THE UNCERTAIN FATE OF ASYMMETRICAL DISPUTE RESOLUTION CLAUSES IN ARBITRATION AROUND THE GLOBE: TO BE OR NOT TO BE (SYMMETRICAL)

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INTRODUCTION

This article examines the validity and enforceability of asymmetrical dispute resolution clauses combining arbitration and litigation. Such clauses are currently favored by businesses in their search for a method of dispute resolution that provides a more favorable position for one of the parties to an agreement and ensures better enforcement against the assets of the counterparty.

For mathematicians, a thing is symmetrical "if there is something that you can do to it so that after you have finished doing it it looks the same as it did before."[1] This article uses the term "symmetry" in the sense of "bilateral symmetry," that is "the symmetry of left and right, which is so conspicuous in the structure of the higher animals, especially the human body."[2] Private law has often been said to be characterized by symmetry, starting with the requirement that both parties must manifest assent for a contract to be formed. But, on closer examination, the symmetry of private law is not perfect. For example, for a contract to be formed, the parties' manifestation of assent need not be symmetric in time, place, or form. Asymmetrical dispute resolution clauses represent another dent in the symmetry of private law.

Such clauses provide for one (bilateral) dispute resolution forum (arbitration or litigation) while also giving a unilateral right to one party to elect to refer a particular dispute to another

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[1] Richard P. Feynman, THE CHARACTER OF PHYSICAL LAW 84 (MIT Press Paperback 12th prtg. 1985).

[2] Hermann Weyl, SYMMETRY 3-4 (New Princeton Science Library 2016). *See also* Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ L. REV. 861, 865-74 (2000) (discussing symmetry in physics and in law).

forum. Such clauses are known as "unilateral option clauses" or "one-sided" dispute resolution clauses, but we prefer to use the term "asymmetrical" rather than "unilateral," although the latter is undoubtedly more common, in order to emphasize that the choices of one contractual party are different from, and usually broader than, the choices of the contractual counterparty.[3]

Asymmetrical dispute resolution clauses have been considered by courts in various jurisdictions during the past few years, with respect to their enforceability and validity. Any dispute resolution clause aims to achieve two primary objectives: select a convenient and predictable forum for the resolution of disputes under a particular contract and, conversely, eliminate other potentially applicable fora perceived as unfavorable by one party or both. In selecting the forum (or eliminating, by implication, other fora) parties take into consideration a variety of factors, such as enforceability, procedural aspects (impartiality, efficiency), and other factors (e.g., linguistic barriers). A difficult choice must sometimes be made, in selecting the forum, between litigation and arbitration. The factors that inform that choice are well-known: confidentiality versus publicity, availability of discovery, joinder, consolidation and summary judgment, applicability of binding precedent, cost, speed, enforceability, etc. In particular, ease of enforcement is a classic consideration. Court judgments are more difficult to enforce than arbitral awards, especially in an international context, absent a specific reciprocal enforcement treaty (or, in the European Union, the application of the Brussels I Recast Regulation[4]). Arbitral awards benefit from the recognition and enforcement process applicable between the

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[3] *See, e.g.*, Alan Scott Rau, *"Asymmetrical Arbitration Clauses"—The United States*, in JURISDICTIONAL CHOICES IN TIMES OF TROUBLE (Georges Affaki & Horacio Grigera Naón eds., 2015); Sherina Petit et al., *Asymmetric Arbitration Agreements: A Global Perspective*, 9 INT'L ARB. REP. 25 (2017); *see also* Simon Nesbitt & Henry Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses*, 22 ARB. INT'L 133, 134 (2006); Adam M. Nahmias, *The Enforceability of Contract Clauses Giving One Party the Unilateral Right to Choose Between Arbitration and Litigation*, 21 CONSTRUCTION LAW. 36, 36 (2001).

[4] European Parliament and Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

member states to the New York Convention,[5] which has been widely adopted by over 150 countries.

Asymmetrical dispute resolution clauses seek to preserve the advantages of both litigation and arbitration.

> They enable the party vested with the option [the unrestricted party, or "UP"] to choose between the differing advantages of each forum . . . . This election is made after the dispute has arisen, when both the nature of the dispute and the identity of the counter-party [the restricted party, or "RP"] are known. This enables [the unrestricted] party to choose the dispute resolution forum that will best [suit its interest,] taking into account both the speed with which [the dispute needs] to be resolved[, any confidentiality concerns,] and the likely location of assets against which enforcement will eventually be required.[6]

Asymmetrical dispute resolution clauses are a common feature in many international transaction documents, particularly in credit agreements, software solution and licensing agreements, film licensing agreements, tenancy and construction contracts,[7] employment agreements, and consumer agreements.[8] The UP tends to be the party with the higher bargaining power (such as the lender, the licensor, the employer, or the professional). It cannot always be excluded that the UP, as part of strategic contract negotiations, would bargain for its additional option with

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[5] *See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/english [https://perma.cc/RP6T-XW4A] (last visited May 1, 2021). *See also* Lucy Greenwood, *A New York Convention Primer*, ABA (Sept. 12, 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolutior_magazine/2019/summer-2019-new-york-convention/summer-2019-ny-convention-primer/ [https://perma.cc/E25Y-HRPZ].

[6] *See* Marie Bérard, James Dingley & Melissa Brown, *Unilateral Option Clauses in Arbitration: An International Overview*, PRACTICAL LAW (June 23, 2017), https://content.next.westlaw.com/Document/I8abcb55b1c9a11e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&originationContext=document&transitionType=DocumentItem&firstPage=true [https://perma.cc/7482-H4XA].

[7] Nahmias, *supra* note 3, at 36; Bas van Zelst, *Unilateral Option Arbitration Clauses: An Unequivocal Choice for Arbitration Under the ECHR?*, 25 MAASTRICHT J. EUR. & COMP. L. 77, 79 (2018).

[8] Duarte Gorjão Henriques, *Asymmetrical Arbitration Clauses Under the Portuguese Law*, 3 YOUNG ARB. REV. 44, 53 (2013) (employment agreements and consumer agreements).

full awareness of (and maybe even desire for) the risk of unenforceability of the unilateral option or even of the entire dispute resolution mechanism.

"[T]he differing attitudes towards [asymmetrical] dispute resolution clauses in many jurisdictions mean that the benefits offered by the theoretical flexibility of [such] clauses are often tempered by . . . uncertainty as to whether they will function as they are intended to."[9] Case law in a number of countries indicates that the devil is in the details with respect to the validity of asymmetrical dispute resolution clauses. That is why it is helpful to attempt to classify them (Part I), before reviewing the legal issues they raise (Part II) and the legal trends in a number of key jurisdictions, which we classify in three categories: countries likely to uphold and enforce such clauses (Part III), countries likely to invalidate and/or refuse enforcement (Part IV) and countries where the jury is still deliberating (Part V). We then draw conclusions from our survey, offer a proposed approach regarding the appropriate remedy in case of invalidity, and practical advice for efficiently drafting asymmetrical dispute resolution clauses.

I. AN ATTEMPT AT TAXONOMY OF ASYMMETRICAL DISPUTE RESOLUTION CLAUSES

Asymmetrical dispute resolution clauses can be divided into two major categories: (i) bilateral arbitration clause with a unilateral option to litigate and (ii) bilateral litigation clause with a unilateral option to arbitrate. Other, less prevalent, varieties also exist.

Bilateral arbitration clause with a unilateral option to litigate. The most commonly encountered asymmetrical dispute resolution clause is a clause which begins by providing for arbitration as the dispute resolution mechanism, but then also gives to the UP alone the right to commence litigation instead.[10]

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[9] *See* Bérard et al., *supra* note 6.

[10] *See*, *e.g.*, Law Debenture Trust plc. v. Elektrim Finance BV, [2005] EWHC 1412, [3] (appeal taken from Eng.) ("[A]ny dispute arising out of or in connection with these presents . . . may be submitted by any party to arbitration for final settlement," and "neither [ESA] nor [EFBV] shall be permitted to bring proceedings in any other court or tribunal," but "[n]otwithstanding" this, "the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England who

In other words, both parties agree to arbitrate any disputes between them, but the UP is also expressly given the option to initiate litigation, with respect to (i) any claim that the UP chooses to bring or (ii) certain categories of claims that are expressly "carved-out" from the overall arbitration clause.[11] This type of clause is commonly referred to as a "unilateral litigation clause" (or "unilateral jurisdiction clause") and is typically drafted as follows:

> Any disputes which may arise out of or in connection with the Agreement may be submitted by any party to arbitration before X for final settlement and neither RP nor UP shall be permitted to bring proceedings in any other court or tribunal. Notwithstanding the preceding sentence, any dispute arising out of or in connection with this Agreement, UP shall have the exclusive right, at its option, to apply to the courts of Y who shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement.

Bilateral litigation clause with a unilateral option to arbitrate. Here, the asymmetrical dispute resolution clause begins by choosing an exclusive judicial forum for any claims brought by either party but goes on expressly to grant to the UP alone the option of bringing any dispute to arbitration.[12] This type

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shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents . . . .") (citation omitted).

[11] The most prevalent contractual "carve-outs" grant to the UP, despite the agreement to arbitrate, the right to seek in court: (i) "injunctive and/or other equitable relief," (ii) protection of IP rights and/or goodwill, (iii) "foreclosure of a security interest," (iv) "recovery of possession or eviction," and (v) "collection of a debt." Rau, *supra* note 3 at 28. *See also* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 762-64 (2001) (list of "carve-outs" in franchise contracts, the most common being trademark disputes and equitable relief sought by a franchisor).

[12] *See, e.g.,* NB Three Shipping Ltd. v. Harebell Shipping Ltd., [2004] EWHC 2001, [7] (appeal taken from Eng.) ("The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration."); Deutsche Bank AG v. Tongkah Harbour Public Co. Ltd., [2011] EWHC 2251, [9] (appeal taken from Eng.) ("Courts of England shall have jurisdiction to settle any disputes . . . which may arise in connection with any Finance Document," but "[n]otwithstanding" this, "any dispute arising out of or in connection with the Finance Documents . . . may at the option of the relevant Finance Party . . . be referred to and

of clause is commonly referred to as a "unilateral arbitration clause" and is typically drafted as follows:

> Courts of X shall have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement. Notwithstanding the preceding sentence, any dispute arising out of or in connection with this Agreement may, at the option of UP, be referred to and finally resolved by arbitration before Y.

There is also sub-distinction that carries legal relevance. It is in the manner of defining the UP, the party that has the option. The UP can be defined either (i) nominally (Company X) or by its title in the transaction (Buyer, Lender, etc.) or (ii) can be defined by its procedural quality (Claimant). As we will see, the first drafting method results in increased risk of invalidity, whereas the second drafting method serves to reduce such risk.

Other garden variety. In addition to the two most common forms discussed above, the sky is the limit in terms of the creativity of contract drafters.

For example, a dispute resolution clause sometimes provides just that: "RP hereby agrees that any and all disputes with UP shall be resolved by binding arbitration."[13] The clause is drafted to impose an obligation on one party alone to submit any claims to arbitration (as opposed to giving a unilateral *right* to one of the parties to submit disputes to arbitration). The effects of a clause drafted in this manner are unclear. The likely meaning is that the UP has no obligation to trigger arbitration in order to resolve the UP's own claims (the UP can resort to the competent courts or choose arbitration), but the RP may only bring its disputes to arbitration (and, in such a case, the UP is bound to arbitrate).

Another example is where the contract grants the UP the "sole option" to require the RP to submit any dispute between the parties to arbitration, by providing that "any dispute between RP

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finally resolved by arbitration."). *See also* Nesbitt & Quinlan, *supra* note 3, at 134; Nahmias, *supra* note 3, at 36.

[13] *See, e.g.*, Deutsch v. Long Island Carpet Cleaning, 5 Misc. 2d 684, 684 (N.Y. App. Term 1956) ("While the customer's claims are required to be arbitrated, the company's claim for money due is at its sole option litigable in the courts."); Noohi v. Toll Bros., Inc., 708 F.3d 599, 609-10 (4th Cir. 2013) ("Buyer . . . hereby agree[s] that any and all disputes with Seller . . . shall be resolved by binding arbitration.").

and UP, shall, at UP's sole option/election, be decided by arbitration."[14] The intended effect is that the UP is able to initiate arbitration with respect to its own claims, and can invoke the arbitral process both as respondent and as claimant, while the RP cannot initiate arbitration with respect to the RP's claims. These clauses are typically reviewed as unilateral arbitration clauses, with an additional negative factor that adds to their likely invalidity (the possibility of the UP to remove a claim commenced by the RP in courts by invoking its unilateral arbitration option).

Finally, there are clauses that appear to impose a mutual obligation to arbitrate, but one party (the UP) retains the right to change any terms of the agreement, including the arbitration clause itself, in its own discretion. Unsurprisingly, such clauses are typically found to be void because the promise to arbitrate is illusory,[15] except when the right to modify (including to terminate) the agreement only applies prospectively, and not retroactively.[16]

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[14] *See*, *e.g.,* Willis Flooring, Inc. v. Howard S. Lease Constr.Co. & Assoc.*,* 656 P.2d 1184, 1184 (Alaska 1983) ("Contractor, at its sole option, shall have the right to require Subcontractor to arbitrate any and all claims, disputes, and other matters in question between the Contractor and the Subcontractor arising out of or related to the Subcontract or the breach thereof."); Sablosky v. Gordon Co., 535 N.E.2d 643, 645 (N.Y. 1989) ("any dispute . . . shall at the Company's election, which election may be made at any time prior to the commencement of a judicial proceeding by the Company, or in the event instituted by the Employee at any time prior to the last day to answer and/or respond to a summons and/or complaint made by the Employee, be submitted to arbitration"); Blumenthal-Kahn Elec. Ltd. v. Am. Home Assurance Co., 236 F. Supp. 2d 575, 577 (E.D. Va. 2002) ("any dispute between San Jose and Subcontractor, shall, at San Jose's sole option, be decided by arbitration"); United States v. Consigli Constr. Co., 873 F. Supp. 2d 409, 411 (D. Me. 2012) ("[a]ny and all claims or disputes arising out of or relating to this Agreement . . . shall be decided, at the sole discretion of [UP], either by submission to (1) arbitration . . . or (2) judicial decision by the Superior Court in the State of Maine"); Boatright v. Aegis Defense Servs., LLC, 938 F. Supp. 2d 602, 605 (E.D. Va. 2013) ("If [RP] seeks relief from [UP] in court relating to a Dispute, [UP] . . . may at its option within sixty (60) days of service of [RP's] complaint, require all or part of the dispute to be arbitrated.").

[15] *See* Caire v. Conifer Value Based Care, LLC, 982 F. Supp. 2d 582, 594 (D. Md. 2013) (arbitration agreement void because the UP "made no promise to arbitrate at all"); Peleg v. Neiman Marcus Grp., Inc., 140 Cal. Rptr. 3d 38, 69 (Cal. Ct. App. 2012) (same holding); Stanich v. Hissong Grp., Inc., No. 2:09–cv–0143, 2010 WL 3732129, at *7 (S.D. Ohio Sept. 20, 2010) (same holding); Phox v. Atriums Mgmt. Co., 230 F. Supp. 2d 1279, 1283 (D. Kan. 2002) ("arbitration clause does not constitute a separate binding agreement because defendant's promise to arbitrate is illusory").

[16] Lizalde v. Vista Quality Mkts., 746 F.3d 222, 226 (5th Cir. 2014) (the fact that "termination of the Arbitration Agreement is restricted to prospective claims" means that the agreement was not rendered "illusory"); Williams v. TCF Nat'l Bank, No. 12 C

II. OVERVIEW OF LEGAL ISSUES RAISED BY ASYMMETRICAL DISPUTE RESOLUTION CLAUSES

Within each category, quirks of drafting may present particular interpretive problems, but in all cases, whatever the structure of the asymmetrical dispute resolution clause, the bottom line is that one party (the RP) has narrower rights than its counterparty (the UP) or, flipping the perspective, one party (the UP) has broader options than its counterparty (the RP).

As such, from the perspective of the RP, asymmetrical dispute resolution clauses raise issues of equality of the parties, both at the stage of the negotiations (or lack thereof) that led to the adoption of the asymmetrical dispute resolution clause, and at the stage of the proceedings once a dispute has arisen and one of the parties has taken legal action under the asymmetrical dispute resolution clause. With respect to international disputes, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[17] One of the debates is whether Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, as reflected in the national arbitration laws governing international commercial arbitrations, applies to both stages, *i.e.* before and after the commencement of legal proceedings.

Asymmetrical dispute resolution clauses also raise issues of potestativeness. The term "potestative" refers to the fact that the fulfillment of the agreement is dependent upon an event which one of the parties has the power to make happen or prevent from happening, or, in other words, the event is entirely within the power of only one party to the contract. The doctrine of potestativity is part of general contract law in several civil law countries.[18] In these countries, obligations contracted subject to a

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05115, 2013 WL 708123, at *10 (N.D. Ill. Feb. 26, 2013) ("contract did not purport to render modifications retroactively applicable to already-pending disputes," as it provided that "no change" to the arbitration clause would apply "after [UP] received [RP's] notice" of a claim).

[17] U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 18 at 14 (2006).

[18] *See, e.g.*, CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1170 (Fr.) ("Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite.") ("A clause that deprives the essential obligation of the debtor if its substance is void"

potestative condition to the benefit of the party binding itself are void. A similar concept, used in other jurisdictions, is that of a "contingent contract," which can be defined as a contract to enter into a contract.

Other legal concepts that are sometimes invoked by the RP (and courts) are the common law concept of unconscionability and the doctrine of "gross disparity," which typically provide that a clause may be avoided if it "unjustifiably gave the other party an excessive advantage."[19]

Finally, a related question sometimes discussed in case law is the doctrine of separability of the arbitration agreement from the container contract. The original purpose of the doctrine is to preserve the validity of the arbitration agreement in situations where the existence or validity of the container contract is at issue. The principle of separability is well-established and recognized by most arbitration laws and rules, as well as by courts, arbitral tribunals, and legal scholars. For example, Article 16 of the UNCITRAL Model Law on International Commercial Arbitration provides that an "arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[20] It is unanimously agreed that this provision embodies the cornerstone principle of *kompetenz-kompetenz* (also known as the principle of *compétence-compétence* in its French translation). Article 16 of the UNCITRAL Model Law on International Commercial Arbitration goes on to explain that, for the purpose of ruling on the existence or validity of the arbitration agreement, "an arbitration clause

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(author's translation)); Art. 1355 C.c. (It.).(conditions precedent to a contract cannot depend exclusively on one party's will and must be objective).

[19] *See*, *e.g.*, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 3.2.7 at 411 (2010), which provides:

> (1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (b) the nature and purpose of the contract.

[20] U.N. COMM'N ON INT'L TRADE LAW, *supra* note 17, at 30.

which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" and that "[a] decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."[21] This principle was sometimes, in our view, misapplied in cases involving asymmetrical dispute resolution clauses.

From the perspective of the UP, the arguments are typically based on freedom of contract (and, in jurisdictions that require it as a condition for valid contract formation, exchange of consideration) and, as specifically applied to arbitration, the principle of party autonomy, a cornerstone principle of arbitration, which is unanimously recognized.[22] For example, Article 19 of the UNCITRAL Model Law on International Commercial Arbitration provides: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[23]

The agreement to arbitrate is a mutually binding promise to refer disputes to arbitration. Article 7 of the UNCITRAL Model Law on International Commercial Arbitration defines the arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[24] In cases where, under the asymmetrical dispute resolution clause, only one party has the right to refer a dispute to arbitration, the legal issue is whether or not the parties manifested a clear intent to arbitrate, required for the validity of the arbitration agreement.

Within these parameters, several laws are relevant to the question of validity and enforcement of a particular asymmetrical

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[21] *Id.*

[22] *See, e.g.*, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 31 (Emmanuel Gaillard & John Savage eds., 1999); Nigel Blackaby, Constantine Partasides, Alan Redfern, & Martin Hunter, REDFERN AND HUNTER ON THE INTERNATIONAL ARBITRATION 1.108 (Oxford University Press, 6th ed. 2015); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 31 (Kluwer Law International, 3d ed. 2020); MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE, 56 (2d ed. 2001); MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1 (2d ed. 2012).

[23] U.N. COMM'N ON INT'L TRADE LAW, *supra* note 17, at art. 19.

[24] *Id.* at art. 7.

dispute resolution clause, in particular the law which governs the container contract of the asymmetrical dispute resolution clause, the law of the chosen seat, and the law(s) of any jurisdictions relevant at the enforcement stage of the arbitral award[25] Consequently, drafters (and interpreters) of asymmetrical dispute resolution clauses must often review not just the domestic law, but a multitude of foreign laws. Several surveys have been published, most of which focus on unilateral litigation clauses[26]. The present study[27] reviews and refines the findings reported by other authors in key jurisdictions, adds additional jurisdictions and recent case law, includes both unilateral litigation clauses and unilateral arbitration clauses, as well as other varieties of asymmetrical dispute resolution clauses, and draws comprehensive conclusions based on which drafting tips are suggested.

III. JURISDICTIONS COMFORTABLE WITH ASYMMETRY

A. Australia

Australian courts have "generally upheld the validity of asymmetrical arbitration agreements."[28] The Australian High Court has reasoned, for example, that the definition of an arbitration agreement is "wide enough to encompass agreements by which the parties are bound to have their dispute[s] arbitrated if an election is made or some event occurs, or some condition is satisfied" and further held that the arbitration agreement is valid

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[25] *See*, Bérard et al., *supra* note 6.

[26] *See, e.g.*, *id.* This survey of the effectiveness of unilateral litigation clauses in 60 jurisdictions, classified those jurisdictions in several categories. The first category encompassed countries where such clauses have been confirmed as effective or are likely to be effective: Australia, Germany, Hong Kong, Italy, Singapore, Spain, the United Kingdom, and the United States, among others. The second category encompassed countries where such clauses have been confirmed as ineffective or are likely to be ineffective: China, France, India, Poland, Russia, Romania, and Turkey, among others. The third category listed countries that have an uncertain position, such as, for example, Kuwait, Luxembourg, Senegal, Slovakia, Slovenia, the Philippines, and Vietnam.

[27] Review of case law in the present study is as of December 31, 2018 (except where otherwise indicated).

[28] *See* BORN, *supra* note 22, at 86.

"even if only one party has the right to elect or is in a position to control the event or satisfy the condition[s]."[29]

In another case, the Queensland Court of Appeal held that the uncertainty regarding whether "those conditions are in fact fulfilled . . . does not deprive [the agreement] of the status of a binding, if executory, agreement to refer disputes to arbitration."[30] In other words, the court found that it is enough that the parties have agreed that, if certain events happen, their disputes will be referred to arbitration, even if only at the option of one of the parties.[31]

B. Hong Kong

In *China Merchants v. JGC*, the dispute resolution clause provided that "if a dispute could not be settled by mutual agreement, JGC was required to state its decision, which was binding until completion of the works."[32] "Once the decision had been notified to the contractor, the contractor was required to continue [performing the works and,] if [it] did not agree with JGC's decision, it had to notify JGC (within fifteen days of receiving notice of JGC's decision) that it wished to refer the dispute to arbitration."[33] All steps were followed, except that the contractor never notified JGC of its intention to refer the dispute to arbitration.[34] "The contractor commenced court proceedings and JGC requested the court to stay the proceedings,"[35] based on the arbitration provisions of the dispute resolution clause.

The court concluded that a clause which gave "only one of the parties the right to refer any dispute" to arbitration was "an arbitration agreement within the meaning of [Article 7 of the]

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[29] PMT Partners Pty Ltd (In Liq) v Austral Nati'l Parks & Wildlife Servs [1995] HCA 36 (Austl.). *See also* Nesbitt & Quinlan, *supra* note 3, at 147-48.

[30] *See* Mulgrave Central Mill Co v Hagglunds Drives Pty Ltd [2001] QCA 471, 5 (Austl.); *See also* Nesbitt & Quinlan, *supra* note 3, at 147-48.

[31] Nesbitt & Quinlan, *supra* note 3, at 147-48.

[32] JUDITA PERÉNYIOVÁ, UNILATERAL OPTION CLAUSES IN COMMERCIAL ARBITRATION 28-29 (2014) (LL.M. Short Thesis, Central European University) (citing China Merch. Heavy Indus. Co. v. JGC Corp., [2001] 3 HKC 580 (High Ct. of the Hong Kong Spec. Admin. Region, C.A. July 4, 2001) (China)).

[33] PERÉNYIOVÁ, *supra* note 32, at 28.

[34] *Id.*

[35] *Id.*

UNCITRAL Model Law on International Commercial Arbitration, which applies in Hong Kong."[36] "The court held that the fact that the party failed to exercise its right to refer a dispute to arbitration did not render the arbitration clause inoperative" and consequently ordered the stay of the court proceedings.[37] Stated differently, the court interpreted the contractor's unilateral right to refer disputes to arbitration as an obligation to refer disputes to arbitration, to the exclusion of the jurisdiction of the courts. The contractor did not have the right to choose between arbitration and court litigation.

C. Italy

Unilateral arbitration clauses "have consistently been upheld by the Italian Corte di Cassazione, broadly on the basis that the parties should, in principle, be free to agree how to determine their disputes, including granting one party only the option to refer a dispute to arbitration."[38] In validating such clauses, Italian courts also relied on Article 1331 of the Italian Civil Code, which deals with the effects of unilateral declarations and provides: "When the parties agree that one of them should be bound by its own declaration and the other has the choice to accept it or not, the declaration of the former is considered as an irrevocable proposal . . . ." [39] There is also broad consensus among Italian scholars that the validity approach is correct.[40]

That view is reinforced by the fact that Italian courts also upheld unilateral forum selection clauses (with no arbitration component) in two recent cases.[41]

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[36] *Id.*

[37] *Id.*

[38] Nesbitt & Quinlan, *supra* note 3, at 144 & n.29 (citing Italian Supreme Court, judgment no. 2096 of Oct. 22, 1970, published in Guistizia Civile Mass., 1970, p. 1103 and stating in footnote that "[t]he Milan Court of Appeal has also considered, and upheld, the validity of unilateral clauses").

[39] Mauro Rubino-Sammartano, *Arbitrato Unilateralmente Facoltativo [Unilateral Arbitration Clauses]*, in IL DIRITTO DELL'ARBITRATO 16-19 (CEDAM Ed., 2000).

[40] Nesbitt & Quinlan, *supra* note 3, at 144. But *see, e.g.*, Renato Vecchione, *Sulla Validità Della Clausola Compromissoria Unilaterale [On the Validity of Unilateral Arbitration Clauses]*, IV Giurisprudenza Italiana 65 (1963) (arguing for invalidity of arbitration clauses).

[41] *See* Claudio Perrella, *Italy: Italian Supreme Court Considers Unilateral Jurisdiction Clauses*, MONDAQ (Apr. 8, 2013),

In the *Sportal Italia v Microsoft* case from 2011, the contract was subject "to the laws of the state of Washington and specif[ied] that . . . the Italian company [Sportal Italia] consented to the exclusive jurisdiction and venue of the courts in Washington (with an additional provision that the 'company waive[d] all defenses of lack of personal jurisdiction and forum *non conveniens*'), [while] the other party—(Microsoft)—was free to [start litigation before] Italian courts."[42] Microsoft started litigation against Sportal Italia before Italian courts.[43]

The Milan Court of Appeal upheld the validity of the clause, noting "that such clauses have long existed and been permitted in the Italian legal system."[44] "[T]he court found an example of an asymmetrical clause in the [1930] bilateral convention . . . between Italy and France,"[45] and noted that Article 17 of the 1968 Brussels Convention (which was later replaced by the Brussels I Regulation) gave the parties the possibility to agree on such a hybrid clause.[46] That provision states: "if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention."[47] The "court added that the Italian defendant could not object to the jurisdiction of its 'natural' judge, and that the alleged imbalance existing between the parties had not taken place in the case at hand [because] Microsoft had preferred to make use of Italian courts instead of filing the lawsuit in Washington."[48]

In the *Grinka v Intesa San Paolo* case from 2012,[49] the Italian Supreme Court considered the validity of a clause that

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https://www.mondaq.com/italy/arbitration-dispute-resolution/231358/italian-supreme-court-considers-unilateral-jurisdiction-clauses [https://perma.cc/3Z94-SKLJ].

[42] *Id.* (citing Sportal Italia v. Microsoft Corp., Corte D'Appello di Milano, 22 Sep. 2011(It.)).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* (citing Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 O.J. (L 299) 35, art. 17).

[48] *Id.*

[49] Grinka in liquidazione v. Intesa San Paolo, Simest, HSBC, Cass., 11 Apr. 2012 (It.).

"provided that one party was bound to refer contractual disputes to the English courts while the other had the liberty to bring an action 'before Italian courts or any other judge having jurisdiction pursuant to the international conventions.'"[50] The Supreme Court upheld the validity of the clause.[51] Italian contract law generally prohibits potestative conditions.[52] Nevertheless, "the Supreme Court found nothing wrong with the possibility [of one party] to choose among various jurisdictions, despite the fact that such a choice depends on the mere will of that party."[53] We will see that, when confronted with an arguably similar clause, the French Supreme Court took a radically different position, both with respect to the interpretation of the relevant EU provisions and with respect to the application of the doctrine of potestativity, and invalidated the clause (see *infra* Part V.1).

D. Portugal

In the *Xilam Animation v. Lnk Videos* case from 2012, the Oeiras First Instance Tribunal, and afterwards the Lisbon Court of Appeal, excluded any presumption of invalidity of a unilateral arbitration clause due to its inclusion in a standard contract.[54] The courts reasoned that "'inconvenient' arbitration clauses would be [deemed null and] void only when the respective provisions would cause gross inconvenience to one of the parties" and not provide any particular benefits to its counterparty.[55] Moreover, legal scholars agree that there is no requirement of mutuality under Portuguese general contract law and, although clearly imbalanced, there is little evidence to support the idea that unilateral arbitration clauses violate Portuguese public policy.[56]

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[50] Perrella, *supra* note 41.

[51] *Id.*

[52] Art. 1355 C.c. (It.) (conditions precedent to a contract cannot depend exclusively on one party's will and must be objective).

[53] Perrella, *supra* note 41.

[54] *See* Xilam Animation v. Lnk Videos, Tribunal da Relação de Lisboa [Lisbon Court of Appeal] of 07-12-2012 (Port.).

[55] *See* IURII USTINOV, UNILATERAL ARBITRATION CLAUSES: LEGAL VALIDITY 26 (2016) (Master's Thesis, Tilburg University).

[56] *See* Henriques, *supra* note 8, at 52-54.

E. Singapore

In 2017, the Singapore Court of Appeal unequivocally confirmed the validity of an asymmetrical dispute resolution clause, in *Wilson Taylor Asia Pacific Pte. Ltd. v. Dyna-Jet Pte Ltd.*[57] In that case, the relevant contract provided that:

> Any claim or dispute . . . 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.[58]

Therefore, the clause was not only asymmetrical but it was also optional. If no amicable settlement were possible, Dyna-Jet could elect to submit the dispute to arbitration or to start litigation.[59] Following a dispute between the parties, Dyna-Jet suspended the works under the contract and commenced litigation proceedings against the defendant, before the Singapore High Court.[60] The defendant sought a stay in favor of the arbitration agreement between the parties, which was denied.[61]

The Singapore High Court concluded that there was nothing objectionable in the fact that the agreement was one-sided or that it lacked mutuality:

> The Judge held that the Clause constituted an arbitration agreement despite its asymmetrical nature. After an extensive survey of modern Commonwealth authority, the Judge decided that a contractual dispute resolution agreement conferring an asymmetric right (in other words, a right enjoyed by only one party to the agreement but not by the other) to elect whether to arbitrate a future dispute was nevertheless an arbitration agreement. Thus he dismissed the Respondent's argument that the Clause was not an arbitration agreement because of its "lack of mutuality". The

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[57] Wilson Taylor Asia Pacific Pte. Ltd. v. Dyna-Jet Pte. Ltd., [2017] SGCA 32 (Sing.).

[58] *Id.* at ¶ 4.

[59] Petit et al., *supra* note 3, at 25.

[60] *Dyna-Jet*, at ¶ 5.

[61] *Id.* at ¶ 6.

> Judge also held that the fact that a contractual dispute-resolution agreement granted a right to elect whether to arbitrate a future dispute was nevertheless an arbitration agreement. Therefore the characteristic of "optionality" in a dispute-resolution agreement was not inconsistent with the meaning or nature of an arbitration agreement. Summing up these principles, he concluded that a contractual dispute-resolution agreement which confers an asymmetric right to elect whether to arbitrate a future dispute is properly regarded as an arbitration agreement.[62]

The Court of Appeal concurred, confirming the finding of the Singapore High Court that the unilateral option clause was valid and binding.[63] The Court of Appeal held that the dispute resolution clause was a valid arbitration agreement and that it was "immaterial" that the clause was asymmetrical, or that arbitration was optional (instead of imposing on the parties an immediate obligation to arbitrate their disputes).[64] However, because Dyna-Jet had elected to refer the dispute to the courts (and had not elected to resolve the dispute to arbitration in accordance with its right to do so), the dispute could no longer be referred to arbitration and was destined to be pursued in the Singapore courts.[65] As such, the defendant's application for a stay of the court litigation in favor of arbitration was dismissed.[66] This is the first case where the Singapore Court of Appeal ruled on the validity of an asymmetrical dispute resolution clause with a unilateral option to arbitrate under Singapore law.

F. Spain

A 2013 decision of the Madrid Court of Appeal in the *Camimalaga SAU v. DAF Vehiculos Industriales SA and DAF Truck NV* case[67] upheld an asymmetrical dispute resolution clause

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[62] *Id.* at ¶ 8 (citations omitted).

[63] *Id.* at ¶ 13.

[64] *Id.*

[65] *Id.* at ¶ 24.

[66] *Id.* at ¶ 26.

[67] Camimalaga SAU v. DAF Vehiculos Industriales SA and DAF Truck NV, Oct. 18, 2013 (Sp.) *See also* Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 J. INT.'L ARB. 19, 28 (2014); Ustinov, *supra* note 55, at 26.; Perényiová, *supra* note 32, at 30.

included in an agreement between a Spanish company and a Dutch company, and the Dutch company's Spanish subsidiary.

The "dispute in question (which related to anti-trust and unfair competition issues) arose out of a series of agreements that had been entered into by a Spanish truck dealership and the Spanish subsidiary of the well-known Dutch truck manufacturer, DAF."[68] "Each agreement contained a [unilateral option] clause allowing the claimant to elect to refer disputes either to arbitration under the arbitration rules of the Netherlands Arbitration Institute or to specified Dutch courts."[69]

"The Spanish truck dealership commenced proceedings before the Spanish courts on the basis that . . . [t]he [asymmetrical dispute resolution] clause was invalid, both as an agreement to arbitrate and as a [jurisdiction] clause."[70] The Spanish truck dealership also argued that "[u]nfair competition and anti-trust issues were not arbitrable as a matter of Spanish law (such that the arbitration option was of no application)"[71] and that "the contractually agreed dispute resolution mechanism was of no application in any event" because "the dispute was not a contractual one."[72] "DAF raised an objection to the Spanish court's jurisdiction on the basis that all disputes should either be referred to arbitration under the arbitration rules of the Netherlands Arbitration Institute or to the specified Dutch courts [pursuant to] the parties' agreement."[73]

"The Spanish court of first instance upheld DAF's objection on the basis that the Spanish courts were not one of the dispute resolution fora selected by the parties (impliedly holding that the unilateral option clause was valid)."[74] "The Spanish truck dealership appealed this decision to the Madrid Court of Appeal."[75] The Madrid Court of Appeal held that "unfair competition and anti-trust issues" are arbitrable and "that the

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[68] *See* Bérard et al., *supra* note 6.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

parties' agreement to submit disputes to the Dutch courts was . . . valid" under the Brussels I Regulation.[76]

The Madrid Court of Appeal also held that "there is nothing in Spanish law undermining the effect of unilateral clauses" and that "the combination of arbitration and court litigation options can be justified on grounds of party autonomy."[77] As such, relying on the principle of party autonomy, the Madrid Court of Appeal concluded that the asymmetrical dispute resolution clause was valid and binding.[78]

"This represented a significant departure from the previous Spanish law position,"[79] which had focused on the requirement for unequivocal consent to arbitration. The *Camimalaga* decision was "the first time [when] a unilateral option clause [was] expressly upheld by the Spanish courts."[80]

G. United Kingdom

Some early national court decisions concluded that an arbitration agreement would only be valid if both parties were granted mutual rights to refer disputes to arbitration. In 1966, confronted with a clause granting one party, but not the other, a unilateral right to commence arbitration, an English court in *Baron v. Sunderland* voided the clause, reasoning:

> It seems to me that this is about as unlike an arbitration clause as anything that one could imagine. It is necessary in an arbitration clause that either party shall agree to refer disputes to arbitration, and it is an essential ingredient in that either party may in the event of a dispute arising refer it in the provided manner to arbitration. In other words, the clause must give bilateral rights of reference.[81]

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[76] *Id.*

[77] *See* Draguiev, *supra* note 67, at 28.

[78] Bérard et al., *supra* note 6.

[79] *Id.*

[80] *Id.*

[81] Baron v. Sunderland Corp., [1966] 1 All ER 349, 351 (Eng.) (holding that "mutuality" was necessary for a valid arbitration agreement and defining it to mean that all parties to an agreement should have "equal procedural rights"). *See also* Tote Bookmakers Ltd. v. Dev. & Prop. Holding Co., [1985] 2 All ER 555 (Eng.).

Starting in 1986, English decisions expressly overruled that approach and refused to require that arbitration agreements be mutual or symmetrical. In *Pittalis v. Sherefettin*, the court held:

> I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by only one of the parties seems to me to be irrelevant. The arrangement suits both parties.[82]

The *NB Three Shipping v. Harebell Shipping* case from 2004 is a leading authority on asymmetrical dispute resolution clauses with a unilateral option to arbitrate (unilateral arbitration clause).[83] In that case, the dispute resolution clause provided: "the courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration."[84] As such, both of the parties (the charterer and the shipowner) could bring litigation proceedings, while only one party (the shipowner) had the right to arbitration.[85] The charterer started litigation before the High Court.[86] Shortly thereafter, the shipowner's solicitors wrote: "[g]iven our client's option we are surprised that you did not consult with our client before you commenced court proceedings."[87] The shipowner then "sought to stay the court proceedings under [S]ection 9 of the [English] Arbitration Act 1996 . . . and refer the dispute to arbitration."[88]

The court held that the asymmetrical clause was designed to give "better rights" to the shipowner than to the charterer, and gave the shipowner "a right to stop or stay a court action brought

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[82] Pittalis v. Sherefettin, [1986] 2 All ER 227, 231 (Eng.) (overruling *Baron*, which had relied on the mutuality doctrine). *See also* BORN, *supra* note 22, at 85.

[83] NB Three Shipping Ltd. v. Harebell Shipping Ltd., [2004] EWHC 2001 (appeal taken from Eng.).

[84] *Id.* at 7- 8.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 5.

[88] Bérard et al., *supra* note 6.

against them, at their option."[89] Consequently, the court found that the shipowner's:

> [A]pplication to stay court proceedings under Section 9 of the [English Arbitration Act] 1996 was consistent with the commercial sense of the clause. In other words, the [ship]owner's right to refer any dispute[s] to arbitration remained even if the charterer[] tried to bypass this right by initiating proceedings without first consulting the [ship]owner on the desired forum.[90]
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> While [the court] noted that it would have been preferable for the clause to provide more detail as to the circumstances in which the option to arbitrate could be exercised or would be lost, and [to provide that] the [ship]owner's option 'would cease to be available if owners took a step in the action or they otherwise led charterers to believe on reasonable grounds that the option to stay would not be exercised,' the absence of such wording did not render the clause unenforceable.[91]

In ruling that the application to stay the litigation satisfied the requirements of Section 9 of the English Arbitration Act 1996, the court applied that provision somewhat generously. Section 9 provides:

> A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.[92]

That provision is intended to apply where a party commences litigation despite being bound by an arbitration clause and entitles the other party to have the matter transferred to an arbitral tribunal, thereby blocking the litigation. "[T]here is a thin

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89 *NB Three Shipping Ltd.*, [2004] EWHC 2001 at 11.

90 *See* Bérard et al., *supra* note 6.

91 *Id.*

92 *NB Three Shipping Ltd.*, [2004] EWHC 2001 at 7.

line between having" a general advantage (the right to choose the dispute resolution forum, prior to commencement of action) "and having an advantage after an action is brought" (the right to remove a dispute brought by the restricted party in a forum considered inconvenient by the unrestricted party).[93] There is no subsequent reported authority in the United Kingdom dealing with the same type of clause.[94]

The *Law Debenture Trust v. Elektrim Finance* case, from 2005, dealt with a clause which provided for arbitration, but granted an option to one of the parties to litigate (unilateral jurisdiction clause).[95] "The claimant was seeking to enforce the payment of monies due under bonds issued by [the] first defendant and guaranteed by the second defendant."[96] "The claimant was the trustee for various bondholders."[97] The Trust Deed "entitled each party to enforce the arbitration provision against the other, but only gave the [trustee] and the bondholders the right to refer disputes to the English courts."[98] The relevant provisions were: "Any dispute arising out of or in connection with these presents may be submitted by any party to arbitration for final settlement . . .[,]" and "neither [ESA] nor [EFBV] shall be permitted to bring proceedings in any other court or tribunal . . .[,]" but "notwithstanding" this, "the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England who shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents."[99]

The trustee "commenced court proceedings under Section 72 of the [English Arbitration Act] 1996, seeking a declaration that there was no valid arbitration agreement, and that the English courts had jurisdiction to decide the matter."[100] Therefore, "the court . . . had to decide whether the jurisdiction question itself

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[93] Draguiev, *supra* note 67, at 24 n.12.

[94] *See id.* at 36-37.

[95] Law Debenture Trust Corp. plc v. Elektrim Finance Fin. B.V., [2005] EWHC 1412 (appeal taken from Eng.).

[96] Bérard et al., *supra* note 6.

[97] *Id.*

[98] *Id.*

[99] *Law Debenture Trust Corp. PLC*, [2005] EWHC 1412, at [3].

[100] Bérard et al., *supra* note 6.

should be decided by the courts or the arbitral tribunal[,] and whether the dispute should be referred to courts or to arbitration."[101] The court held that the clause was valid and, consequently, the trustee's "application to stay arbitration proceedings was granted[,] as the right to seek arbitration was subject to the agreed option to litigate" granted to the trustee.[102]

The court held that the trustee "had not yet participated in any arbitration proceedings and was therefore entitled to rely on Section 72 of the [English Arbitration Act] 1996."[103] "Referring to [the *NB Three Shipping v. Harebell Shipping* case] as authority for the 'converse case[,]' concerning an option to arbitrate, [the court] held that . . . one party [being] granted an 'additional advantage' did not mean that the clause was invalid."[104] The court reasoned that "many contractual provisions confer advantages to only one of the parties."[105] The court also noted that the wording of the clause was "clear and unequivocal."[106] Consequently, the court held that the trustee could not be forced to arbitrate if it wished to commence its own proceedings covering the same subject matter, but imposed a limitation to the right of the trustee. Specifically, the court observed: "If [the trustee] starts an arbitration it would have waived its right (or option) to go by way of litigation. By the same token, if it participates sufficiently in an arbitration, it may well be held to have waived its rights to exercise its option. Subject to that, it has its clear rights."[107]

The general approach of the English courts, of giving effect to the parties' chosen dispute resolution method, even if asymmetrical, was confirmed in *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd.*, decided in 2013.[108] In that case, an asymmetrical forum selection clause in a loan agreement provided that the "courts of England have exclusive jurisdiction . . ." except

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[101] *Id.*

[102] Petit et al., *supra* note 3, at 35.

[103] Bérard et al., *supra* note 6.

[104] *Id.*

[105] *Id.*

[106] Law Debenture Trust Corp. plc v. Elektrim Finance Fin. B.V., [2005] EWHC 1412 [40] (appeal taken from Eng.).

[107] *Id.* at 42.

[108] Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd., [2013] EWHC 1328 (appeal taken from Eng.).

that "the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction."[109] The borrower defaulted, and the lender brought suit in England. The court applied English law to the interpretation of the clause (not Mauritian law, which is based on French law and the application of the *Rothchild* decision, discussed in Part V.1 below).[110] Under English law, the court validated the clause, noting that a textual interpretation suggested that at the very least the lender "ha[d] agreed to be subjected to the exclusive jurisdiction of the English courts, subject to its right to bring claims (which may overlap) abroad,"[111] and emphasizing that the clause represented the parties' contractual bargain.

Similarly, in *Barclays v. Ente Nazionale di Previdenza Ed Assistenza dei Medici e Degli Odontoiatri*, decided in 2015, "the High Court upheld a clause allowing one party to sue only in English courts but giving the other party a choice."[112] The court noted that there were "good practical reasons" for this asymmetrical clause.[113] Moreover, in *Commerzbank AG v. Pauline Shipping*, the High Court "held that asymmetrical jurisdiction clauses are exclusive jurisdiction clauses for . . . purpose[s] of Article 31(2) [of] the Brussels I Recast Regulations."[114] This provision states:

> [W]here a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.[115]

The court concluded that "with the asymmetric jurisdiction clauses in the present case, the defendants agreed to sue only in

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[109] *Id.* at 10.

[110] *See id.* at 32.

[111] *Id.* at 40.

[112] Petit et al., *supra* note 3, at 26.

[113] Barclays Bank plc v. Ente Nazionale di Previdenza Ed Assistenza dei Medici e Degli Odontoiatri, [2015] EWHC 2857 [124] (appeal taken from Eng.).

[114] Petit et al., *supra* note 3, at 26.

[115] *See* European Parliament and Council Regulation 1215/2012, 2012 O.J. (L 351) 1, Art. 31(2).

the courts of one EU Member State, England. Instead, they have enabled another court, the Greek court, to be seized of the matter. It would undermine the agreements of the parties, and foster abusive tactics, if the jurisdiction clauses in these agreements were to be treated not as exclusive, but as non-exclusive."[116]

To summarize, "English courts . . . will uphold [asymmetrical dispute resolution] clauses, irrespective of whether the [unilateral] option vested in one party is to litigate the dispute or to refer it to arbitration[. I]n other words, [unilateral] options to litigate and unilateral options to arbitrate are both valid," and the parties' agreement will be upheld.[117] Moreover, English courts "[w]ill not infer from the fact that a dispute resolution clause is 'one-sided' that the fundamental rights of [the] party that is not entitled to exercise an election have been infringed."[118]

IV. JURISDICTIONS UNCOMFORTABLE WITH ASYMMETRY

A. Bulgaria

"The first time a Bulgarian court had the chance to adjudicate on the validity and admissibility of unilateral jurisdictional clauses in Bulgaria was [in] 2011." [119] The clause at issue was included in "[a] loan agreement concluded between individuals (natural persons)[,] in an entirely domestic situation."[120] The law governing the loan agreement and the dispute resolution clause was Bulgarian law.[121]

The dispute resolution clause provided that the lender could "initiate proceedings against the borrowers before the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry

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[116] Commerzbank Aktiengesellschaft v. Liquimar Tankers Mgmt. Inc., [2017] EWHC 161 [70] (appeal taken from Eng.).

[117] *See* Bérard et al., *supra* note 6.

[118] *Id.*

[119] Ilya Komarevski & Eleonora Mateina, *Dispute Resolution: Unilateral Dispute Resolution Clauses in Bulgaria*, IFLR (Oct. 1, 2015), https://www.iflr1000.com/NewsAndAnalysis/Dispute-Resolution-Unilateral-dispute-resolution-clauses-in-Bulgaria/Index/4107 [https://perma.cc/MF93-HE8J].

[120] Gilles Cuniberti, *Bulgarian Court Strikes Down One Way Jurisdiction Clause*, CONFLICTOFLAWS.NET (Nov. 13, 2012), http://conflictoflaws.net/2012/bulgarian-court-strikes-down-one-way-jurisdiction-clause/ [https://perma.cc/9QNS-HR97].

[121] *Id.*

(BCCI) or any other [arbitral] institution, or before the Regional Court of Sofia."[122] "A dispute arose[,] and the lender brought an action before the Court of Arbitration at BCCI, which . . . found that it [had jurisdiction] to hear the dispute and ruled that the borrowers . . . were jointly liable . . . ."[123] "The borrowers initiated proceedings to set aside the [arbitral] award before the Supreme Court of Cassation[,] claiming that the Court of Arbitration at BCCI lacked jurisdiction."[124] "They argued that the arbitration clause was against good morals [basically, unconscionable and that it breached the principle of party equality,] a general principle under Bulgarian civil procedural law."[125]

The Supreme Court of Cassation held that "the right of the lender to choose at its own discretion the [forum] before which to exercise its right to bring a claim fell within the category of 'potestative rights.'"[126] A "potestative" right is "the entitlement of one person (or a group of persons) to affect unilaterally the legal position of another person (or a group of persons), where the latter are obliged to bear . . . the consequences [of the former's entitlement]."[127] "Examples of potestative rights under Bulgarian law include the right to divorce [or] the right of cancellation . . . of a contract."[128] The court held that, "[u]nder Bulgarian law, potestative rights can be established only ex lege (by law), . . . not contractually"[129] through an agreement between private parties, due to their intensity and potentially detrimental effects on third parties. On this basis:

> [T]he court concluded that a clause which in violation of law entitled one of the parties to unilaterally decide which dispute resolution body (an arbitration institution or a court) has a jurisdiction to resolve a particular dispute, is void pursuant to art.26, par.1 of the Bulgarian Contracts and Obligations Act . . . [a]ccording to [which], all contracts that [are] violating or

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122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 Komarevski & Mateina, *supra* note 119.
129 *Id.*

> evading the law, as well as all contracts in breach of good morals, are void.[130]

The court did not present:

> [A]ny legal or . . . theoretical test for determining the potestative nature of the rights[,] . . . did not comment on the wording of the clause, the position of the parties, or the type of clause (for example, unilateral litigation or arbitration or mixed, one-step or multi-stage) and did not present any other arguments that could ground the nullity of the unilateral jurisdictional clauses

or, more broadly, of asymmetrical dispute resolution clauses.[131]

This decision warrants two additional observations. First, although the clause at issue in that case was incorporated in a purely domestic contract, the court did not emphasize the purely domestic character of that case. As such, the holding would also be applicable to an international context, whether or not the dispute resolution clause is governed by Bulgarian law.[132] Second, the judgement of the Bulgarian Supreme Court of Cassation is not binding on other (lower) Bulgarian courts. Consequently, in Bulgaria, asymmetrical dispute resolution clauses that provide one of the parties with a unilateral right to decide whether to refer a dispute to a state court or to an arbitral tribunal are invalid. In contrast, (symmetrical) dispute resolution clauses that provide for alternative competences of the courts and arbitrators might be valid, but such clauses would raise another issue, that of whether there was mutual intent to arbitrate.

B. China

In China, arbitration is governed by the Chinese Arbitration Law and by the provisions of the Civil Procedure Law that pertain to arbitration. In addition, the Supreme People's Court uses judicial interpretations the purpose of which is to guide the lower courts' application of the law. China is not a UNCITRAL Model

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130 Cuniberti, *supra* note 120.

131 Komarevski & Mateina, *supra* note 119.

132 *See id.*

Law jurisdiction, although Chinese Arbitration Law contains some of the cornerstone principles relevant to the issue of validity of asymmetrical dispute resolution clauses, such as the principle of party autonomy and the doctrine of separability of arbitration agreements.

The issue of asymmetrical dispute resolution clauses was addressed in two interpretations issued by the Supreme People's Court. Pursuant to Article 7 of the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, adopted on December 26, 2005:

> Where the parties concerned agree that they may either apply to the arbitration institution for arbitration or bring a lawsuit with people's court for settlement of dispute, the agreement for arbitration shall be ineffective, unless after one party applies to the arbitration institution for arbitration, the other party fails to propose any objection within the period prescribed . . . .[133]

Consequently, bilateral dispute resolution clauses allowing both parties an option between both arbitration and litigation are invalid ("ineffective") as an arbitration agreement. If the claimant chooses arbitration and commences arbitral proceedings, the other party (the respondent) may object. However, failure to object constitutes implied consent to the arbitration and cures the invalidity. The clause is nevertheless valid as a (bilateral) litigation clause.

Moreover, unilateral arbitration clauses are also invalid, subject to the same exception (the restricted party's failure to object after the unrestricted party chooses arbitration). However, the invalidity only concerns the unilateral option for arbitration and does not extend to the entire dispute resolution clause. As such, the agreement on a particular jurisdiction remains valid.[134]

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[133] *Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China*, BEIJING ARB. COMM'N, http://www.bjac.org.cn/english/page/ckzl/htf3.html [https://perma.cc/L8B6-5Y8E] (last visited May. 1, 2021).

[134] *See* Jiangmen Jiangci Electrician Co., Ltd. v. Yunnan Copper Co., Ltd., Supreme People's Court, 2013.

Recently, the Supreme People's Court adopted the Provisions on Certain Issues related to the Conduct of Judicial Review of Arbitration Cases, which came into force on January 1, 2018. Article 14 of this new interpretation provides:

> Where, absent the parties' choice of the governing law, a people's court is to ascertain the law governing the validity of a foreign-related arbitration agreement . . . , and application of the law of the place of the arbitral institution or the law of the seat of arbitration will bring about different results in respect of the validity of the arbitration agreement, then the people's court shall apply the law that renders the arbitration agreement valid.[135]

In other words, with respect to a foreign-related arbitration agreement (not domestic), if there is no choice of the law governing the validity of the arbitration agreement,[136] a court will examine both "the law of the place of the arbitral institution" and "the law of the seat of the arbitration" (the *lex arbitri*). If either one of these laws admits the validity of the arbitration agreement, the court will uphold its validity. Because of the new interpretation, Chinese courts will be more inclined to admit the validity of unilateral arbitration clauses (or bilateral dispute resolution clauses granting both parties an option between arbitration and litigation) included in international contracts.

However, Article 14 of the new interpretation does not apply to purely domestic contracts, governed entirely by Chinese law with respect to both the container contract and the arbitration clause contained therein. In purely domestic situations, unilateral

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[135] *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases*, CHINA JUSTICE OBSERVER, https://www.chinajusticeobserver.com/p/provisions-of-the-spc-on-several-issues-concerning-the-trial-of-judicial-review-of-arbitration-cases [https://perma.cc/T7NG-FTMR] (last visited Mar. 4, 2021).

[136] Such choice must be express (which is rare in practice). Article 13 of the new interpretation provides:

> Where the parties intend to choose by agreement the law governing the validity of their foreign-related arbitration agreement, they shall make an explicit expression to that effect. The fact that the applicable law of the contract has been agreed upon is not determinative that the same law governs the validity of the arbitration clause of the contract.

Id.

arbitration clauses remain governed by Article 7 of the old interpretation and are very likely to continue to be held invalid. The recent adoption of the Chinese Civil Code, effective January 1, 2021, does not change this assessment.

"The promulgation of the Civil Code marks the end of . . . decades of efforts to formulate a comprehensive and unified civil code since 1954. The Civil Code is the most extensive legislation in the history of [China] and is the first and only legislation named 'code' in China."[137] However, the Civil Code does not modify the legislative framework applicable to arbitration. In particular, it codifies a version of the doctrine of gross disparity/unconscionability,[138] a concept relied on by many courts in other jurisdictions to invalidate unilateral arbitration clauses.

C. India

"The starting point under Indian law is that there must be mutuality in an arbitration agreement."[139] In *Union of India v. Bharat Engineering*, a case from 1977, "[t]he Delhi High Court held that [a unilateral] arbitration clause is not valid [as an arbitration agreement] until the point at which the party exercises its option to arbitrate[, because,] prior to that [moment], there is a lack of mutuality"[140] and consideration.[141] In reaching its decision, the court cited cases from the United Kingdom and the United States, which, at that time, required mutuality.[142] The court

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[137] Jenny (Jia) Sheng, Chunbin Xu & Wenjun Cai, *China Promulgates Its Long-Awaited Civil Code*, PILLSBURY (June 16, 2020), https://www.pillsburylaw.com/en/news-and-insights/china-promulgates-civil-code.html#:~:text=China%20has%20passed%20its%20first,by%20the%20Supreme%20People%27s [https://perma.cc/8J2T-JF9Y].

[138] Specifically, the Civil Code provides that:

> [W]here one party takes advantage of the other party that is in a desperate situation or lacks the ability of making judgment, and as a result the civil juristic act thus performed is obviously unfair, the damaged party is entitled to request the people's court or an arbitration institution to revoke the act.

CIVIL CODE OF THE PEOPLE'S REPUBLIC OF CHINA, NAT'L PEOPLE'S CONGRESS, at art. 151 (May 28, 2020), http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html#:~:text=The%20first%20Chinese%20law%20to,effect%20on%20Jan%201%2C%202021 [https://perma.cc/8A7K-AUYA].

[139] Petit et al., *supra* note 3, at 27.

[140] *Id.*

[141] *See* Union of India v. Bharat Eng'g Corp., (1977) ILR 499, at ¶¶ 20-22 (India).

[142] *See id.* at ¶¶ 64-65.

further held that once the beneficiary of the option exercises it, a valid arbitration agreement exists and that, from then onwards, the principle of mutuality applies, which means that either party can submit disputes to arbitration.[143] As such, the clause becomes, to a certain extent, bilateral.

The relevant arbitration clause had been concluded between a contractor and a railway. On its face, the clause only entitled the contractor to submit disputes to arbitration.[144] The court started its legal analysis by noting that the ambiguity of the clause "makes two interpretations possible: either the clause means, as the contractor says, that only he can demand a reference; or, as is contended by the Railway, that both parties can invoke it" and that the legal question is whether "there can be an arbitration agreement reserving the right of reference to only one party . . . [f]or, if there cannot be an arbitration agreement of that kind, the only way of sustaining the clause is by construing it as conferring bilateral rights."[145] The court then relied on the definition of an arbitration agreement contained in the Arbitration Act, "a written agreement to submit present or future differences to arbitration," and observed:

> [T]he agreement to "submit" must be presently subsisting, or else there is no arbitration agreement. The definition does not contemplate a contingent agreement or an agreement to agree in the future. As to the latter, it is well settled that "a contract to enter into a contract, is not a contract known to the law . . . ."[146]

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[143] *Id.*at ¶ 68 .

[144] *See id.* at ¶ 7 ("In the event of any dispute or difference between the parties hereto as to the construction of operation of this contract or the respective rights and liabilities of the parties, on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, . . . the Contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration, such demand for arbitration shall specify the matters which are in question dispute or difference, and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration.") (quotations omitted).

[145] *Id.* at ¶ 13.

[146] *Id.* at ¶ 15 (citations omitted).

Interestingly, the court analyzed the notion of a "contingent contract," defined under ordinary contract law as "a contract to do or not to do something if some event, collateral to such contract, does or does not happen."[147] Indian contract law provides that "[c]ontracts which are contingent on the happening of a future uncertain event cannot be enforced unless and until that event has happened, and, if the event becomes impossible, such contracts become void."[148] As such, "a contingent contract is unenforceable until the condition on which it depends is fulfilled."[149] Until then, "it is strictly not even a 'contract,' [defined as] 'an agreement enforceable by law.'"[150] The court concluded: "A 'contingent' arbitration agreement would not, therefore, be a 'present' contract. But this . . . is the sine qua non of an arbitration agreement. It follows that a 'contingent' agreement cannot be an 'arbitration agreement' in law."[151] Stated differently, "an arbitration agreement must be a present agreement, and the reciprocal promises it comprises must not be contingent,"[152] and "the law does not contemplate an arbitration agreement which is contingent or conditional or confers an option."[153] In reaching this conclusion, the court also noted that "[i]n an arbitration agreement[,] the consideration for the promise of each party is the reciprocal promise of the other" and that, without a reciprocal promise to submit the differences to arbitration, the unilateral promise made by one party would lack consideration.[154]

As applied to the case that was before the Delhi High Court, these principles led the court to decide that the contractor could validly submit its claims to arbitration (because a valid arbitration agreement existed once the contractor had exercised the unilateral option) but that the railway could not submit its counter-claims to arbitration because the contractor had only

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147 *Id.* at ¶ 17.
148 *Id.* at ¶ 18.
149 *Id.*
150 *Id.* (citation omitted).
151 *Id.*
152 *Id.* at ¶ 25.
153 *Id.* at ¶ 31.
154 *Id.* at ¶¶ 20-22.

consented to arbitration with respect to the contractor's own claims.[155] Specifically, the court held:

> Clause 64 of the General Conditions of Contract is so formulated as to constitute a contract of option. It says, the contractor "may demand" a reference to arbitration. Nothing is said about a demand by the Railway. Furthermore, the demand by the contractor must "specify the matters which are in question dispute or difference." A reference is permissible in respect of them alone "and no other."
>
> . . . .
>
> [T]he moment the contractor invokes the clause (thereby exercising his option) an arbitration agreement exists in respect of the dispute specified by him. From then onward the principle of mutuality applies. Either party can now make the reference. If, after electing for arbitration, the contractor refrains from making a reference, the Railway may do so. That is the practical consequence of mutuality. But the arbitration agreement is restricted to the disputes regarding which the contractor made the "demand." Here, the contractor sought arbitration only for his own claims. The order of reference that he obtained was restricted to those. At no time did he require or consent to a reference of the counter-claims of the Railway to arbitration. So there exists no arbitration agreement under which they can be referred. The petition of the Railway under section 20 of the Arbitration Act could not, therefore, have been allowed.[156]

In *New India Assurance Co. v. Central Bank of India*, a case from 1984, the Calcutta High Court upheld the validity of a unilateral arbitration clause.[157] The court "expressly declined to adopt the reasoning of the Delhi High Court and held that a unilateral arbitration clause constitutes a valid arbitration agreement from the outset, albeit enforceable only by the party with an option to arbitrate."[158]

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[155] *Id.* at ¶¶ 67-69.

[156] *Id.* at ¶¶ 67-69.

[157] *See* New India Assurance Co. Ltd v. Central Bank of India, AIR 1985 Cal. 76 (1984) (India).

[158] *See* Petit et al., *supra* note 3, at 27.

In conclusion, because caselaw is inconsistent, the status of asymmetrical dispute resolution clauses in India is unclear.[159] This uncertainty can be resolved only by the Supreme Court of India or by the legislature.[160] "Although not dealing with the point directly, more recent cases indicate that Indian courts are comfortable with some asymmetry between the parties' rights in arbitration clauses."[161] In 2017, in *TRF Ltd. v. Energo Engineering Projects*, the Supreme Court of India "reiterated that a clause entitling one party to appoint an arbitrator alone[,] without the input of the other[,] is valid."[162] Similarly, also in 2017, the High Court of Judicature in Bombay, when dealing "with a clause whereby one party was solely entitled to appoint the arbitrator," did not perform an analysis regarding "whether that aspect of the clause was valid."[163] Therefore, recent cases suggest "that Indian courts might permit some asymmetry in arbitration clauses, [but] the position is far from settled."[164]

D. Poland

The Polish arbitration law (2005) is included in the Polish Code of Civil Procedure. Poland is a UNCITRAL Model Law jurisdiction. However, under Article 1161(2) of the Polish Code of Civil Procedure, clauses which entitle one party only to bring a claim before an arbitration tribunal or a court violate the principle of equality of the parties and, as such, are "ineffective."[165] It is still unclear what "ineffective" means, and what are the consequences of including such a clause, as there is no case directly on point yet.[166]

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159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* (citing TRF Ltd. v. Energo Eng'g Projects Ltd., (2017) 8 SCC 377 (India)).

163 Petit et al., *supra* note 3, at 27 (citing Dbm Geotechnics v. Bharat Petroleum Corp., (2017) 5 ABR 674 (India)).

164 Petit et al., *supra* note 3, at 27.

165 *See* Bartosz Krużewski & Adelina Prokop, *Unilateral Option Clauses in Arbitration Agreements*, INT'L L. OFFICE (Jan. 22, 2015), https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Poland/Clifford-Chance/Unilateral-option-clauses-in-arbitration-agreements [https://perma.cc/5NNN-5RMP].

166 *But see* Draguiev, *supra* note 67, at 32 ("The Supreme Court of Poland reviewed a unilateral clause and considered that it may be void on grounds that the different options granted to the parties may impact their standing in the procedure (e.g., with

There are three main ways of interpreting Article 1161(2) of the Polish Code of Civil Procedure that could be adopted by the Polish courts. First, an asymmetrical dispute resolution clause might be considered ineffective only insofar as it prohibits a party (the restricted party) from enjoying a similar range of choices for taking the claim to litigation or arbitration as the unrestricted party. Second, the asymmetrical portion of the clause might be struck down, such that the party that had the unilateral right (the unrestricted party) would be deprived of it, which would leave both parties with just the bilateral default option (in favor of litigation or arbitration). Third, the inclusion of a unilateral right might lead to the invalidity of the entire dispute resolution clause. In such a case, either party could bring a dispute before any competent courts, as there would be no dispute resolution clause.

It should be noted that the first draft version of Article 1161(2) provided that, in cases of violation of the principle of equality of the parties, the arbitration agreement would be "invalid." However, this was later changed to "ineffective", which could be an argument against the entire arbitration agreement being considered invalid.[167]

E. Romania

In Romania, domestic arbitration is governed by Book IV of the Romanian Code of Civil Procedure, while international arbitration is governed by Book VII (Title IV) of the Romanian Code of Civil Procedure. There are no express provisions regarding the validity of asymmetrical dispute resolution clauses in either set of regulations. Such clauses are not often encountered in Romanian legal practice or caselaw.[168] Instead, bilateral (symmetrical) clauses, giving each of the right to choose either to arbitrate or to litigate have been used in practice and analyzed by

respect to choice of arbitrators, which may be more beneficial to one party in a given arbitral institution compared to another, which one of the other parties is not allowed to turn to under the unilateral clause.") (citations omitted).

[167] *See* Krużewski & Prokop, *supra* note 165.

[168] *See* Andreea Ghiță, *Romania's Bilateral Arbitration Option Clause: A Binding or Non-binding Arbitration Mechanism?*, SCHOENHERR (Jan. 17, 2017), http://roadmap2017.schoenherr.eu/romanias-bilateral-arbitration-option-clause-a-binding-or-non-binding-arbitration-mechanism/ [https://perma.cc/CY7P-M6M8].

arbitral tribunals and courts.[169] Arbitration practice shows a predilection for interpreting dispute resolution clauses with a (bilateral) option to arbitrate in the sense that they are valid, while national courts are undecided.

With respect to such bilateral clauses, arbitral tribunals found "that the intention of the parties to resort to arbitration, even as an option, is enough to find that an arbitration agreement exists[,] and that it binds the parties to arbitration"[170] and that "to subject the commencement of arbitration to a distinct agreement between the signatories would mean depriving the option clause of its effects[, and, consequently, that] as soon as the claimant files a request for arbitration, the arbitration clause should be considered effective."[171]

In contrast, Romanian courts took a different approach. Lower Romanian courts refused enforcement of an arbitral award issued on the basis of an option (bilateral) clause, reasoning that, because an "option clause does not irrefutably exclude the jurisdiction of the national courts, it does not represent an effective arbitration agreement."[172] For example, an appellate court held in 2014:

> [T]he arbitration agreement must unequivocally show the parties' intent to submit their future disputes to arbitration [and that] a clause whereby the parties agreed that future disputes may be solved either by arbitration before the Chamber of Commerce and Industry Bacau or by litigation

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169 *Id.*

170 *Id.* (citing Award no. 283 dated Nov. 25, 2009 rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania).

171 *Id.* (citing Award no. 233 dated Nov. 16, 2007 rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania,; Award no. 49 dated Mar. 9, 2010 rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania; Award no. 124 dated July 22, 2009 rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania; Award no. 145 dated Dec. 27, 1996 rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania).

172 *Id.*

> before national courts is not unequivocal, because it does not exclude the default jurisdiction of national courts.[173]

However, in 2016, the Supreme Court of Romania held that a bilateral option clause is not void.[174] The case involved a dispute between *Spitalul Județean de Urgență Sf. Pantelimon Focşani* (claimant) and *Casa de Asigurări de Sănătate Vrancea* (respondent).[175] The contract between the parties contained a bilateral option clause, whereby each of the parties could bring a claim either before the Bucharest Central Arbitration Commission or before national courts.[176] The claimant chose to commence litigation before Romanian courts (Vrancea District Court).[177] The Vrancea District Court found that it lacked jurisdiction over the dispute and the dispute was remanded and adjudicated by the Bucharest Central Arbitration Commission, which issued an arbitral award in 2013.[178] The claimant (presumably because it lost in arbitration) then brought annulment proceedings against the arbitral award, arguing that there was no agreement to arbitrate.[179]

The Court of Appeal Galaţi declined to annul the arbitral award, finding that there was a valid arbitration clause.[180] The Supreme Court of Romania confirmed the decision of the Court of Appeal Galaţi. In so doing, the Supreme Court of Romania held that "despite its obvious deficiency, an alternative arbitration clause [i.e., one that gives both parties an option between arbitration and litigation] is not null and void, and shall be interpreted pursuant to the general provisions applicable to

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[173] *Id.* (citing Bacău Court of Appeal, Decision no. 3259 of Oct. 16, 2014). *See also* Art. 553, C. Proc. Civ., titled "Exclusion of Court Jurisdiction": "The conclusion of the arbitral agreement excludes, for the disputes that are within the scope of the arbitration agreement, the jurisdiction of the courts." (author's translation). In our view, the Romanian court misapplied this provision, which deals with the *effects* of a (valid) arbitration agreement, and not with the *conditions* needed for the validity of an arbitration agreement.

[174] *See* Supreme Court of Romania, Decision no. 318 of Feb. 11, 2016.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

contract interpretation."[181] Consequently, whenever such a clause is present, "exercising one option or another [i.e., arbitration or litigation] is subordinated, pursuant to the principle of contract supremacy, to there being a subsequent agreement between the parties, in favor of either arbitration or litigation."[182] The principle of contract supremacy, which is codified in the Romanian Civil Code, provides that "legally concluded contracts have the same effects as the law between the parties."[183]

The Supreme Court of Romania then went on to note that the claimant, despite initially filing the dispute before national courts, had not contested the decision of the Vrancea District Court (which declined jurisdiction in favor of arbitration) nor challenged the jurisdiction of the arbitral tribunal (which found that there was a valid arbitration agreement and proceeded to adjudicate the case and issue a final arbitral award).[184] As such, the Supreme Court of Romania found that the claimant had impliedly agreed (subsequently) to the dispute being resolved by arbitration.[185]

Legal scholars interpreted this decision to mean that bilateral option clauses are valid.[186] However, this is an improper reading of the decision. If the validity of the initial agreement of the parties (that each of them has the right to choose either to arbitrate or to litigate) is dependent on a subsequent agreement being reached between the parties, then there was no agreement to begin with and, as such, the bilateral option for arbitration produces no effects (or, pursuant to Romanian terminology, is invalid because it does not contain a "binding" agreement to arbitrate that would remove jurisdiction of the national courts).

The Supreme Court of Romania essentially required that there be an agreement to arbitrate, either at the time of contract formation or subsequently, which corresponds to the typical two ways in which parties can agree to arbitration either directly in their contract via an arbitration clause or later, when a dispute

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[181] *Id*.

[182] *Id*.

[183] Art. 1270, C. Civ.

[184] *See* Supreme Court of Romania, Decision no. 318 of Feb. 11, 2016.

[185] *Id*.

[186] *See*, *e.g.*, Ramona Elisabeta Cîrlig, *Arbitraj. Clauză Compromisorie Alternativă. Nulitate. Exercitarea Opțiunii Asupra Competenței*, 1 REVISTA ROMANA DE JURISPRUDENTA (2017); Ghiță, *supra* note 168.

arises via a separate submission agreement.[187] Under Romanian law, an agreement to arbitrate must be in writing.[188] However, the 2016 decision of the Supreme Court of Romania seems to indicate that such agreement could be tacit, based on the subsequent behavior of the parties (which includes the possibility that it would not be in writing). In fact, the court relied on the absence of writings (no challenge to the decision of the Vrancea District Court or of the arbitral tribunal by the claimant) to find that the claimant had agreed to arbitration (whereas the claimant had actually initially exercised its option right in favor of litigation, not arbitration).

Even more problematic, the decision of the Supreme Court of Romania, despite its laudable pro-arbitration approach, does not provide any guidance to practitioners drafting bilateral option clauses, nor a solution to situations when the first party to exercise its option persists in its attempt to obtain enforcement of the option (contrary to the claimant in the 2016 litigation).

Finally, this decision is limited to bilateral option clauses. As such, uncertainty persists under Romanian law regarding unilateral clauses (unilateral arbitration clauses and unilateral litigation clauses). As for unilateral arbitration clauses, which have not been yet analyzed by Romanian courts, it is very unlikely that they will be considered invalid, for the same reasons that bilateral option clauses for arbitration were found invalid (or, at least, were found to require an additional agreement to be effective) and for the additional reason that they violate party equality in that they represent a bilateral commitment to arbitrate.

F. Russia

Before 2012, Russian courts "were guided by the decisions of the Federal Arbitrazh Court of the Moscow Circuit rendered in a series of disputes initiated by financial institutions under relevant

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[187] *See* Art. 549, C. Proc. Civ.

[188] Same requirement as Article 7 (option I) UNCITRAL Model Law on International Commercial Arbitration. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 17, art. 7 at 4.

facility agreements."[189] "The agreements contained [a bilateral] arbitration clause and also provided for the right of the creditor to initiate proceedings in the courts of England or any other appropriate jurisdiction"[190] (unilateral litigation clause). The "creditors initiated actions before the Arbitrazh Court of Moscow."[191] "The defendants requested that the [court] proceedings be [terminated, referencing the] arbitration clauses."[192] "Although the courts of first instance in some of the cases upheld the defendants' approach and terminated the proceedings, the higher courts . . . confirmed the validity of the unilateral [litigation] clauses" and considered the claims on the merits."[193]. Moreover, the higher courts emphasized "that a party bearing financial risks (a creditor) is lawfully vested with the right to choose" between the dispute resolution options contained in the agreement.[194]

In 2012, this approach changed as a result of the decision in the *Sony Ericsson* case.[195] In this case, the Presidium of the Supreme Arbitrazh Court of the Russian Federation (a state court, not an arbitral institution, known under its Russian acronym: "VAS") held that a unilateral litigation clause was contrary to Russian law because it gave one party an unfair advantage over the other (the clause contained a standard arbitration clause and, additionally, gave only to one party the option to litigate) and, therefore, violated the equality of arms principle stated in Article

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[189] Alexander Gridasov & Maria Dolotova, *Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion*, KLUWER ARB. BLOG (May 7, 2019), http://arbitrationblog.kluwerarbitration.com/2019/05/07/unilateral-option-clauses-russian-supreme-court-puts-an-end-to-the-long-lasting-discussion/ [https://perma.cc/G3DG-PH9X].

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id. See also* PERÉNYIOVÁ, supra note 32 (citing Red Barn Cap, LLK v. Zao Factoring Company Eurocommerz, Russian Federal Arbitration Court, case no. A40-59745/09-63-478, Dec. 28, 2009 (the court confirmed the validity of a unilateral litigation clause)).

[195] *See* Postanovlenie Prezidiuma VAS RF ot 19 iyun' g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2012, p. 6.

18 of Russian Federation Law on International Commercial Arbitration (identical to Article 18 of the UNCITRAL Model Law on International Commercial Arbitration).[196]

More specifically, the "case concerned an action initiated by a Russian entity, *Russkaya Telefonnaya Kompaniya* (RTK), against a Russian subsidiary of *Sony Ericsson* over the quality of mobile phones supplied to RTK."[197] "The dispute resolution clause provided for all disputes to be resolved by ICC arbitration in London, with an option vested [(only)] in Sony Ericsson to apply to a court of competent jurisdiction"[198] in respect of claims for outstanding payments owed to it. The dispute resolution clause read:

> Any dispute arising in connection with this Agreement . . . is to be finally resolved in accordance with the *Rules of Conciliation and Arbitration of the International Chamber of Commerce* . . . . The arbitration clause does not restrict Sony Ericsson's rights to file with a court of a competent jurisdiction a claim for recovery of debts for supplied Products.[199]

Subsequently, RTK filed a claim with the Arbitrazh Court of Moscow (a state court), seeking delivery of replacement goods, although the clause did not enable RTK to commence litigation. [200] The Arbitrazh Court of Moscow dismissed the claim, based on the existence of the bilateral arbitration agreement contained in the dispute resolution clause, as requested by the foreign party, Sony Ericson.[201] Due to the arbitration agreement, the court concluded that it did not have jurisdiction to hear the case.[202] The conclusion of the Arbitrazh Court of Moscow "was upheld at the next two levels of appeal, first by the Appellate Arbitrazh Court [of Moscow

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196 *Id*.

197 Gridasov & Dolotova, *supra* note 189.

198 *Id*.

199 *See* Postanovlenie Prezidiuma VAS RF ot 19 iyun' g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2012, p. 3. (emphasis in original) (quotations and citations omitted).

200 *Id*.

201 *Id*.

202 *Id*.

and then by the] Federal Arbitrazh Court . . . of Moscow . . . ."[203] Both appellate courts confirmed "previous practice of Russian courts that the parties' contractual agreement should be upheld."[204]

RTK appealed these decisions with the VAS and RTK's appeal was based on a violation of the principle of procedural equality of the parties.[205] The Presidium of the VAS set all previous court rulings aside and remanded the case to the court of first instance because the asymmetrical dispute resolution clause violated the principle of equality of the parties and was therefore invalid insofar as it granted the right to refer a dispute to a state court to one party but not to the other.[206] The Presidium of the VAS then held that the restricted party should have the commence litigation before a competent court and enjoy equal rights as the other party.[207] Effectively, the holding of the Presidium of the VAS converted the unilateral right of Sony Ericsson to have recourse to litigation into a bilateral right. Stated differently, asymmetrical jurisdiction clause was transformed into a symmetrical jurisdiction clause, in order for the clause to be compliant under Russian law. The result was that both parties were entitled to bring claims before the Russian courts, which effectively meant that the Russian claimant (RTK) was allowed to start court proceedings (as it had done).

Since the 2012 decision in *Sony Ericsson* by the Presidium of the VAS, Russian courts took different approaches on this issue. One explanation for the contradictory approaches resides in the fact that the VAS was abolished in 2015 and the matters previously under the authority of VAS were transferred to the Supreme Court of the Russian Federation.[208] The prevailing view was to follow the ruling in the *Sony Ericsson* case by holding that

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[203] *See* Bérard et al., *supra* note 6.

[204] *Id.*

[205] *See* Postanovlenie Prezidiuma VAS RF ot 19 iyun' g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2012.

[206] *Id.*

[207] *Id.*

[208] *See* Gridasov & Dolotova, *supra* note 189.

unilateral litigation or arbitration clauses are invalid and that they should be interpreted as giving bilateral rights to the parties, "so that both parties (when acting as a claimant) have similar rights to choose between arbitration and state courts."[209] Exceptions existed. Some courts validated unilateral litigation or arbitration clauses. Other courts invalidated such clauses in full, without interpreting them as giving symmetrical rights to the parties.

In the 2014 case *Novokuznetsky v. UMO*, the court refused to enforce an arbitral award rendered under a unilateral arbitration clause.[210] Pursuant to the dispute resolution clause at issue in that case, one party had the choice between litigation or arbitration, while the other party could only arbitrate.[211] "Referring to the *Sony Ericsson* case, the court concluded that the unilateral [arbitration] clause was invalid, as violating the equality of the parties. The court [did not] further substantiate the particular legal grounds under which it found the award unenforceable."[212] Presumably, the relevant ground was violation of public policy. Moreover, the court did not interpret the clause as giving symmetrical rights to the parties.[213]

In the 2015 case *Piramida v. BOT*, the Chamber on Economic Disputes of the Supreme Court of the Russian Federation considered a bilateral dispute resolution clause, giving the claimant the right to choose between litigation and arbitration.[214] In that case, two Russian entities, Piramida LLC (supplier) and BOT LLC (buyer) entered into a Supplier Contract. A Contract of

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[209] *See, e.g.*, Petit et al., *supra* note 3, at 26; Gridasov & Dolotova, *supra* note 189. *See also* Verkhovnogo Suda Rossiiskoi Federatsii [Determination of the Supreme Court of the Russian Federation of June 7, 2016], BIULLETEN' VERKHOVNOGO SUDA RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2016, No. 305-ЭС16-7033 (holding that unilateral litigation clause where only one party has the choice between litigation or arbitration and the other party may only arbitrate is void as such).

[210] *See* Gridasov & Dolotova, *supra* note 189.

[211] *Id*.

[212] *Id*.

[213] *Id.* (noting that the "court also found that the counterparty (UMO) was not properly notified about the arbitration hearing").

[214] *See* Verkhovnogo Suda Rossiiskoi Federatsii [Determination of the Supreme Court of the Russian Federation of May 27, 2015], BIULLETEN' VERKHOVNOGO SUDA RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2015, No. 310-ЭС14-5919.

Guarantee was also concluded between Piramida LLC and Mr. Babkin, pursuant to which, if the buyer failed to pay for the goods supplied, Mr. Babkin agreed to pay.[215]

Section 10.3 of the Supplier Contract provided:

> Any dispute arising in connection with this contract is to be finally resolved by the Commercial Court of Ulanovsk region [a state court] or by the arbitration court of the Chamber of Commerce of Ulanovsk region depending on the choice of a claimant.[216]

Section 4.2 of the Contract of Guarantee provided: "[T]he dispute should be finally resolved by the Dimitrovogradsky City Court [a state court] or by the arbitration court of the Chamber of Commerce of Ulanovsk region depending on the choice of a claimant."[217] As such, "the parties agreed to refer the disputes either to arbitration or to a state court, with [the] claimant having a right to choose between arbitration and litigation."[218]

When BOT LLC breached the Supplier Contract by failing to make the payment, Piramida LLC commenced arbitration against both BOT LLC and Mr. Babkin.[219] The arbitral award was in favor of Piramida LLC (the claimant) but because the respondents failed to comply with the award voluntarily, Piramida LLC was obligated to seek enforcement.[220] The Arbitration Court of Smolensk region (a state court) relied on the *Sony Ericsson* decision and invalidated the unilateral arbitration clause (although the *Sony Ericsson* case was about a unilateral litigation

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[215] *Id*.

[216] Aleksandra Orzeł, *A Few Remarks on Enforceability of Unilateral Dispute Resolution Clauses Involving Arbitration*, *in* Klára Drličková & Tereza Kyselovská (eds.), COFOLA INTERNATIONAL 2016: RESOLUTION OF INTERNATIONAL DISPUTES PUBLIC LAW IN THE CONTEXT OF IMMIGRATION CRISIS, 117, 126, n. 32.

[217] *Id*.

[218] Mikahil Samoylov, *The Evolution of Unilateral Arbitration Clauses*, KLUWER ARB. BLOG (Oct. 1, 2015), http://arbitrationblog.kluwerarbitration.com/2015/10/01/the-evolution-of-unilateral-arbitration-clauses-in-russia/?doing_wp_cron=1592302976.0316419601440429687500 [https://perma.cc/SGH4-PYUP].

[219] *See* Verkhovnogo Suda Rossiiskoi Federatsii [Determination of the Supreme Court of the Russian Federation of May 27, 2015], BIULLETEN' VERKHOVNOGO SUDA RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2015, No. 310-ЭС14-5919.

[220] *Id*.

clause).[221] Consequently, the motion for the enforcement of the arbitral award was rejected. The court of cassation upheld the ruling.[222]

The Supreme Court of the Russian Federation overturned the previous decisions and found that there was no violation of the principle of equality, noting that the lower courts had misinterpreted the *Sony Ericsson* case.[223] In our view, that was because, in the *Sony Ericsson* case, the name of the party with an option between arbitration and litigation (Sony Ericsson) was indicated directly and nominally, which had led to the ruling, by VAS, that the principle of equality was violated. In contrast, in the *Piramida* case, the holder of the option was not mentioned by name but by the procedural posture (the wording of the clause was: "depending on the choice of a claimant"). On remand, enforcement of the arbitral award in the *Piramida* case was granted by the Arbitration Court of Smolensk region.[224]

This *Piramida* case indicated that the Supreme Court would follow the approach adopted in the *Sony Ericsson* case by the abolished VAS, namely that unilateral arbitration or jurisdiction clauses are invalid under Russian law, except where they provide that the right to exercise the option to litigate or arbitrate belongs generically to the claimant, as opposed to being granted to a named party. A similar distinction was made by German courts (see Part V.2 below). Another possible reading of the *Piramida* case is that Russian courts would adopt a more flexible approach in cases concerning unilateral arbitration clauses (as opposed to unilateral litigation clauses) because unilateral arbitration clauses that supplement bilateral forum selection clauses do not

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[221] *Id*.

[222] *Id*.

[223] *Id*.

[224] *See* Dmitry Vlasov, *Russian Supreme Court Upholds the Validity of Optional Dispute Resolution Clause*, PRACTICAL LAW (Oct. 14, 2015) (citing the following cases which confirmed the validity of optional dispute resolution clauses in Russia: Resolution of the Supreme Arbitrazh Court of the Russian Federation dated June 8, 2007, no. 6920/07, case no. A32-8964/2006; Resolution of the Supreme Arbitrazh Court of the Russian Federation dated March 27, 2012, no. BAC-1943/12, case A40-57887/11; Judgment of the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated Feb. 14, 2012, no. 11196/11, case A75-1836/2011).

raise issues of access to the default system for dispute resolution: jurisdiction of national courts.

The next relevant case is the 2016 case *Emerging Markets v. Zhilindustriya*.[225] This case involved a loan agreement granted by a foreign creditor to a Russian entity (Zhilindustriya). The loan agreement was secured by guarantees provided by a number of Russian companies.[226] The relevant loan agreement and the guarantees were governed by English law.[227] "Under the dispute resolution clauses[,] the disputes were to be submitted to the [London Court of International Arbitration], but the lender had an option to submit them to a court in England, Russia or any other competent jurisdiction"[228] (unilateral litigation clause). The borrower defaulted and the lender commenced court proceedings against the debtor and the guarantors in order to recover the loan.[229] The proceedings were brought before the Arbitrazh Court of Moscow (a state court), the place of residence of one of the respondents.[230] The respondents raised the lack of competence of the state court and requested that the case be referred to arbitration.[231]

The Arbitrazh Court of Moscow and the appellate court ruled that the dispute resolution clause violated the principle of procedural equality, due to the fact that the clause gave only one of the parties the option to choose between arbitration and litigation. In so ruling, the courts refused to apply English law in order to validate the optionality feature of the dispute resolution clause, despite the fact that English law was the applicable law to both the loan and the guarantees and to the dispute resolution.[232] The rationale of the courts in dismissing the respondent's argument that the clause was valid under the law chosen by the

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[225] Emerging Markets Structured Products B.V. v. Zhilindustriya LLC et al., Appellate Arbitrazh Court of Moscow, case no. A40-125181/2013 (Mar. 14, 2016).

[226] *Id.*

[227] *Id.*

[228] *Arbitration and Cross-Border Litigation in Russia: Arbitration*, DOUBLE BRIDGE LAW DIGEST (Mar. 2016), http://doublebridgelaw.com/wp-content/uploads/2016/04/DBL-Arbitration-Digest.-Issue-4-2016.pdf [https://perma.cc/YNZ2-HJMG].

[229] *Id.*

[230] Emerging Markets Structured Products B.V. v. Zhilindustriya LLC et al., Appellate Arbitrazh Court of Moscow, case no. A40-125181/2013 (Mar. 14, 2016).

[231] *Id.*

[232] *Id.*

parties (English law) was that "because the relevant practice of Russian courts rests on the provisions of international law, it overrides the parties' choice of English law."[233] Consequently, the courts declared the entire dispute resolution clause invalid, referring to the *Sony Ericsson* case.[234] Because the entire dispute resolution clause was invalid, under the general rules of jurisdiction, [235] the Arbitrazh Court of Moscow, where the lender had brought the claim, had jurisdiction, because it was the place of residence of one of the respondents.[236] The lender's claim was then granted in full.[237] The Supreme Court refused to reconsider the case.[238]

In December 2018, the Presidium of the Supreme Court of the Russian Federation issued a Digest of Court Practice Relating to Judicial Assistance and Control over Domestic and International Arbitration.[239] Although the "Digest does not formally have precedential value, it provides valuable guidance to the approach that the Russian courts will likely pursue in relation to [the legal matters addressed]."[240]

Section 6 of the Digest basically restates the holding of the *Piramida* case, by noting:

> The laws of Russian Federation allow dispute resolution clauses that provide the right of a claimant to defer his claims, at his discretion, either to [state courts] or international commercial arbitration . . . . A provision in a dispute resolution clause that grants claimant a right to choose between going to court or to arbitration is not disproportionate, because it does not entitle a certain party of the contract (a specific party) to such a choice, but merely state that the claimant is the holder of the right to choose, provided that any party of the contract, both the promisor and

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[233] Usoskin et al., *Courts and Arbitration in Russia*, RAA40 (2017), http://cisarbitration.com/wp-content/uploads/2015/06/RAA40-Newsletter-No-7-2017.pdf [https://perma.cc/B7NL-RMZD].

[234] *Id.*

[235] *Id.*

[236] *See* Gridasov & Dolotova, *supra* note 189.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

> the promisee, can become claimant in a dispute . . . . The wording "subject to claimant's choice" is a usual one in such contracts and does not violate the balance of parties' rights and equality of their procedural rights. Such a clause gives both parties the right to submit the dispute either to courts, or to arbitration.[241]

However, Section 7 of the Digest reiterates the holding of the *Sony Ericsson* case, and notes:

> A dispute resolution clause containing an alternative choice—the solution of a dispute by courts or by arbitration—and asserting the right to go to courts for one party only is invalid inasmuch as it denies the other party the right to go to courts. In such a case, each of the parties has the right to go both to courts, and to arbitration.[242]

The language only covers unilateral litigation clauses (not also unilateral arbitration clauses), and the solution only applies where a specific party (as opposed to the claimant) has an option, and not the other party. In such a situation, the unilateral option is interpreted as bilateral, giving both parties (depending on who is the claimant) the right to start legal proceedings in court.

As such, the Digest notes:

> The principles of an adversarial system and of procedural equality provide for the allocation of equal procedural opportunities for each party to defend its rights and legitimate interests. As such, according to the general principles of the protection of civil rights, a dispute resolution clause cannot grant only one party (the seller) the right to submit the dispute to the competent court and deny the other party (the buyer) such a right. In such a case, the disadvantaged party is allowed to recourse to any of the means available to the other party, according to the dispute resolution clause. Because the first party has the opportunity to choose between submitting the dispute to courts or to

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[241] Presidium of the Supreme Court of the Russian Federation, Digest of Case Law Involving Judicial Assistance and Oversight in Relation to Domestic and International Arbitration (Dec. 28, 2018), http://www.supcourt.ru [https://perma.cc/Y2N2-65FG], p. 12, par. 6-7.

[242] *Id.* at p. 14.

> international commercial arbitration, the second party is entitled to the same rights of resolving the dispute. As a consequence, the party whose rights have been violated by such a clause is also entitled to address to the competent court, having enforced its right to juridical assistance on the same terms as its counterpart.[243]

Given the terminology employed, and the final conclusion ("the party whose rights have been violated by such a clause is also entitled to address to the competent court"), which seem to apply solely to unilateral litigation clauses, it remains unclear whether or not unilateral arbitration clauses would be considered invalid or valid. Some legal authors have interpreted the Digest to apply to both types of unilateral clauses, in the sense of rendering them bilateral.[244]

It also remains unclear from the Digest (with respect to unilateral litigation clauses granting one party the right to opt between international arbitration and a specific court, as opposed to any court that has jurisdiction, and assuming that the unilateral part is interpreted as bilateral) whether the other party, the restricted party, would have the right to refer disputes only to the specified court or to other competent courts as well.

In conclusion, uncertainty persists in Russia despite (or because) of the December 2018 Digest with respect to asymmetrical dispute resolution clauses (unilateral litigation clauses or unilateral arbitration clauses). Such clauses will continue to be problematic when inserted in contracts with Russian parties, especially where enforcement might be sought in Russia. The main potential outcomes are: (1) asymmetrical dispute resolution clauses would be validated, by interpreting the unilateral option part as bilateral; (2) asymmetrical dispute resolution clauses would be invalidated in full, without the unilateral option part being interpreted as bilateral; or (3) only the unilateral option part would be invalidated, while the bilateral option (for litigation or for arbitration) would be given full effect.

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[243] *Id.*

[244] *See* Clifford Chance, *Supreme Court of the RF Issues Digest of Case Law on the Issues of Arbitration*, CLIFFORDCHANCE.COM (Feb. 2019), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/02/supreme-court-of-the-rf-issues-digest-of-case-law-on-the-issues-of-arbitration-eng.pdf [https://perma.cc/6UU3-HKSM].

G. Turkey

Turkey is a UNCITRAL Model Law jurisdiction. Under Turkish law (Turkish Civil Procedure Law for domestic arbitrations and Turkish International Arbitration Law for international arbitrations), courts require "an absolute intent to arbitrate" for the validity of arbitration clauses, and pay particular attention to the terminology used in the drafting of the clause.[245]

In 2011, the Court of Cassation held that a unilateral arbitration clause (a clause which gave to only one party the right to initiate both litigation and domestic arbitration, while the other party was restricted to litigation) was invalid.[246] More specifically, plaintiff was the owner of a ship who signed a Rescue Assistance Agreement with the defendant, who was a municipality.[247] The Rescue Assistance Agreement provided for the unilateral arbitration clause, in favor of the defendant. During the rescue mission, the defendant's Coastal Police Department caused damages to the ship. Consequently, the owner of the ship started court litigation to recover damages and reimbursement of the assistance fee it had paid to the defendant.[248] The defendant moved for dismissal of the case arguing, among others, that the court lacked jurisdiction to resolve the dispute due to the arbitration clause included in the Rescue Assistance Agreement.[249] The court of first instance agreed with the defendant, and dismissed the case, holding that the dispute should be settled by arbitration.[250] The Court of Cassation

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[245] *See, e.g.*, Court of Cassation, 15th Civil Law Division, May 22, 2015, Decision no. 2015/2198-2758; Court of Cassation, 15th Civil Law Division, July 1, 2014, Decision no. 2014/3330-4607; Court of Cassation, 19th Civil Law Division, May 29, 2012, Decision no. 2012/4065-9080; Court of Cassation, 11th Civil Law Division, Apr. 13, 2006, Decision no. 2005/4053-4040; Court of Cassation, 11th Civil Law Division, Apr. 12, 2005, Decision no. 2004/6686-3600; Court of Cassation, 11th Civil Law Division, June 10, 2002, Decision no. 2002/2228-5894.

[246] *See* Petit et al., *supra* note 3, at 27 (citing Court of Cassation, 11th Civil Law Division, Feb, 15, 2011, Decision no. 2011/1675).

[247] *Id*.

[248] *Id*.

[249] *Id*.

[250] *Id*.

overturned the decision, and ruled that the arbitration clause was invalid due to its unilateral character.[251]

> The court cited reasons of due process and the right to be heard. [The court noted that] the party with the right to go to arbitration could bar state court proceedings by invoking the arbitration clause, while the other party could not have recourse to arbitration at all. The court also held that the intent to arbitrate was not clear and absolute [because] the agreement allowed one party to initiate both litigation and arbitration.[252]

In 2016, the Court of Cassation recognized the validity of an asymmetrical forum selection clause.[253] The clause in question "gave one of the parties the right to bring proceedings before a foreign court as well as before the courts of the other party's country/place of business."[254] This potentially indicated that asymmetrical arbitration clauses might also be validated by Turkish courts in the future.[255]

However, in 2017, the 15th Civil Law Division of the Court of Cassation rendered a judgment which invalidated a bilateral arbitration clause, merely because there was a (limited) option between arbitration and litigation.[256] The case arose from a construction agreement between a contractor and a sub-contractor. [257] The sub-contractor, as plaintiff, started litigation against the contractor, as defendant.[258] The defendant requested

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[251] *Id*.

[252] *Id*.

[253] *See* Court of Cassation, 11th Civil Law Division, Apr. 25, 2016, Decision no. 2016/4646.

[254] *See* Petit et al., *supra* note 3, at 27.

[255] *Id*. at 28.

[256] *See* Court of Cassation, 15th Civil Law Division, Jan. 23, 2017, Decision no. 2017/259.

[257] Abdülkadir Güzeloğlu & Fatma Esra Güzeloğlu, *Use Extreme Caution: Recent Judgment of the Turkish Court of Cassation Emphasizes the Importance of Clear Wording of the Arbitration Clauses*, GUZELOGLU (Mar. 13, 2017), https://www.guzeloglu.legal/en/news-insights/use-extreme-caution-recent-judgment-of-the-turkish-court-of-cassation-emphasizes-the-importance-of-clear-wording-of-the-arbitration-clauses-200.html [https://perma.cc/3BNZ-GHUK].

[258] *Id*.

the dismissal of the case, relying on the existence of a valid arbitration agreement.[259] The dispute resolution clause provided:

> Any dispute between the company and the contractor that may arise from the execution of this contract shall be settled by arbitration. The arbitrators selected by the parties shall appoint the 3rd arbitrator and the decision rendered by this tribunal shall be valid. The arbitrators shall be a member of . . . and the arbitration costs shall be borne by the contractor. Parties shall resort to Istanbul Courts and Execution Offices for the matters that are not arbitrable and in cases stipulated under the contract and its appendices.[260]

The court of first instance dismissed the case.[261] The plaintiff appealed.[262] The Court of Cassation overturned the decision of the first court and declared that the (bilateral) arbitration clause was invalid because it failed to reflect parties' clear and absolute intention to arbitrate due to the last sentence of the clause, which provided for the alternative jurisdiction of Istanbul courts.[263] "[T]he court held that an arbitration clause should clearly express the absolute intention to arbitrate."[264] The dissenting opinion stated that the arbitration clause was valid because it expressed the parties' intention to submit all their disputes to arbitration, provided that the dispute in question was arbitrable, and to submit non-arbitrable disputes to Istanbul courts.[265] This decision emphasizes that precision in drafting is essential with respect to arbitration agreements in Turkey, in order to clearly and unequivocally establish the parties' intention to arbitrate.[266]

As such, for now, asymmetrical dispute resolution clauses that provide for an option between arbitration and state courts (bilateral or unilateral) are likely invalid under Turkish law.[267]

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[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *See* Petit et al., *supra* note 3, at 28.

V. JURISDICTIONS WHERE THE JURY IS STILL OUT

A. France

Our review has revealed only two cases where French courts dealt with a unilateral option to choose between litigation and arbitration.

First, the *Sicaly v. Grasso* case from 1974 involved a commercial dispute between a French company (Sicaly) and a Dutch company (Grasso).[268] The contract was governed by Dutch law, and provided for a dispute resolution clause, which, in essence, gave jurisdiction to either Dutch state courts or a Dutch arbitral institution at the election of only one party.[269] The clause was included in the General Conditions for Delivery and Payment in the Metallic Industry, which were annexed to the contract concluded by the parties.[270]

Despite the dispute resolution clause, the French company started litigation against the Dutch company before a French court (the Saumur Commercial Court).[271] The French court of first instance interpreted the dispute resolution clause (which was deemed valid) in the sense that, by agreeing to the clause, Sicaly had waived the benefit of Article 14 of the French Civil Code, which grants jurisdiction to French courts on the sole ground that the plaintiff is a French national.[272] As such, French courts lacked the exceptional jurisdiction that they would otherwise derive from Article 14 of the French Civil Code.[273] The appellate court of Angers similarly found that French courts lacked jurisdiction.[274] Sicaly appealed to the French Supreme Court.[275]

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[268] Cour de cassation [Cass.] [supreme court for judicial matters], civ., May 15, 1974, 72-14706 (affirming Angers Court of Appeal, decision dated Sept. 25, 1972).

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] Angers Court of Appeal [appellate court], decision dated Sept. 25, 1972. *See also* Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL L. REV. 1, 25, n.72 (1981).

[273] *Id.*

[274] *Id.*

[275] Cour de cassation [Cass.] [supreme court for judicial matters], civ., May 15, 1974, 72-14706 (affirming Angers Court of Appeal, decision dated Sept. 25, 1972).

In front of the French Supreme Court, Sicaly argued that, by agreeing to the dispute resolution clause, Sicaly had not waived its benefit under Article 14 of the French Civil Code, of being able to start litigation against a foreign defendant before French courts.[276] The French Supreme Court rejected this argument, stating that the wording of the dispute resolution clause did imply waiver of that benefit.[277] In reaching its decision, the French Supreme Court presumably relied on the fact that the contract was governed by Dutch law and that Sicaly had made an election of domicile (for service of process purposes) at the address of the Dutch companies, as reference to these particular facts was made in the decision.[278]

Sicaly also argued in front of the French Supreme Court, under French and Dutch law, and under the 1961 European Convention on International Commercial Arbitration (to which France, but not the Netherlands, is a party), that the dispute resolution clause was invalid, for several reasons, including: (1) the dispute resolution clause only gave the option to choose between courts and arbitration to one party, and, as such, did not represent a valid agreement to arbitrate because it did not absolutely eliminate the natural jurisdiction of courts; and (2) the dispute resolution clause was contrary to French public policy.[279] In rejecting Sicaly's appeal and confirming the decisions of the lower courts (that French courts did not have jurisdiction), the Supreme Court did not specifically respond to these arguments.[280]

However, by not responding, an inference may be drawn that the French Supreme Court was not concerned with the validity of the dispute resolution clause, from the perspective of the unilateral option to choose between litigation and arbitration. As such, indirectly, the decision validated unilateral option clauses. It remains unclear if this case concerned a unilateral arbitration clause (most likely) or a unilateral litigation clause, because the

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[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*

French Supreme Court did not cite the original wording of the dispute resolution clause.[281]

Second, in *Thermodyn v. M-Real Alizay*, the French Supreme Court invalidated a dispute resolution clause that contained a (bilateral) option of either party to choose between arbitration and litigation. The relevant clause provided:

> If the dispute is not resolved within thirty (30) days . . . each party has the option to have recourse to arbitration or to litigation before the courts at the buyer's place of business. The dispute will be submitted and finally decided by the Arbitration Rules of the London Court of International Arbitration (LCIA), which is integrated by reference in this Article.[282]

The French Supreme Court summarily held that, given each party's right to opt between arbitration and litigation, the clause did not make arbitration mandatory, but merely optional, such that the claimant (the buyer, French) was entitled to commence litigation in front of French courts.[283] This decision is hardly surprising, given that arbitration requires a clear (bilateral) manifestation of intent to arbitrate, which was not present given the manner in which the clause was drafted. As such, this decision is not useful to predict how French courts would interpret an asymmetrical dispute resolution clause with a bilateral choice supplemented by a unilateral option for either arbitration or option. Importantly, however, the invalidity of the arbitration agreement did not extend to the entire dispute resolution clause, as it pertained to the chosen litigation forum.

The French Supreme Court also issued a number of controversial decisions regarding unilateral forum selection clauses: the *Rothschild* case, the *Crédit Suisse* case, and the *Apple* case. These decisions did not involve clauses having any arbitration component, but nevertheless provide important guidance regarding the French courts' comfort (or lack thereof)

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[281] *Id.*

[282] Cour de cassation [Cass.] [supreme court for judicial matters], civ., June 12, 2013, 12-22656.

[283] *Id.*

with asymmetrical clauses pertaining to dispute resolution in general.

The *Rothschild* case concerned a dispute between a French national residing in Spain (Mrs. X) who opened an account at the Luxembourg-based Rothschild Bank through a Paris intermediary.[284] The contractual arrangements between the parties provided for "the exclusive jurisdiction of the Courts of Luxembourg" but that the bank would have "the right to bring an action before the Courts of the client's domicile *or any other court of competent jurisdiction*."[285] Despite the exclusive jurisdiction clause agreed by the parties, Mrs. X later commenced proceedings against the bank in France. The bank objected to the competence of the French courts to hear the case, arguing that the (bilateral) forum selection clause provided for the competence of Luxembourg courts.[286]

The French Supreme Court invalidated the forum selection clause on the grounds that it contained a potestative condition,[287] namely, the bank's unilateral right to choose between Luxembourg courts and any court of competent jurisdiction. The court held that "[i]n accordance with the French and Luxembourg law, obligations entered into under potestative condition are invalid."[288] The court also noted that the potestative clause was "contrary to the objectives and the finality of the prorogation of jurisdiction" provided for in Article 23 of the Brussels I Regulation (before its recast).[289] In other words, the court "found that [the]

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[284] *See* Cour de cassation [Cass.] [supreme court for judicial matters], civ., Sept. 26, 2012, 11-26022.

[285] *Id.*

[286] *Id.*

[287] Under Article 1170 of the French Civil Code, a clause is potestative if its performance is subject to the occurrence of a condition precedent entirely within the power of only one of the contracting parties to cause to occur or to prevent. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1170 (Fr.).

[288] *See* Cour de cassation [Cass.] [supreme court for judicial matters], civ., Sept. 26, 2012, 11-26022.

[289] *Id.* Art. 23 of the Council Regulation (EC) 44/2001 (Brussels I Regulation) (now Council Regulation (EC) 1215/2012 (Brussels I Recast Regulation)) provides:

> If the parties, one or more of whom is domiciled in a [EU] Member State, have agreed that a court or the courts of a [EU] Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts

'one-sided' [forum selection] clause [did not represent] an agreement conferring jurisdiction within the meaning of the Brussels I Regulation, but rather the imposition of terms by one party on the other."[290] Consequently, the entire clause failed, not just the option afforded to the bank to choose between Luxembourg courts and any other competent court. Because there was no valid forum selection clause, the French courts could hear the case because there was a sufficient connection with France, pursuant to French civil procedure provisions.[291]

Similarly, the *Crédit Suisse* case involved a unilateral forum selection clause which provided that "the exclusive forum is Zurich or the place of the bank subsidiary where the loan is entered into" but that the bank would have "the right to bring an action against the debtor before *any other court of competent jurisdiction*."[292] Notwithstanding these terms, the debtor, Société Civile ICH, commenced litigation in France, before the Angers tribunal.[293] The claim was brought against Crédit Suisse as the lender, Société Générale as the guarantor, as well as against two other entities.[294] The Angers tribunal declined jurisdiction in favor of Swiss courts.[295]

The debtor appealed and, in 2013, the Angers Court of Appeal confirmed the decision of the Angers tribunal, finding that the forum selection clause was valid and that French courts lacked jurisdiction.[296] In so ruling, the Angers Court of Appeal

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shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

2001 O.J. (L 12) 8. In other words, parties to a legal relationship (contractual or non-contractual) can elect to refer any disputes between them (present or future) to the state courts of an EU Member State of their choice and such agreement on jurisdiction will grant to the chosen state courts exclusive jurisdiction (unless otherwise agreed by the parties). It is unclear if the French Supreme Court considered or applied art. 15-17 of the Brussels I Regulation, which provide for specific arrangements for procedures involving consumers.

290 *See* Bérard et al., *supra* note 6.

291 *See* Cour de cassation [Cass.] [supreme court for judicial matters], civ., Sept. 26, 2012, 11-26022.

292 *See* Cour de cassation [Cass.] [supreme court for judicial matters], civ., Mar. 25, 2015, 13-27264.

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.*

dismissed the arguments presented by the banks.[297] Crédit Suisse had argued that the forum selection clause was valid and that Zurich courts had exclusive jurisdiction.[298] Société Générale had argued that, with respect to the debtor's claim against Société Générale, Paris courts had jurisdiction, because Paris was the domicile of Société Générale (defendant).[299] The court dismissed Société Générale's argument, holding that the claims against the two defendants were indivisible and that, as such, Zurich courts had exclusive jurisdiction over the entire dispute.[300]

The debtor filed a second appeal, which was heard by the French Supreme Court in 2015.[301] The French Supreme Court annulled the ruling of the Angers Court of Appeal for failure to determine if the unbalanced character of the forum selection clause, which reserved to the bank the right to pursue litigation against the debtor before any competent court, "without containing any indication of objective criteria to be used in determining the competent court," was contrary to the "objective of foreseeability and legal certainty" underlying Article 23 of the Lugano Convention.[302] The French Supreme Court referred the case back to another French court of appeal (Rennes Court of Appeal) to make that determination.[303]

In 2016, the Rennes Court of Appeal determined that the forum selection clause was invalid in its entirety due to the unilateral choice of the bank in favor of "any other court of competent jurisdiction" under Article 23 of the Lugano Convention.[304] The court reasoned that the unilateral choice was invalid because it "did not reference any specific rule of national or international law that could be used to establish that alternative jurisdiction" and, as such, there was no agreement of the parties on the competent courts to hear their dispute.[305] Like in the *Rothchild* case, in the absence of any choice made by the parties,

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297 *Id.*
298 *Id.*
299 *Id.*
300 *Id.*
301 *Id.*
302 *Id.*
303 *Id.*
304 *See* Rennes Court of Appeal [appellate court], 15/02999, Apr. 1, 2016.
305 *Id.*

the court applied the relevant conflict of competence rules, starting from the choice made by the plaintiff, who had commenced litigation in France.[306] The court held that the only competent French court to hear the entire dispute (which was indivisible) was the Paris court, as the place of domicile of one of the two defendants (Société Générale).[307]

As the last element of this saga, Crédit Suisse filed an appeal with the French Supreme Court that was decided in 2018.[308] Crédit Suisse argued, once again, that the forum selection clause was valid, in that the parties had designated the Swiss courts (Zurich) as the competent courts, and the competence of any other courts could be identified by applying the conflict of competence rules that the Rennes Court of Appeal relied on, which would have pointed, in practice, to one of three options: (1) the domicile of the defendant; (2) the place of performance of the contract; and (3) the place where the immovable property is located.[309] The French Supreme Court summarily rejected these arguments and upheld the decision of the Rennes Court of Appeal, holding that "the validity of such a forum selection clause is conditioned by a requirement of precision in order to satisfy the objective of foreseeability and legal certainty underlying [Article 23 of the Lugano Convention]" and that the clause, as drafted, "contained no objective element permitting to identify other competent courts, because the clause did not reference any specific rule of national or international law that could be used to establish that alternative jurisdiction."[310] In other words, the French Supreme Court validated its previous ruling from 2015, which, in turn, was based on the ruling of the court in the *Rothchild* case.

Another case that dealt with a similar clause was the *Apple* case.[311] In this case, the French Supreme Court analyzed a unilateral forum selection clause and concluded that it was valid because it did not breach the foreseeability requirement (which

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306 *Id.*

307 *Id. See also* 2007 O.J. (L 339) 3 (Article 6(1) of the Lugano Convention).

308 *See* Cour de cassation [Cass.] [supreme court for judicial matters], civ., Feb. 7, 2018, 16-24497.

309 *Id.*

310 *Id.*

311 *See* Cour de cassation [Cass.] [supreme court for judicial matters], civ., Oct. 7, 2015, 14-16898.

the clauses in the *Rothschild* and the *Crédit Suisse* cases were held to breach).[312] The clause at issue provided that the holder of the option could choose between the Irish courts, the courts of the reseller's corporate seat (France), or "*any jurisdiction where harm to [the reseller] is occurring*."[313] As such, the clause provided less options than in the previous cases analyzed. For this reason, the French Supreme Court concluded that the requirement of foreseeability was met, despite the unilateral character of the clause, because it was possible to identify the jurisdiction competent to hear a claim.[314]

The *Rothchild* and the *Crédit Suisse* cases indicate a hostility of French courts towards unilateral forum selection clauses. The *Apple* case did not directly overturn the decisions in the *Rothchild* and the *Crédit Suisse* cases, especially if we take into consideration that the last decision of the French Supreme Court in the *Crédit Suisse* case was rendered after the decision in the *Apple* case. However, the *Apple* case confirmed that if the choices of the beneficiary of the option are determinable (even if not absolutely determined) and relatively narrow, French courts will uphold the agreement of the parties.

Moreover, these cases did not directly address the issue of unilateral option clauses used in arbitration. In our view, the 1974 holding from *Sicaly v. Gasso* case still controls with respect to asymmetrical dispute resolution clauses mixing litigation and arbitration, and we do not believe that French courts would strike such clauses if the option is limited and allows to determine the competent jurisdiction with a reasonable degree of predictability.[315]

First, the unilateral forum selection clauses that were analyzed in the *Rothchild* and the *Crédit Suisse* cases are subject to additional requirements in the European context (under the Lugano Convention and/or the Brussels I Recast Regulation). In particular, those clauses were held to be subject to the

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[312] *Id.*

[313] *Id.* (author's translation) (emphasis added).

[314] *Id.*

[315] *See* Petit et al., *supra* note 3, at 26. *But see* Bérard et al., *supra* note 6, at 4 (noting that France is on list of countries where unilateral option clauses are likely to raise issues of effectiveness, together with Poland, Romania, and Turkey).

requirements of foreseeability and legal certainty (predictability) with respect to the competent courts. A clause where one of the parties has the option to choose between litigation before the courts of a particular country and arbitration in front of a particular arbitral institution does not raise the issues of predictability that were of concern in the *Rothchild* and the *Crédit Suisse* cases ("any court of competent jurisdiction"), as illustrated by the *Apple* case. That being said, asymmetrical dispute resolution clauses mixing litigation and arbitration can raise (different) predictability issues, particularly where the restricted party is the one to commence litigation, and the unrestricted party, with the benefit of its unilateral option, could remove the case from the forum where the restricted party brought the dispute originally.

Second, the *Rothchild* and the *Crédit Suisse* decisions were severely criticized and the French Supreme Court has in the past changed its precedent in order to reflect changes in international practice and evolving commercial needs.[316] The *Apple* case could be viewed as a first step in that direction. Moreover, the *Rothchild* and the *Crédit Suisse* cases arose in the particular context of lender agreements where the bargaining power of the two parties is, by definition, unequal. Even if the courts did not apply the specific national (and European) regulations regarding consumers, the existence of an unequal bargaining power was necessarily a factor that the courts considered in ultimately declaring the clauses, which had been proposed by the banks, invalid. That consideration would not be applicable with respect to an asymmetrical dispute resolution clause concluded between two commercial, equally sophisticated parties.

B. Germany

In a 1989 case, known as *Injection Molded Parts*, the German Federal Supreme Court invalidated a severely unbalanced unilateral arbitration clause.[317]

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[316] *See* Bérard et al., *supra* note 6, at 7.

[317] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 26, 1989, X ZR 23/87 (Ger.).

In that case, the plaintiff was the bankruptcy trustee for the assets of company H (former plaintiff in the matter).[318] Company H had manufactured and delivered injection molded parts as part of a long business relationship with the defendant, company G.[319] The subject of the dispute was the remuneration for not yet amortized injection molds to be paid by company G to company H.[320] The contract between the parties stipulated that, at company G's free choice and sole decision, instead of ordinary judicial proceedings, an arbitration proceeding could also be carried out.[321] The arbitration mechanism contained several unusual features. First, it provided that only one procedure (one arbitration) could be conducted by the parties against each other at one time and that the amount in dispute in each arbitration procedure was limited to a maximum of DM 7,000 (German marks). Second, company G was entitled to select a neutral person, specialized in business or in law, as an arbitrator, who would definitively decide the dispute. The decision would be immediately enforceable without any objection. Third, the clause provided that the parties would represent themselves and not have recourse to attorneys.[322]

The lower courts ordered company G to pay DM 50,000 for the injection molded parts.[323] The defendant appealed, relying, among other things, on the arbitration agreement.[324] The Court of Appeal rejected company G's objection, noting that the arbitration agreement in any event only covered proceedings up to DM 7,000.[325] The court noted, however, that company G's complaints against the arbitration agreement (as being invalid) were well-founded.[326] However, those complaints did not lead to company G's success in the appeal because the outcome of the legal dispute did not depend on the invalidity of the arbitration agreement.[327] In other words, the arbitration agreement was invalid but it was not

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318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.*
322 *Id.*
323 *Id.*
324 *Id.*
325 *Id.*
326 *Id.*
327 *Id.*

applicable to the dispute, which had been properly commenced before state courts. The German Federal Supreme Court agreed with the reasoning of the Court of Appeal.[328] This decision indicates that an utterly one-sided dispute resolution clause with a unilateral option for arbitration may be invalidated as being in violation of public policy. However, the particular unilateral option in that case was truly exceptional, and the option's one-sided character did not stem just from the fact that only one party had the option to invoke it but from the other exceptional features that it contained.

Similarly, in a 1991 case, the German Federal Supreme Court invalidated a rather unique unilateral arbitration clause.[329] That case involved a dispute between a buyer and a seller, both merchants (not consumers). The buyer owned a winery and ordered wooden items from the seller.[330] The quality was not what was stated in the contract and the buyer refused to pay.[331] The dispute resolution clause, which was included in General Terms and Conditions attached to the contract, afforded the claimant the option to bring disputes to arbitration, to the exclusion of the ordinary legal alternative (court litigation).[332] The arbitration clause provided that the parties agreed to avoid higher costs, if possible, and to privilege the appointment of a solo arbitrator.[333] If a solo arbitrator could not be appointed, each party had the right to nominate its own arbitrator and, if one party failed to nominate its arbitrator within a set period of time, the other party had the right to request the Chamber of Commerce to appoint an arbitrator for the party in default.[334] The clause further provided for a mechanism in case of deadlock: If the arbitrators failed to agree on the solution, they would appoint a chairman, who would decide the issue.[335] Lastly, the arbitration clause provided that the

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[328] *Id.*

[329] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 10, 1991, X ZR 141/90 (Ger.).

[330] *Id.*

[331] *Id.*

[332] *Id.*

[333] *Id.*

[334] *Id.*

[335] *Id.*

decision of the arbitrators was final and binding for both parties.[336]

The seller exercised the option, and commenced arbitration, obtaining a favorable arbitral award. The seller then attempted to enforce the arbitral award and requested a declaration of enforceability from German courts.[337] The court of first instance (LG Bremen) rejected the seller's request to declare the award enforceable and revoked the award.[338] On appeal, the decision was overturned and the award was declared enforceable.[339] The case then went to the German Federal Supreme Court, who annulled the appeal judgment.[340] The German Federal Supreme Court refused to enforce the award and annulled it, holding that the arbitral award was not based on a valid arbitration agreement.[341] In other words, the dispute resolution clause providing for a unilateral option to choose arbitration was invalid.

The German Federal Supreme Court started its legal analysis by noting that the mere inclusion of a (unilateral) arbitration clause in the General Terms and Conditions of one party does not invalidate it, because that fact alone "does not constitute unreasonable disadvantage for the contractual partner." [342] It is worth noting that the dispute involved two merchants but, on this point, the court would have likely reached the same solution even if a consumer was involved.

The German Federal Supreme Court then noted that the arbitration clause was not invalid merely because it was unilateral, but noted that an "arbitration clause that only gives one party the right to choose between arbitration and state courts gives that party the possibility of influencing the content of the desired decision by removing the legal control of the terms and conditions of the contract from the state courts."[343] The issue, apparently, was that the arbitral tribunal had not examined the validity of the overall contract under mandatory German law,

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[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *Id.*

namely the General Terms and Conditions Act, an examination which state courts would have undertaken.[344] In this sense, the court observed that a unilateral arbitration clause will unreasonably disadvantage one party where the specific process for appointing arbitrators makes it unlikely that those arbitrators will examine the terms of the contract against mandatory German law.[345]

As such, the German Federal Supreme Court held that unilateral arbitration clauses are subject to "content control" by the courts, even when they are concluded between merchants.[346] Such review includes the context of the entire contract and the overall circumstances in which the arbitration clause was agreed between the parties.[347] A particular feature of the contract concluded between the parties was that if the buyer did not state a complaint within the prescribed time (three days after receipt of the goods), the buyer lost the right to rely on the non-conformity of the goods and, even if such a complaint was made, the buyer still had to pay the price, pending resolution of the complaint.[348] This applied whether or not the deficiency complained about was immediately recognizable or was hidden.[349] It was on this basis (failure by the buyer to give notice of non-conformity within the three-day period) that the arbitral tribunal had ruled in favor of the seller.[350]

The court observed that this notice requirement, which was a substantive provision in the contract, was closely related to the dispute resolution mechanism, in the sense that, given the shortness of the deadline (three days), it practically had the effect of eliminating any claims of non-conformity of the buyer.[351] Because both the notice requirement and the unilateral arbitration clause were included in General Terms and Conditions, their validity had to be assessed under the General

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344 *Id.*
345 *Id.*
346 *Id.*
347 *Id.*
348 *Id.*
349 *Id.*
350 *Id.*
351 *Id.*

Terms and Conditions Act.[352] The court found that the notice requirement was invalid under the General Terms and Conditions Act, as contrary to the requirements of good faith and fairness, even when agreed between merchants.[353] That was because a clause which allowed complaints about open and hidden defects to be made only within three days practically eliminated the legal principle of the responsibility of the seller and the legal right of retention of the buyer.[354] Because the dispute resolution clause was intrinsically linked with the notice provision, the court concluded that the dispute resolution clause was invalid.[355] The court noted that a dispute resolution clause included in General Terms and Conditions "must not open up the possibility of deviating from the protective guarantees of the general terms and conditions law".[356]

In a 1998 case, the German Federal Supreme Court added a further layer of complexity to its case law on unilateral arbitration clauses.[357] The dispute resolution clause at issue provided: "Pursuant to our choice, the court in Gera or Munich or the Hamburg arbitral court . . . in accordance with the Arbitration Rules of the Commodities Association of the Hamburg Stock Exchange ("Warenverein der Hamburger Börse") shall be competent to decide any dispute."[358] The clause was, like in the 1991 case, included in the standard terms of one of the parties, and, similarly, was assessed against the German General Terms and Conditions Act.

Both the court of appeal and the German Federal Supreme Court ruled that the clause was invalid insofar as the unilateral option for arbitration was concerned.[359] The court found that the unilateral option placed the contractual partner at an unreasonable disadvantage, because, in the courts' view, the restricted party, when acting as claimant, does not know if the

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[352] *Id.*

[353] *Id.*

[354] *Id.*

[355] *Id.*

[356] *Id.*

[357] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 24, 1998, III ZR 133/97 (Ger.).

[358] *Id.*

[359] *Id.*

unrestricted part will exercise its right to choose.[360] In other words, the party who is not the beneficiary of the unilateral arbitration clause (the restricted party) runs the risk of incurring unnecessary costs for bringing court proceedings only to then have the beneficiary of the unilateral arbitration clause (the unrestricted party) exercise its right to submit the dispute to arbitration. The court held that such a risk is not reasonable for the restricted party.[361] Interestingly, the court noted that the risk could have been mitigated by additional contractual provisions (for example, stating that the restricted party has the right, prior to the commencement of litigation, to force the beneficiary of the unilateral right to make a choice, and regulating the consequences of a refusal to make a choice or of belated election). However, the clause at issue did not include such mechanisms.[362]

As such, the German Federal Supreme Court invalidated the clause. The court was also careful to distinguish its decision from that reached in the 1991 case, noting that the clause at issue in the 1991 case involved a right to choose only as claimant/plaintiff (not also as respondent/defendant).[363] In contrast, the 1998 case involved a right to choose of a named party, whether acting as claimant/plaintiff or as respondent/defendant. A similar distinction was made in recent caselaw in Russia (see Part IV.6 above).

In conclusion, although asymmetrical dispute resolution clauses with a unilateral option to arbitrate are not invalid *per se* in Germany,[364] German law requires agreements to arbitrate not to violate German public policy by being utterly one-sided, in light of the overall features of the clause.[365] In addition, with respect to such clauses included in standard form contracts, German law requires the agreement to arbitrate not to place the restricted party at an unreasonable disadvantage, even when the clause is applicable between commercial parties. Courts found such a disadvantage to be contrary to the principles of good faith and

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[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *See* Philip Clifford & Oliver Browne, *Finance Agreements: A practical Approach to Options to Arbitrate*, 1 GLOBAL ARB. REV. 39, 41.

[365] *Id.*

fairness and, therefore, "unreasonable," either due to specific features related to procedural requirements or because the option for arbitration is granted to a named party (without further contractual language forcing an election to be timely made by the beneficiary of the option), as opposed to it being granted to whichever party will be the claimant.

C. United States of America

In the United States, it is the law of each individual state, rather than federal law, that governs the issue of the enforceability of any contract that touches arbitration. Section 2 of the Federal Arbitration Act (FAA),[366] now binding on the states, provides that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[367] The United States Supreme Court held that the "grounds" referred to in Section 2 of the FAA are necessarily matters of state law.[368] As such, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements . . . ."[369] "[S]ome of the most common arguments against the enforceability of unilateral/discretionary arbitration provisions are that they are adhesive, lack mutuality, and are unconscionable."[370]

Asymmetrical clauses and consideration (mutuality of obligation). Some state courts, based on, and taking to an extreme, the "separability" of the arbitration agreement from the

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[366] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (noting that Section 2 of the FAA "provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of th[e] statute . . . [and] state law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

[367] Section 2 of the Federal Arbitration Act provides, in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. 2.

[368] Nahmias, *supra* note 3, at 36.

[369] Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[370] Nahmias, *supra* note 3, at 37.

underlying contract,[371] held that an arbitration agreement must independently, in and of itself, satisfy all the requirements of contract formation, including consideration, and cannot borrow "consideration" from the container contract[372] Some federal courts took the same view.[373] As noted by a legal scholar, this was "separability with a vengeance[,]"[374] requiring essentially mutuality of obligation.

Such holdings are rare today. Notably, New York courts, formerly at the forefront of requiring mutuality,[375] later rejected

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[371] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 409 (1967). *See also* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1010 (1996) ("In addition to the contract really alleged to have been formed (the container contract), the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms.") (citations omitted).

[372] *See* Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt. Inc., 795 P.2d 1308, 1313 (Ariz. Ct. App. 1990) (holding that "Because under the separability doctrine the arbitration provision is an independent and separate agreement, [it] cannot 'borrow' consideration from the principal contract to support the arbitration provision" and concluding that "the arbitration provision, which clearly lacks mutuality, is void for lack of consideration"); Knepp v. Credit Acceptance Corp. (*In re* Knepp), 229 B.R. 821, 836 (N.D. Ala. 1999) ("Under this doctrine, an arbitration clause must fulfill all the requirements of a contract including mutuality of assent and cannot rely on the container contract for these elements."); The Money Place, LLC v. Barnes, 78 S.W.3d 714, 717, 719 (Ark. 2002) ("mutuality within the arbitration agreement itself is required"; "the agreement to arbitrate is not supported by sufficient consideration, because [RP] is the only party that has promised to forego her rights to seek redress in the court system" and UP "has the option of pursuing arbitration or bringing suit in court") (citation omitted); Cheek v. United Healthcare of the Mid-Atlantic, Inc., 835 A.2d 656, 664-65 (Md. 2003) ("[W]e have followed the lead of the Supreme Court in [*Prima Paint*] by considering an arbitration clause of a larger contract to be severable therefrom . . . [in consequence] "mutual promises to arbitrate [must be present to create] an independent enforceable contract.") (citations omitted); Vassilkovska v. Woodfield Nissan, Inc., 830 N.E.2d 619, 630 (Ill. App. Ct. 2005) (holding that exclusion of seller's claim against buyer from arbitration clause invalidated any consideration for the buyer's promise to arbitrate, and concluding that, because the arbitration agreement was separate and distinct from the purchase contract entered into by the parties, it required its own consideration).

[373] *See, e.g.*, Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985) (refusing to require arbitration where only one party to an employment contract (the employee) was bound to arbitrate).

[374] Rau, *supra* note 3, at 24-25; *see also* Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 542-47 (2002) (noting that "[p]rior to 1990, a number of courts . . . refused to enforce nonmutual arbitration clauses, relying on the doctrine of mutuality of obligation[,]" although "[t]oday, virtually all courts hold" that this does not preclude enforcement of such clauses).

[375] *See, e.g.*, Cored Panels, Inc. v. Meinhard Comm. Corp., 420 N.Y.S.2d 731, 731 (N.Y. App. Div. 1979) ("void for lack of mutuality"); Arcata Graphics Corp. v. Silin, 399

the doctrine's application to arbitration clauses. In *Sablosky v. Edward S. Gordon Co.*, the Appellate Division of the Supreme Court of New York held:

> 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.[376]

The recent general trend of both state and federal American courts is to uphold dispute resolution clauses which permit one party (but not the other) to commence arbitration and to reject both the separate consideration requirement, and the mutuality doctrine.[377] As one court concluded, "[w]e see no reason why justice should require perfect symmetry of remedy . . . ."[378]

N.Y.S.2d 738, 738-39 (N.Y. App. Div. 1977) (refusing to enforce arbitration clause that only one party could invoke); Kaye Knitting Mills v. Prime Yarn Co., 326 N.Y.S.2d 361, 363 (N.Y. App. Div. 1971) ("It should be clearly manifest that the parties adopt arbitration as their exclusive remedy . . . ."); Hull Dye & Print Works, Inc. v. Riegel Textile Corp., 325 N.Y.S.2d 782, 783 (N.Y. App. Div. 1971).

[376] Sablosky v. Edward S. Gordon Co., 535 N.E.2d 643, 646 (N.Y. 1989) (citations omitted).

[377] *See, e.g.*, *In re* Am Express Fin. Advisors Sec. Litig., 672 F.3d 113, 142 (2d Cir. 2011) (enforcing non-mutual agreement to arbitrate under FINRA Code of Arbitration Procedure for Customer Disputes); Forbes v. A.G. Edwards & Sons, Inc., No. 08 Civ. 552(TPG), 2009 WL 424146, at *8 (S.D.N.Y. Feb. 18, 2009); Price v. Taylor, 575 F. Supp. 2d 845, 853 (N.D. Ohio 2008) ("[A] valid arbitration clause does not fail for lack of mutuality, as long as consideration supports the contract."); Pridgen v. Green Tree Fin. Servicing Corp., 88 F. Supp. 2d 655, 659 (S.D. Miss. 2000) ("[M]utuality of obligation is not required for a contract to be enforceable."); Barker v. Golf U.S.A., Inc., 154 F.3d 788, 792 (8th Cir. 1998) ("[M]utuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration."); Doctor's Assoc., Inc. v. Distajo, 66 F.3d 438, 453 (2d Cir. 1995) ("[W]here the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole covers the arbitration clause as well.") (citations omitted); Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989) ("Because the contract as a whole did not lack consideration, we see no grounds justifying the district court's decision, which appears to be pervaded by 'the old judicial hostility to arbitration . . . .'") (citations omitted); W.L. Jorden & Co. v. Blythe Indus., Inc., 702 F. Supp. 282, 284 (N.D. Ga. 1988); Becker Autoradio U.S.A., Inc. v. Becker

However, even in very recent years, there are still a number of cases that require mutuality of obligation or consideration, often citing *Prima Paint*.[379] In our view, these holdings miss the point on the function that the doctrine of separability is designed to serve, which is to preserve the validity of the arbitration agreement in case the container contract is invalid. As such, these holdings misapplied *Prima Paint*, in the sense that the separability doctrine and its underlying policies do not require mutual promises to arbitrate nor prevent an arbitration clause from "borrowing" the consideration of the container contract. Moreover, under general American contract law, there is no mirror image rule that would require that the obligations of one party be exactly co-extensive with the obligations of the other. For example, unilateral termination clauses have never been problematic as to their validity. Consequently, "the doctrine of mutuality . . . was not properly or sensibly applied to require that

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Autoradiowerk GmbH, 585 F.2d 39, 47 n.15 (3d Cir. 1978) (upholding a unilateral arbitration clause because "there is no such doctrine of complete mutuality as a matter of federal law . . ."); Verolme Botlek B.V. v. Lee C. Moore Corp., 1996 Y.B. COMM. ARB. 824.

[378] Kalman Floor Co. v. Jos. L. Muscarelle, 481 A.2d 553, 560 (N.J. Super. Ct. App. Div. 1984).

[379] *See, e.g.*, Raglani v. Ripken Prof'l Baseball, 939 F. Supp. 2d 517, 522-23 (D. Md. 2013) (stating that "courts are not permitted, when assessing the enforceability of an arbitration agreement, 'to go beyond the confines of the arbitration agreement itself and into an analysis of the validity of the larger contract'") (citations omitted); Noohi v. Toll Bros., Inc., 708 F.3d 599, 603, 608 (4th Cir. 2013) ("[A]n arbitration provision is treated as a severable contract that must be supported by adequate consideration[;] . . . . [therefore,] the arbitration provision was unenforceable as a matter of law because it was not supported by mutual consideration, notwithstanding the fact that the contract as a whole was supported by adequate consideration.") (citation omitted); Caire v. Conifer Value Based Care, LLC, 92 F. Supp. 2d 582, 593 (D. Md. 2013) (invalidating agreement for lack of consideration and noting that "[t]he parties' obligations need not be identical for an arbitration agreement to be valid, . . . but there must be some mutual promise") (citations omitted); Independence Cty. v. City of Clarksville, 386 S.W.3d 395, 399 (Ark. 2012) ("[L]ack of mutuality to arbitrate in an arbitration clause renders the clause invalid."); Gonzalez v. West Suburban Imps., 411 F. Supp. 2d 970, 973 (N.D. Ill. 2006) (holding that lack of mutuality in separable arbitration agreement rendered the agreement invalid); Richard Harp Homes, Inc. v. Van Wyck, 262 S.W.3d 189, 192-93 (Ark. Ct. App. 2007) ("[A]n arbitration agreement lack[s] the necessary mutuality of obligation where [one party was] limited to pursuing any grievance in an arbitration forum while the [other party] retained the sole legal right to pursue legal or equitable remedies."); Wisconsin Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155 (Wisc. 2006); Tyson Foods, Inc. v. Archer, 147 S.W.3d 681 (Ark. 2004).

the terms of contractual dispute resolution provisions grant precisely identical rights and remedies to all parties."[380]

Asymmetrical clauses and unconscionability. Despite the rejection of the mutuality doctrine by most American courts, some courts have relied on theories of unconscionability in holding asymmetrical arbitration agreements invalid. For example, Section § 2-302 of the Uniform Commercial Code provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[381]

The cases invoking the doctrine of unconscionability typically involve unilateral arbitration clauses with a twist, in the sense that it is the weaker party that has a unilateral obligation (not a unilateral right) to submit to arbitration while the more powerful party (which is often the drafter) has a unilateral option to resort to courts for the settlement of the dispute. Under this fact pattern, courts sometimes found that the disparity was substantively and/or procedurally unconscionable, and, consequently, declared the arbitration clause void. The procedural element of the doctrine of unconscionability focuses on two factors: "oppression" and "surprise" due to unequal bargaining power.[382] The substantive element focuses on "overly harsh" or "one-sided results."[383] "The prevailing view is that these two elements must both be present in order for a court to exercise its discretion to refuse to enforce a

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[380] BORN, *supra* note 22, at 85.

[381] U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

[382] *See* A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (Cal. Ct. App. 1982).

[383] *Id.* at 487.

contract or clause under the doctrine of unconscionability," but not necessarily to the same degree."[384]

Another frequent fact pattern involves unilateral litigation clauses with carve-outs, where both parties agree to arbitrate any disputes between them, but one party is expressly given the option to initiate litigation as well, with respect to certain categories of claims that are expressly carved-out from the overall arbitration clause.

Most of the decisions that have applied the doctrine of unconscionability to arbitration agreements come from state courts, which often have histories of hostility to arbitration agreements, and involve domestic (as opposed to international) arbitration agreements.[385] In contrast, federal courts have frequently refused to apply the doctrine of unconscionability in similar scenarios.[386]

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[384] *See* Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1533 (1997).

[385] *See*, *e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 691-94 (Cal. 2000); Iwen v. U.S. W. Direct, 977 P.2d 989, 996 (Mont. 1999) (arbitration clause in standard form contract of telephone company with consumer held "completely one-sided" and unconscionable); Arnold v. United Cos. Lending Corp., 511 S.E.2d 854, 861 (W. Va. 1998) (in "contract between the rabbits and foxes," an asymmetrical arbitration clause was "unreasonably favorable" to corporate lender against unsophisticated consumer) (citation omitted); Martinez v. Master Prot. Corp., 12 Cal. Rptr. 3d 663, 669-70 (Cal. Ct. App. 2004) (arbitration agreement lacks mutuality because it required employees to arbitrate all claims while employer had the right to court injunctive relief for certain causes of action); *Stirlen*, 51 Cal. App. 4th at 1542; Showmethemoney Check Cashers, Inc. v. Williams, 27 S.W.3d 361, 367 (Ark. 2000) ("Given the lack of mutuality to support the arbitration agreement, we hold the arbitration clause contained in the 'Check Cashing Agreement' does not constitute a valid enforceable agreement to arbitrate . . . ."); Lopez v. Ace Cash Express, Inc., Nos. LA CV11-04611 JAK(JCx), LA CV11-07116 JAK(JCx), 2012 WL 1655720, at *6 (C.D. Cal. May 4, 2012) ("An arbitration agreement that manifests a lack of mutuality—that requires only one party to arbitrate—is substantively unconscionable."); Plaskett v. Bechtel Int'l, Inc., 243 F. Supp. 2d 334, 341-42 (D.V.I. 2003) (the arbitration clause between employer and employee unconscionable because it "unreasonably favors" the employer while the employee "obtains absolutely no benefit from this provision").

[386] *See*, *e.g.*, M.A. Mortenson Co. v. Saunders Concrete Co., 676 F.3d 1153, 1158 (8th Cir. 2012) ("Courts have similarly rejected [the] argument that an arbitration agreement is substantively unconscionable because it gives one party the sole discretion to choose arbitration . . . ."); DiMercurio v. Sphere Drake Ins., 202 F.3d 71, 81 (1st Cir. 2000) (noting that, although "one-sided agreements to arbitrate are not favored," there is no unconscionability where relevant category of disputes is subject to reciprocal agreements to arbitrate).

Empirical studies show that the number of unconscionability challenges is on the rise. Where such "challenges once appeared in less than 1% of all arbitration-related cases, more recently [as of 2008] they . . . appeared in 15-20% of all cases involving arbitration."[387] Challenges on the ground of "unconscionability" typically involve cases where the underlying contract is one of "adhesion" and the weaker party is a consumer, employee or franchisee[388] of the more powerful bargaining party,[389] contrary to the "consideration and mutuality" cases discussed above, which had broad application. Additionally, some state courts, most notably, California courts, have taken the lead in requiring the more powerful bargaining party to establish some "legitimate commercial need" based on "business realities" for an asymmetrical clause.[390] In *Armendariz v. Foundation Health*

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[387] *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1440-41 (2008). *See also* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009) (acknowledging that the "total number of reported unconscionability decisions . . . increased nearly tenfold" between 1990 and 2008, and "those involving arbitration clauses accounted for the lion's share of the overall increase").

[388] On the availability of the "unconscionability" challenge to franchisees, see Ticknor v. Choice Hotels Int'l, 265 F.3d 931, 939-43 (9th Cir. 2001) (The majority found that the franchise agreement "was a standardized, form agreement that [the franchisee] was forced to accept or reject without negotiation," and, because of the "one-sided" nature of the obligation to arbitrate, the arbitration provision was "unenforceable as unconscionable under Montana law." *Id.* The dissent noted that this was a "commercial contract between sophisticated business organizations," and that the franchisee was an "experienced and sophisticated motel franchise operator." *Id.* (Tashima, J., dissenting)). *See also* Bolter v. Superior Court, 104 Cal. Rptr. 2d 888, 907 (Cal. Ct. App. 2001) (concerning contract between a "large wealthy international franchiser" and franchisee with "limited financial means, owning small 'one-man operated' Dry-Chem franchises").

[389] *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 642-43 (1996); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 97-98 (2001). *See also* United States v. Consigli Constr. Co., 873 F. Supp. 2d 409, 416 (D. Me. 2012) ("Most of the cases invalidating unilateral arbitration clauses involve employee or consumer contracts, where the doctrine of unconscionability has greater application than in the commercial context, and many of these cases conclude that these clauses both lack mutuality and are unconscionable.").

[390] *Armendariz*, 6 P.3d at 691-94 (requiring a "legitimate commercial need" or a "reasonable justification" for lack of mutuality). *See also* Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1174 (N.D. Cal. 2002); Flores v. Transamerica Homefirst, Inc., 113 Cal.

Psychcare Services, Inc., decided in 2000, the California Supreme Court examined an agreement by an employee to arbitrate wrongful termination or employment discrimination claims, which the employer had imposed on a prospective or current employees as a condition of employment.[391] The employee claimed that several provisions of the arbitration agreement were unconscionable, including because the arbitration agreement was not bilateral.[392] The court concluded that the arbitration agreement was unconscionably unilateral[393] and that the unconscionable provisions rendered the entire arbitration agreement unenforceable.[394]

The court first determined that the contract was one of adhesion, defined as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[395] The court noted that, pursuant to generally accepted principles, an adhesion contract will not be enforced against the weaker party even if consistent with the reasonable expectations of the parties, if, considered in its context, it is unduly oppressive or unconscionable.[396] The court found the arbitration agreement to be unconscionable, holding:

> Given the disadvantages that may exist for plaintiffs arbitrating disputes, 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 for such one-sidedness based on "business realities." . . . If the arbitration system established by the employer is indeed fair, then the employer

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Rptr. 2d 376, 383 (Cal. Ct. App. 2001). *See generally* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (reviewing two decades of California appellate cases).

391 *Armendariz*, 6 P.3d at 674.

392 *Id.* at 675-76.

393 *Id.* at 692-94.

394 *Id.* at 698-99.

395 *Id.* at 689 (citing Neal v. State Farm Ins. Cos., 188 Cal. App. 2d 690, 694 (Cal. Ct. App. 1961)).

396 *Id.* at 692.

> as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose.
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> . . . .
>
> [A]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. The arbitration agreement in this case lacks mutuality in this sense because it requires the arbitration of employee—but not employer—claims arising out of a wrongful termination.[397]

In our view, the court placed a particularly high burden of proof on the party with superior bargaining power, which will have to justify asymmetrical clauses by demonstrating the existence of "business realities" supporting the imposition of an asymmetrical obligation to arbitrate without a corresponding benefit to the other.[398] Any particular contractual provision that confers benefits (or imposes burdens) unequally is presumably "paid for" by adjusting the terms of the overall deal. Consequently, it must be possible for the parties to reflect in their agreement, on a clause-by-clause basis, their respective bargaining power and skills, as well as risk allocation, including by means of an imbalanced dispute resolution clause. The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise. It is not to disturb the overall bargained for allocation of risks.

The realistic explanation for the holdings in these cases is that asymmetrical arbitration clauses are found "unconscionable" as putative measures of consumer protection. In other countries, national laws render invalid (not just unenforceable as applied to a particular dispute) arbitration agreements pertaining to consumer, employment, or franchise disputes. An additional factor

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[397] *Id.* at 692-94.

[398] *See* Rau, *supra* note 3, at 30.

is an ongoing war between state courts (favoring litigation) and federal policy (promoting arbitration as an alternative means of dispute resolution). As applied to the context of asymmetrical arbitration clauses, the doctrine of unconscionability assumes the inferiority of arbitration to litigation.[399] Things are still evolving with respect to the acceptance of arbitration as an alternative method of dispute resolution. Interestingly, in 2011, the United States Supreme Court held that California courts could not hold "unconscionable" the increasingly common provisions in adhesion contracts barring class-wide proceedings and requiring arbitration to proceed on a bilateral basis.[400] However, to date, the United States Supreme Court has refused to declare that the Federal Arbitration Act preempts the requirements crafted by some state courts for asymmetrical dispute resolution clauses to be upheld and not ruled unconscionable.[401]

In conclusion, the same evolution that took place in the United Kingdom, from invalidity to validity (see Part III.7 above), can be observed in the United States but is still ongoing. Early decisions relied on the "mutuality doctrine" and the requirement of "consideration" to refuse to enforce asymmetrical dispute resolution clauses. In more recent years, most American courts have generally upheld asymmetrical clauses, rejecting both the mutuality doctrine and the separate consideration requirement, but there are still traces left. Moreover, despite a general trend toward enforcing asymmetrical arbitration clauses, some American courts have relied and continue to rely on theories of

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[399] *See, e.g.*, THI of N.M. at Hobbs Ctr., LLC v. Patton, 741 F.3d 1162, 1168-69 (10th Cir. 2014) (state courts had ruled that an agreement permitting a nursing home "to litigate its most likely claims against the resident—guardianship, collection, and eviction claims—while requiring arbitration of the resident's most likely claims against the nursing home—personal-injury claims and the like"—was unconscionable; the federal court held that state rule was preempted by the federal law of arbitration and that "[a] court may not invalidate an arbitration agreement on the ground that arbitration is an inferior means of dispute resolution"); Willis Flooring, Inc. v. Howard S. Lease Constr. Co., 656 P.2d 1184, 1186 (Alaska 1983) ("Arbitration is not so clearly more or less fair than litigation that it is unconscionable to give one party the right of forum selection."); Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001) ("If arbitration will afford [RP] essentially the same opportunity to present [its claims] as would litigation, there is no reason to believe that the agreement limiting [RP] to arbitration is unfair.").

[400] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 332, 356 (2011).

[401] *See*, *e.g.*, Winston & Strawn LLP v. Ramos, 140 S. Ct. 108 (2019) (cert. denied).

unconscionability in holding such clauses invalid. Lastly, there is no consensus yet among state and federal courts regarding this issue.[402]

CONCLUSION

This article reviewed case law in both common law and civil jurisdictions and focused particularly on a number of recent decisions. We first summarized the various approaches taken by these jurisdictions and the key considerations that informed the decisions reviewed. We then focused on the potential outcomes in jurisdictions likely to hold asymmetrical dispute resolution clauses invalid and argue for partial invalidity and severance instead of invalidity of the entire clause. Lastly, we review the risks associated with asymmetrical dispute resolution clauses against their theoretical benefits of flexibility and offer practical advice for drafting such clauses in a manner that maximizes their chances of validity and enforcement.

A. Approaches with Respect to Validity and Enforcement

Legal authors are split on the issue of validity and enforceability of asymmetrical dispute resolution clauses. For example, Alan Scott Rau criticized the application of the doctrines of mutuality, separability, and unconscionability to such clauses.[403] Similarly, Gary Born firmly rejected the application of the doctrine of mutuality and noted that "an asymmetrical arbitration clause is ordinarily best considered an appropriate exercise of the parties' autonomy with regard to the mode of resolving their disputes, which is entitled to full effect, save where unconscionable under applicable law."[404] He further observed:

> In general, there will be little basis for concluding that asymmetrical arbitration agreements are unconscionable. The right of a party unilaterally to select either arbitration or a domestic court is an important procedural benefit. Nonetheless, where the party's choice is between two neutral forums, it cannot be regarded as fundamentally unfair or so

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[402] *See* Nahmias, *supra* note 3, at 38.

[403] *See* Rau, *supra* note 3, at 30-32.

[404] BORN, *supra* note 22, at 85.

> one-sided as to create unconscionable disadvantages for the counter-party.[405]

In contrast, Professor Hans Smit concluded that "[a]n optional unilateral arbitration clause is patently unfair" based on his perceived superiority of arbitration over litigation and a quasi-presumption that such a clause would only be agreed to by an economically weaker party:

> When viewed in the light of delays and extraordinary expense experienced in ordinary litigation, the optional unilateral arbitration clause gives its beneficiary the unreasonable advantage of being able to choose arbitration or litigation depending on what best suits its purposes. Furthermore, the clause's discrimination is typically practiced upon the economically weaker party. No person intent upon protecting its interests will agree to a unilateral arbitration clause, unless it is economically compelled to do so or is unaware of the disadvantageous position in which the clause puts it. In either case, the person discriminated against appears to deserve society's protection against an overbearing opponent.[406]

Our survey of 17 jurisdictions confirms these differing approaches.

Some courts, such as those in Bulgaria, China, India, Poland, Romania, Russia, and Turkey, are generally uncomfortable with asymmetrical dispute resolution clauses, under some form of the mutuality doctrine. In addition to the countries specifically surveyed in this article, the following countries are likely to invalidate asymmetrical dispute resolution clauses: Brazil, the Czech Republic, Hungary, Indonesia, Mauritius, Saudi Arabia, South Korea, and the United Arab Emirates.[407]

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[405] *Id*. at 258, n.1430. *See also* Nahmias, *supra* note 3, at 37 ("[A] majority of the contracts for large construction projects effectively are offered on a 'take-it-or-leave-it' basis, with little or no room for negotiation. While some courts may be willing to invalidate or otherwise refuse to enforce unilateral/discretionary arbitration provisions, others are just as likely to conclude that such provisions are not unconscionable and are valid and enforceable, despite a lack of mutuality or consideration.").

[406] Hans Smit, *The Unilateral Arbitration Clause: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 391, 404 (2009).

[407] *See* Bérard et al., *supra* note 6.

Other courts, such as those in Australia, Hong Kong, Italy, Portugal, Singapore, Spain, and the United Kingdom are generally comfortable with some asymmetry between the rights, pursuant to the principle of party autonomy and freedom of contract. In addition to the countries specifically surveyed in this article, the following countries are likely to uphold asymmetrical dispute resolution clauses: Argentina, Austria, Belgium, Canada, Dubai, Egypt, Finland, Greece, Ireland, Japan, Mexico, the Netherlands, Nigeria, Pakistan, South Africa, Sudan, Switzerland, Thailand, and Tunisia.[408]

France, Germany, and the United States have a liberal approach towards asymmetrical arbitration clauses in general, except where they involve adhesion contracts or contracts reflecting a significant imbalance in bargaining power, in which case concepts of predictability, consumer protection, public policy, and unconscionability may be used to invalidate asymmetrical dispute resolution clauses. A similar situation might exist in Sweden and South Africa.

Interestingly, three countries (Bulgaria, Italy, and France), members of the EU, have reached different conclusions based on the courts' application of the potestative doctrine. Italy has validated unilateral forum selection clauses while France invalidated the same types of clauses under the doctrine of potestativity. Bulgaria applied the same doctrine to invalidate an asymmetrical dispute resolution clause that granted only one party the right to choose between arbitration and litigation (such a clause is neither a unilateral arbitration clause nor a unilateral litigation clause, as defined in this article). India used a similar doctrine (contingent contracts) to invalidate unilateral arbitration clauses.

Lastly, there is a lack of legal authority on this issue in a number of jurisdictions. In countries that place great emphasis on the parties' intent to arbitrate and require such intent to be clear and explicit, asymmetrical dispute resolution clauses with a unilateral option to arbitrate will likely be invalid. In this sense,

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[408] *Id.*

asymmetrical dispute resolution clauses with a unilateral option to arbitrate would be considered "pathological."[409]

Despite this diversity of approaches, some interesting conclusions can be drawn from our survey. First, the approaches taken by these various jurisdictions do not follow "party lines" imposed by the traditional distinction between legal families. In other words, it cannot be said that one trend is observable in common law countries while the opposite trend is observable in civil law countries. However, what is observable is that citations to cases from other jurisdictions do tend to follow the common law versus civil law distinction, in the sense that common law jurisdictions cite to a case from other common law jurisdictions (including for the purposes of distinguishing them) while civil law jurisdictions do not cite cases from any jurisdictions, and rely instead on the relevant statutory provisions, which might explain the above-referenced referenced contradiction between France and Italy when applying the same (European) legal framework but different national laws.

Second, the debate regarding asymmetrical dispute resolution clauses goes back many years in certain countries, such as the United States, but is relatively recent in many other states, including the European Union. That is why only a general trend may be discerned at this time. That trend is in favor of the validity of asymmetrical dispute resolution clauses, and we predict that a majority of jurisdictions will uphold such clauses in the following years (with the exception of consumer disputes and, more broadly, adhesion contracts). As of today, specific and/or confirmed case law is still lacking in a number of jurisdictions, making it difficult to indicate what is presently the majority approach.

Third, there seems to be a unifying link between the countries that will likely invalidate asymmetrical dispute resolution clauses and those which would uphold their validity. If we look at the jurisdictions surveyed in this article, we found that Bulgaria, China, India, Poland, Romania, Russia, and Turkey disfavor such clauses. These countries have historically been

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[409] Frédéric Eisemann, *La Clause D'Arbitrage Pathologique* [The Pathological Arbitration Clause], *in* ARBITRAGE COMMERCIAL: ESSAIS IN MEMORIAM EUGENIO MINOLI [COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI] 129 (1974).

characterized, for different reasons, by restrictive foreign investor control regulations and a tendency to protect domestic manufacturers. In contrast, the jurisdictions surveyed in this article that are likely to uphold asymmetrical dispute resolution clauses, Australia, France, Germany Hong Kong, Italy, Portugal, Singapore, Spain, the United Kingdom, and the United States, have had a liberal approach to foreign investments.

Fourth, our review of the case law shows that the key considerations on which the courts focused in analyzing the validity of asymmetrical dispute resolution clauses were, on the one hand, the principle of party equality, and, on the other hand, the principle of party autonomy and the binding effect of contracts (*pacta sunt servanda*). The existence of a consumer or adhesion context, or some other form of unequal bargaining power, were also given great weight by the courts (especially those who invalidated such clauses). Lastly, the degree of precision in drafting the asymmetrical dispute resolution clause, and predictability concerns, were also frequently invoked.

In the particular context of the European Union, another factor was sometimes discussed, namely the impact of the European Convention on Human Rights (ECHR) which embodies, in its Article 6(1), the "equal access to justice" rule.[410] The provisions of the ECHR are applicable to court proceedings that are related to arbitration, including those concerning competence, annulment or set side, as well as enforcement and recognition. Consequently, a court from a member state of the ECHR faced with such an action will have to investigate whether an asymmetrical dispute resolution clause meets the criteria established by the ECHR. The issue arises in particular regarding unilateral arbitration clauses which may have the practical effect, if the unilateral right to arbitration is exercised, of removing a dispute started by the restricted party from court litigation. Courts from member states to the ECHR will "have to assess whether the waiver of the right of access to a court established by

[410] EUROPEAN CT. H.R., EUROPEAN CONVENTION ON HUMAN RIGHTS, at art. 6(1) (2010), ("In the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly . . .").

law was in accordance with the case law of the ECHR."[411] The issue may also come up in set-aside proceedings or at the stage of recognition and enforcement, given that violation of the public policy of a particular country is a ground to set aside or refuse recognition or enforcement.[412]

Interestingly, in Russia, the Presidium of the VAS cited several cases from the ECHR, as well as Article 6(1) ECHR, in support of its finding in the *Sony Ericsson* case that a unilateral litigation clause (bilateral arbitration agreement with a unilateral option to litigate given to one of the parties) violated the principle of equality.[413] In the United Kingdom, to the contrary, the High Court refused to invalidate an asymmetrical forum selection clause, noting that Article 6(1) ECHR "is directed to access to justice within the forum chosen by the parties, not to choice of forum."[414] Similarly, in our opinion, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, which gives effect to the principle of equality in arbitration, should be interpreted to apply only to treatment and conduct during arbitral proceedings, as indicated by the title of the chapter within which it is placed: "Conduct of Arbitral Proceedings."

Other legal scholars share the same view, and have noted:

> Nevertheless, a party may waive his or her rights of due process in accordance with the ECHR. Although it is not required under the ECHR's case law – as the case may be under US State law – that a 'reasonable justification based on business realities' for the UAC exists, a waiver of the right to access to a state court, under the ECHR, must be unequivocal. Furthermore, the case law of the ECHR requires minimum guarantees commensurate to the importance of the

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411 *See* van Zelst, *supra* note 7, at 85.

412 *See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/english [https://perma.cc/QEH3-3GJF] (last visited May 1, 2021), at art. V 2(b) (1958).

413 *See* Postanovlenie Prezidiuma VAS RF ot 19 iyun' g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2012, pg. 6.

414 Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd., [2013] EWHC 1328 [43] (appeal taken from Eng.).

> right that is waived. In other words, the more relevant the procedural right that is waived, the more stringent the test will be as to whether such a waiver is unequivocal, as is required by the ECHR's jurisprudence.

It is submitted that a properly drafted UAC meets these requirements. After all, a UAC—provided that it is freely concluded—provides for an unequivocal renouncement of the right to access a domestic court. There is nothing in the ECHR's case law to suggest that this is different in the case of a UAC which confers the choice for arbitration or litigation on the beneficiary of the UAC. After all, under a UAC the parties agree to submit the dispute to arbitration, albeit subject to the choice made by the beneficiary of the UAC—on the basis of the right explicitly so granted to it by the non-beneficiary—to opt for arbitration.[415]

Fifth, our review indicates that whether or not a particular clause will be given effect depends on a variety of fact-specific circumstances: what party (the restricted or the unrestricted party) commenced the proceedings, whether the proceedings were commenced by that party in the default (bilateral) forum selected or pursuant to a unilateral option to choose, whether the proceedings were commenced pursuant to the dispute resolution clause or in violation of the agreed-upon terms and the stage of the proceedings when the challenge is launched.

B. Approaches with Respect to Remedies in Case of Invalidity

With respect to remedies, there are three possible scenarios in cases of invalidity of asymmetrical dispute resolution clauses (either unilateral litigation clauses or unilateral arbitration clauses).

First scenario. A first possibility is that an asymmetrical arbitration clause will be considered ineffective only insofar as it prohibits the restricted party from enjoying a similar range of choices for taking the claim to litigation or arbitration as the

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[415] van Zelst, *supra* note 7, at 86. *See also* X v. Federal Republic of Germany, App. No. 1197/61 (1962) 5 Y.B. 88. ("the inclusion of an arbitration clause in an agreement between individuals amounts legally to partial renunciation of the exercise of those rights defined by Article 6(I) whereas nothing in the text of that Article nor any other article of the Convention explicitly prohibits such renunciation").

unrestricted party. The options of the two parties are evened up by interpreting the clause as granting bilateral rights to the parties. This would mean that the clause is ultimately effective, but no longer unilateral, and instead becomes bilateral. This stance has been taken by many Russian courts, starting with the *Sony Ericsson* case,[416] but also by courts from other jurisdictions.[417] From a practical point of view, as discussed below, this scenario only applies to unilateral litigation clauses.

As such, if the clause provides for a reciprocal right to have recourse to arbitration coupled with a unilateral right of one party to take the dispute to courts (unilateral litigation clause), like in the *Sony Ericsson* case, interpreting the clause as bilateral means that both parties have a right to start either litigation or arbitration. Consequently, the restricted party can also start litigation proceedings. In the *Sony Ericsson* case, the (Russian) party that had only the right to use arbitration, started nevertheless litigation, before Russian courts. The Supreme Arbitrazh Court basically had to decide if the right to have access to the system of national courts for resolution of disputes could be suppressed. The ultimate practical effect of the holding meant that the Russian party was given access to the Russian courts, despite not having it under the contract.

If, instead, the clause is a unilateral arbitration clause providing for a mutually-selected judicial forum and a unilateral right of one party to submit the dispute to arbitration, interpreting the clause as bilateral would mean that the restricted party could also start arbitration. If the restricted party started arbitration despite not expressly having such a right, we believe that an arbitral tribunal would not interpret the unrestricted

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[416] Postanovlenie Prezidiuma VAS RF ot 19 iyun' g. No. 1831/12 [Ruling of the Presidium of the Highest Arbitration Court of the Russian Federation of June 19, 2012, No. 1831/12], VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [VESTNIK VAS RF] [Bulletin of the Highest Arbitration Court of the Russian Federation] 2012, pg. 6 (unilateral litigation clause). See also Verkhovnogo Suda Rossiiskoi Federatsii [Determination of the Supreme Court of the Russian Federation of July 6, 2016], BIULLETEN' VERKHOVNOGO SUDA RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2016, No. 305-ЭС16-7033 (holding that unilateral litigation clause where only one party has the choice between litigation or arbitration and the other party may only arbitrate is void as such).

[417] *See* Union of India v. Bharat Eng'g Corp., (1977) ILR 499 (India) (unilateral arbitration clause).

party's unilateral right to bring disputes to arbitration as a bilateral right. That is because agreements to arbitrate represent an exception from the natural jurisdiction of the courts and, as such, must be interpreted narrowly. In this scenario, the hypothetical situation is that the agreement to arbitrate refers only to disputes started by the unrestricted party as the claimant. The problems raised by unilateral arbitration clauses are rather whether or not the unrestricted party has a right to block litigation started by the restricted party as the claimant, by exercising its option for arbitration. English courts have taken the position that such a right exists, in the *NB Three Shipping v. Harebell Shipping* case.[418]

Second scenario. The court will simply strike down the asymmetrical portion of the clause, such that the party that had the unilateral right will be deprived of it, which would leave both parties with just the bilateral default option (in favor of litigation or arbitration). For example, if the parties had agreed to litigation, with one party having a unilateral option for arbitration, the dispute would be resolved in litigation. The legal basis for only invalidating the unilateral portion of the clause is the principle of severability, known to most contract laws.[419]

Third scenario. The inclusion of a unilateral right leads to the invalidity of the entire dispute resolution clause. The legal basis for invalidating the entire dispute resolution clause could be that, under many national and international contract laws,[420] if one of the terms of an agreement is invalid, the entire agreement becomes invalid if it is proven that without that term the parties would not have concluded the agreement at all. The initial option beneficiary would argue that, without the unilateral option, it would not have agreed to the dispute resolution clause, and, therefore, that the entire dispute resolution clause should be deemed void. Courts have invalidated entire dispute resolution

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[418] NB Three Shipping Ltd. v. Harebell Shipping Ltd., [2004] EWHC 2001 (appeal taken from Eng.).

[419] *See, e.g.*, INTERNATIONAL INST. FOR THE UNIF. OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 3.2.13 at 412 (2010) ("Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.").

[420] *See, e.g.*, *id.* at art. 3.2.2 at 410-11.

clauses based on the finding that certain elements of the clause were unconscionable[421] or illegal.[422] However, application of the doctrine of separability of the arbitration agreement from the container contract might provide an argument against the entire dispute resolution clause being considered invalid, because the primary function of the doctrine is to preserve the container contract, meaning all provisions other than the arbitration agreement.

Under this scenario, either party will be able to bring a dispute before any competent courts, as there would be no dispute resolution clause. This is not a good outcome, for several reasons. First, it disregards the elements that the parties have agreed upon and opens up a number of possibilities that neither party contemplated. For example, most conflict of competence rules applied to contract dispute would point at least to: (1) the place of residence of the defendant(s); (2) the place of performance of the contract; and (3) the place where the property is located. As such, the application of these rules leads to unpredictability, which is precisely what dispute resolution clauses are meant to eliminate. Second, the determination of the competent jurisdiction can turn out to be very difficult in an international context, where conflict of competence and/or conflict of law rules must be applied.

In our view, if the national law or mandatory precedent requires invalidation of an asymmetrical dispute resolution clause, the second scenario should be privileged and only the problematic portions of the dispute resolution clause should be struck out while preserving, to the greatest possible extent, the original agreement of the parties, even if reached from unequal bargaining positions. There are no two exactly identical parties in terms of economic power, such that a finding of unequal bargaining power should only be reserved for situations of manifest discrepancy, to be assessed in light of the overall circumstances of each case.

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[421] *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).

[422] *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters], civ., Sept. 26, 2012; Emerging Markets Structured Products B.V. v. Zhilindustriya LLC et al., Appellate Arbitrazh Court of Moscow, case no. A40-125181/2013 (Mar. 14, 2016).

C. Practical Advice for Limiting Risk

Given the risks of invalidity or unenforceability identified in this article, it is essential that the parties and their legal advisors draft asymmetrical dispute resolution clauses very carefully and with very precise languages. Prior to any drafting, it is imperative to consider the applicable law and caselaw in all potentially relevant jurisdictions: (1) the law governing the arbitration agreement; (2) the law of the seat of the arbitration; (3) the law of all jurisdictions where the parties have assets; and (4) the laws of any other jurisdictions where a party might seek to bring proceedings in breach of the dispute resolution clause (e.g., the parties' home countries).[423]

Decisions from the jurisdictions surveyed in this article show that they are heavily dependent on the exact language used when drafting the clause, the bargaining power of the parties, and the conditions under which the provision was sought to be enforced.

A properly drafted asymmetrical dispute clause provides significant advantages in certain circumstances, but even such a clause can also carry considerable risks. Consequently, parties wishing to include asymmetrical dispute clause should carefully balance the advantages (optionality and flexibility) and the associated risks (invalidity and unenforceability). Such clauses must be approached with caution, on a case-by-case basis, to reduce their susceptibility to challenge and, in the context of an EU member state, to satisfy the requirements of foreseeability and legal certainty required by the Brussels I Recast Regulation. In the United States, specific research should be performed regarding the relevant state law potentially applicable, as well as an assessment of disputes being heard in state or federal courts. Moreover, unusual provisions should be avoided, particularly in contracts that have triggered an enhanced review by the courts (employment agreements, loan agreements, franchises, etc.). If it is agreed that an asymmetrical dispute resolution clause should be included, the clause should be drafted in a clear and precise manner in other to ensure its effectiveness to the highest possible degree.

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[423] Petit et al., *supra* note 3, at 28.

The unilateral option should set out how and when it can be exercised. For example, the clause should clarify if (and when) notice of the election made by the unrestricted party must be given to the restricted party. Moreover, the clause should state if the unilateral option is subject to any conditions. The unilateral option can be limited in a number of ways: (1) by providing that an election can only be made with respect to certain kinds of disputes ("carve-outs"); or (2) by providing that an election right exists only upon the occurrence of certain stipulated events.

The partial or total invalidity of an asymmetrical dispute resolution clause could be avoided altogether with careful drafting. For example, courts have held that where the unilateral option is granted to whichever party will be the "claimant" (as opposed to one of the two parties nominally) such clauses will likely be considered valid. That is because, although optically drafted as unilateral, they are, in fact, bilateral. For example, the clause could be drafted as follows: "Any dispute arising in connection with this contract is to be finally resolved by [state court] or by the arbitration administered by [arbitral institution], depending on the choice of the claimant commencing legal proceedings."

Moreover, particular attention should be paid to excluding the possibility of parallel proceedings, and the clause should include language regarding "how to deal with any proceedings that have already been commenced before the option is exercised (as well as the costs of those proceedings)."[424] For example, the clause should clarify "by when must any unilateral option be exercised": (1) if claimant in the proceedings (for example, "before commencing any proceedings"); and (2) if respondent in the proceedings (for example, "before taking [any] specified (substantive) step in any proceedings").[425]

As a simple rule, "both the litigation and the arbitration aspects of the [asymmetrical dispute resolution clause should be drafted] as though they were individual clauses," and "[t]he party with the benefit of the option should refrain from any substantive steps in litigation or arbitration proceedings before exercising its

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[424] Clifford & Browne, *supra* note 364, at 41.

[425] Bérard et al., *supra* note 6.

option [because] otherwise, the option might become unenforceable."[426]

[426] Clifford & Browne, *supra* note 364, at 41.