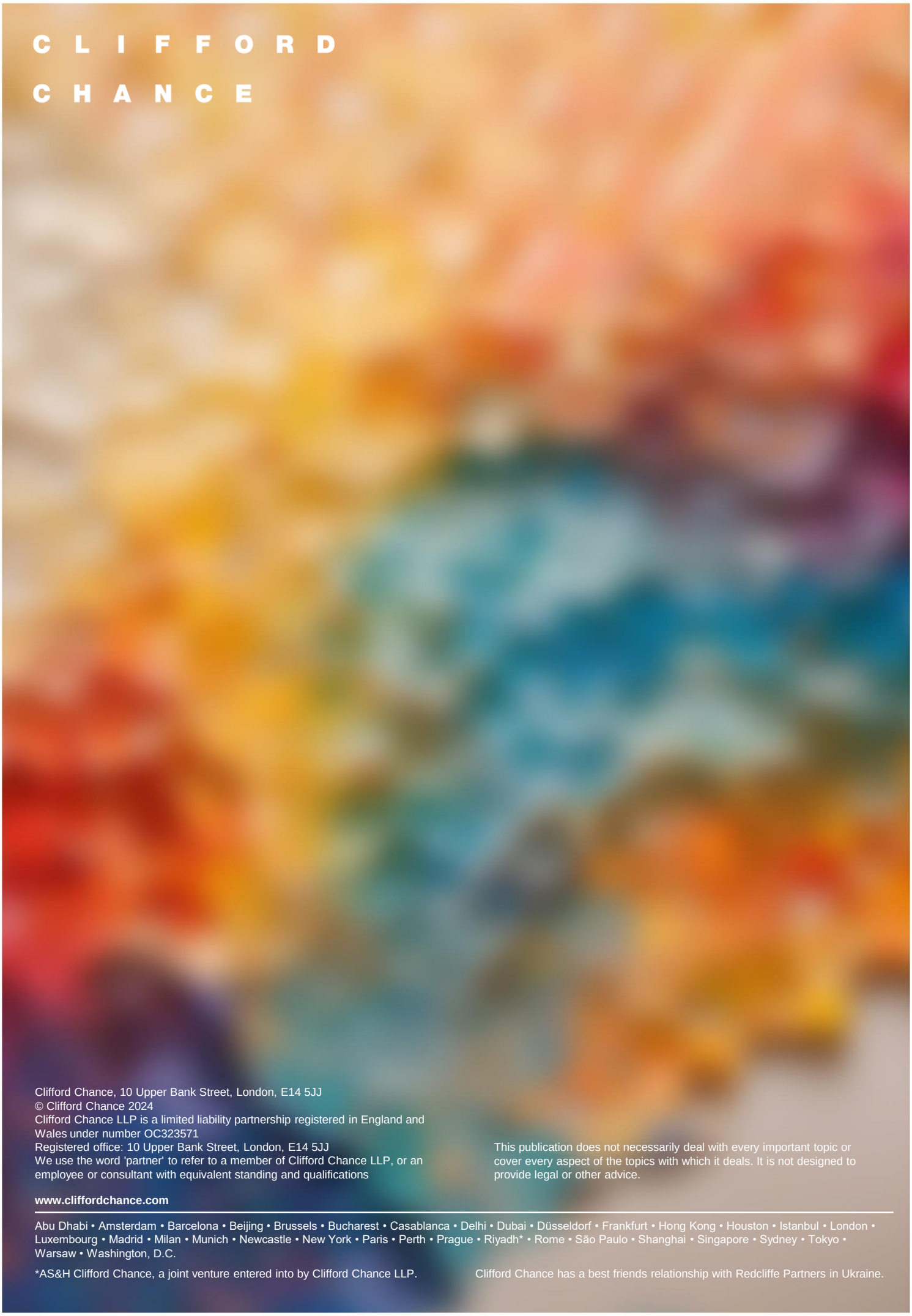

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