

Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability

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This article presents a study of the so-called ‘unilateral’ (‘optional’, ‘hybrid’) jurisdiction clauses combining arbitration and choice of court options, which business tends to favour as such clauses seek to designate a method of dispute resolution that provides a more favourable position for one of the parties to an agreement and ensure better enforcement against a debtor’s assets. However, there are a growing number of jurisdictions where courts have issued decisions that declare such clauses either invalid or as having a significant defect. This study makes a review of both common law and continental jurisdictions and focuses particularly on a number of decisions issued recently in continental jurisdictions making an assessment of the arguments that are typically employed by courts in order to find that a unilateral clause is invalid. Finally, this study proposes a method of interpretation of unilateral jurisdiction clauses which favours their validity or, where there is a significant defect, proposes partial invalidity and severance instead of invalidity of the entire clause.

1 INTRODUCTION

There has been a steady accumulation of case law from both state courts and arbitral tribunals dealing with the so-called ‘unilateral,’ ‘one-sided,’ ‘optional,’ ‘asymmetrical,’ ‘hybrid,’ ‘split,’ etc., jurisdiction clauses. This follows from the growing need for designation of specific means to ensure enforcement against assets of debtors in a world where assets may be located in several jurisdictions and very quickly relocated. It also reflects the necessity to bypass ordinary pathways for dispute resolution and opt for tailor-made mechanisms. Arbitration has usually been perceived as the primary way for deflecting from compulsory state-made dispute resolution. More recently, prorogation (choice of court)¹ has developed as a viable means in cross-border litigation.

Multi-tiered dispute resolution clauses have been produced to devise a number of options for the parties to a contract instead of one standard option for

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¹ As the study analyses both common law and continental jurisdictions, it uses established terms from the legal doctrines of both systems, although these usually have different terms for one and the same phenomena. The readers are invited to accept ‘conflict of laws’ and ‘private international law’, ‘choice of court’ and ‘prorogation’, etc., as interchangeable for the reason that they denote identical concepts.

each and every dispute. This is based on sound business logic but it has produced a long-feared instability and imbalance since such clauses *ab initio* create an unequal position for the parties to a dispute. Different jurisdictions have given different treatment to such clauses. Although in most jurisdictions such clauses stand as valid and enforceable, there is a growing tendency in the courts of some countries to hold them void, thus leaving the parties with only one avenue of redress (what has been sought to be prevented by the insertion of these clauses): the unpredictability and uncertainty of determination of international jurisdiction under the rules of private international law. The purpose of this study is to concentrate on the nature and effect of these clauses, to review the ways these clauses are treated and give a reasoned analysis of what the approach to them should be.

The clauses bearing the features outlined *infra* in this study can be found under a variety of names. Usually they are called unilateral, one-sided or one-way clauses, in some cases and commentaries; hybrid, and in others, optional jurisdiction clauses. For the sake of clarity and comprehensiveness, this study has to adopt one overarching term to identify this type of dispute resolution clause. In the search for the most precise term, it is reasonable to concentrate on the term that reflects the differentiating characteristics (*differencia specifica*) of these clauses compared to other phenomena. These clauses are complex, multilayered and encapsulate a number of dispute resolution pathways. They may provide only for arbitration, only for state court prorogation, or a combination of both, which would make them 'hybrid.' But what lies at the root of these clauses is that regardless of the specifics of the mechanism they set out, they provide for an intrinsic imbalance of the parties, which is the legal 'capsule' capturing the imbalance between the commercial (and real-life) standing of the parties to these clauses. Since these clauses are most often inserted in financial agreements, and as the lender is usually the economically stronger party, the clause is drafted to ensure a level of deference to it, ability to protect its interests in a number of ways which are better than the option(s) for the other party (usually the borrower). This is why the specific feature that has to be taken into account is the *unilateral effect* of the clause. The clause may be 'hybrid' but only where it envisions both arbitration and prorogation. Such a clause is definitely 'optional' but what is more important is the reason for the insertion of this option – the aforementioned defining imbalance. On the basis of this reasoning, the following analysis will use 'unilateral jurisdiction clause' as a catch-all term referring to one-sided, hybrid, optional, asymmetrical, combined, etc., clauses.

2 NATURE OF UNILATERAL JURISDICTION CLAUSES

2.1 CONTEXT

The asymmetrical distribution of rights and duties under the unilateral jurisdiction clauses is rooted in the asymmetrical position of the parties to these agreements. On most occasions, if not in all, one of the parties holds stronger bargaining power and is able to compel the other party to accede to its own terms (including standard terms of business *strictu sensu*), although these may be less beneficial for the other party subscribing to them. It is usual to point out that the banks and financial institutions in general (the lenders) are the parties most eager to insert unilateral clauses in their loan agreements with borrowers. Since borrowers may be commercial counterparts and consumers alike, this expands the scope of unilateral clauses outside purely commercial relations and has the potential to expose them to the influence of the more protective regime of consumer law, as discussed further in section 3.2[e] *infra*. However, unilateral clauses may be found in other types of contracts, for instance, as the case law suggests,² in tenancy agreements, charter parties, employment contracts, and other agreements. What significantly defines such clauses is that they are prepared for the benefit of an economically stronger party. In the case of banks, this is even more important as lenders seek to ensure mechanisms to pursue the assets of debtors.³

Standard arbitration clauses provide the often praised flexibility which has made arbitration attractive in general. However, arbitral awards are subject to enforcement proceedings and it is very possible that at the enforcement stage a bank faces the impediment of public policy (or procedural propriety)⁴ considerations so that in effect the arbitral award against a defaulting debtor would not be enforceable at the location of its assets.⁵ If the clause is drafted to opt for prorogation of state forums instead, the lender faces a situation similar to that under the procedure for recognition and enforcement of foreign judgments. Therefore, the commercial rationale of the stronger business party (be it a bank or not) is to have a dispute resolution clause that entitles it to options for bringing its claim, both in arbitration and in state courts (then, in a variety of state courts).

² For Example, *Hull v. Norcom Inc.*, 750 F.2d 1547 (11th Cir. 1985); *Armendariz v. Health Psychcare Servs Inc.*, 24 Cal. 4th 83 (S. Ct. California, 2000); also see *NB Three Shipping Ltd. v. Harebell Shipping Ltd.*, [2005] 1 Lloyd's Rep. 509, discussed *infra*.

³ See Richard Fentiman, *Unilateral jurisdiction agreements in Europe*, 72 CLJ 72 24, 24 (No. 1, 2013).

⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V (10 Jun. 1958) 330 U.N.T.S.

⁵ See, e.g., the point made in A. Mullineux & V. Murinde, *Handbook of International Banking*, 762 (Edward Elgar, 2003).

However, this is not absolute.⁶ A clause may adopt only prorogation without an arbitration component. A unilateral clause need not necessarily favour non-exclusive jurisdiction as well; the case may be exactly the opposite, but the rationale remains the same. One of the parties to an agreement seeks the benefit of this type of clause to safeguard the opportunity to keep all doors for recovery of debts open.

2.2 MECHANISM

The unilateral clause bears the features of dispute resolution (jurisdiction) clauses⁷ but is further enhanced by its multilayered structure. As dispute resolution clauses usually provide for either arbitration or prorogation, there is no established general understanding of dispute resolution clauses. However, from the characteristics of arbitration and prorogation clauses, the following points may be inferred.

The clause is contractual, i.e., it is binding due to the valid intention of parties to an agreement where it is incorporated, or it forms a separate agreement on its own. Although the clause is usually bilateral, it is not impossible to be multilateral as well. This is applicable where on both sides of the agreement stand a group of parties, e.g., a group of borrowers or a group of lenders.⁸ For instance, a parent company is bound to stand as surety for the debts of its subsidiaries but they are, for better protection of the bank's interests, parties to the loan agreement; or vice versa, the subsidiaries guarantee with their assets the credit arrangement of the parent company.

The clause derogates from the dispute settlement venue that should normally hear any disputes arising out of the agreement. Dispute resolution clauses seek to choose a non-state dispute resolution mechanism or appoint a particular national forum (otherwise there would be no rationale in escaping from the applicable forum under the rules of relevant national law or private international law in cross-border cases). This is especially significant where parties are from different jurisdictions and a rule of private international law may point to a number of courts competent to deal with the dispute. In such a case the most important step would be the fast response in filing suit in one of the several potential courts. In order to evade this uncertainty, the parties select a court (or arbitral tribunal) of

⁶ For Example, refusal on grounds of Arts 34 and 35 of Council Regulation (EC) 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter 'Brussels I Regulation').

⁷ See also *infra* s. 3.2[d].

⁸ Although a group of banks would rather choose a trustee to act on behalf of the syndicate of banks, see, e.g., Andrew Fight, *Syndicated Lending*, 67–68 (Butterworths 2004); notice the arrangement of the facility in *Deutsche Bank A.G. v Tongkah Harbour Public Co. Ltd.* and *Deutsche Bank A.G. v Tungkum Ltd.*, [2011] EWHC 2251 (Comm) (discussed *infra* s. 3.1[a]).

their choice. Choice of forum has, *inter alia*, one important effect: the chosen forum should have exclusive jurisdiction.⁹

Unilateral clauses bear all of the foregoing features. However, their *differencia specifica*, which makes them stand out, is that they have a far more elaborate structure. In the usual case, each of the parties to a dispute resolution clause is entitled to the same scope of options, i.e., one single option for settlement of a dispute. In the case of unilateral clauses, one of the parties has the opportunity to choose. At the preliminary stage, there is a choice provided in the structure of the clause: the indication of competent jurisdictions, their location, which of them are exclusive and which are not. The choice is inserted in the clause a priori, and is latent until the envisioned dispute arises out of the agreement.

At that point, one of the parties is entitled to bring its claim(s) to a number of forums while the other party (or parties) is entitled to follow only one avenue. This is also the point where one of the various inserted choices is actually 'elected.'¹⁰ The choice of forum in favour of one of the parties is multilayered: it may be agreed on the level of *one and the same type of mechanism* (i.e., more than one state court) or *a combination of different types of mechanisms* (i.e., both arbitration and state court litigation). Furthermore, a second tier of the clause may provide for further elaboration: the choice may be exclusive or not. A unilateral clause may appoint one exclusive mechanism for dispute resolution for one of the parties and election between two different types of mechanisms for the other (i.e., either state court or arbitration). In this case there is exclusivity per each of the elected mechanisms. However, it is perfectly possible (and often found in financial agreements) that a party has a non-exclusive opportunity to elect a forum to bring its claim. This is the most complex scenario although the most protective for the lender's interests and the most imbalanced for the borrower. In this case, the borrower is entitled to sue in a particular state court (or arbitral institution) while the bank may opt not only for this mechanism but also for any state court it prefers. The election is usually practically predetermined by the desire to enforce against the debtor's assets located in a certain jurisdiction.

In spite of the variety of options that a unilateral clause may combine, it nevertheless functions like any other jurisdiction clause in terms of consequences following from its triggering. The dispute resolution mechanism having

⁹ This is not absolute. Non-exclusivity is also possible but from a pragmatic perspective parties usually prefer exclusivity in most dispute resolution clauses in general as this makes them a predictable means for resolution of a dispute. Apart from that, some case law suggests that there may be situations in some jurisdictions where the first seized forum would not be considered to have exclusivity, *see infra* n. 11.

¹⁰ The term 'election' is used by analogy to election between remedies in contract law. For this usage *see PMT Partners Pty Ltd (In Liq) v. Australian National Parks & Wildlife Service*, [1995] H.C.A. 36 (s. 3.1[a] *infra*).

jurisdiction *in concreto* is the one that is first seized by either of the parties. The options ‘crystallize’¹¹ at this point and the sole, mandatory exclusive place for settlement of the dispute is reduced to the one where the claim has been brought. In a pragmatic context, this is the place where the bank lodges its claim against the defaulting debtor, thus compelling him to appear at the place which suits the bank’s best interests (although, as a matter of theory, the debtor is entitled to be the first to file). However, once the dispute is brought for settlement, the parties cannot exercise any further election. In spite of this, the practical (and common) step that a ‘weaker’ party to a unilateral clause makes is to apply to a state court which should be competent under the applicable rules of private international law in lieu of the chosen forums under the unilateral clause and plead that the unilateral clause is invalid on some grounds, which should entitle the particular court to hear the dispute, this time initiated by the debtor. Alternatively, the party with choice limited to state court may file first and then the party which benefits from the arbitration option may request a stay or termination of the litigation proceedings for the purpose of transferring the dispute to an arbitral tribunal.¹²

If the jurisdiction clause is enhanced by inclusion of an arbitration option, two arbitration–litigation scenarios deserve particular review. In scenario 1, a party A may elect between arbitration and state court litigation while the party B is

¹¹ ‘Crystallization’ here is used with a meaning close to that regarding crystallization of assets under a floating charge, see John Birds (ed.), *Boyle & Birds’ Company Law*, 324–328 (Jordans, 2009); also Sarah Worthington, *Proprietary Interests in Commercial Transactions* 88–93 (Oxford, 1996). A floating charge is an interest over the entirety of a company’s business while a fixed charge is an interest granted to a creditor over a particular asset (e.g., mortgage of real estate). Upon an agreed event, the floating charge ‘crystallizes’ so that the assets in a company’s business are ‘frozen’ at that moment and it becomes clear in relation to what assets the creditor may claim its interest. This bears similarity to election of forums, as the making of an election should bar the making of further elections and render clear and predictable which particular forum would have jurisdiction to hear the case.

¹² See *NB Three Shipping Ltd. v. Harebell Shipping Ltd.*, [2005] 1 Lloyd’s Rep. 509. The decision, a leading authority on unilateral clauses with arbitration option (see *infra* s. 3.1[a]), is compliant with a literal and formalistic interpretation of s. 9 of the English Arbitration Act 1996: the court stayed the instituted litigation proceedings for the benefit of initiation of arbitration procedure upon request by the party with the arbitration option. However, there is a good argument that this may in effect allow severe abuse, as the beneficiary of the arbitration option would always be entitled to undermine any court action brought by the other party. Other jurisdictions, where the control over the fairness of such clause may be more stringent, would possibly strike down the clause (see, e.g., the German case law *infra* s. 3.1[b]). It seems that the English court has applied s. 9 of the Arbitration Act 1996 somewhat generously, as the jurisdiction clause in the case did not fall squarely within it. Section 9 is intended to operate in the situation where one party bound by an arbitration clause turns, in spite of the obligations arising out of the clause, to state court litigation; then the other party should be entitled to block this and transfer the matter to the arbitral tribunal. In *NB Three Shipping Ltd. v. Harebell Shipping Ltd.*, one of the parties had the benefit of a choice of arbitration, but the clause did not declare that this released the party from the obligation to appear in a state court if the other party requested it. The point that Morison J. seems to have missed in the case is that s. 9 should not find application to the extent adopted in the decision in this case, and that there is a thin line between having advantage in general, or prior to commencement of action, and having advantage after an action is brought, as the second does not seem to have been provided by the clause at hand, although Morison J. surprisingly managed to find it.

limited to state forums. If party A institutes proceedings, it may take party B to either a state court, or an arbitral tribunal, and party B should comply. However, if party B files a claim, there is some case law suggesting that party A would be able to request a transfer of the dispute to an arbitral tribunal.¹³ In scenario 2, party X has the benefit of election between arbitration and state court litigation, while party Y is entitled to seek remedy only in arbitration. Here, party X may bring an action in both forums and party Y is obliged under the clause to appear wherever party X has elected. Vice versa, party Y may institute proceedings in the arbitral tribunal chosen in the clause. If it attempts to turn to state court litigation, this would be a breach of the unilateral clause and the state court would lack jurisdiction to hear the case unless party Y argues that the clause is void and the court accepts this argument and bases its jurisdiction on its forum law (or rules of private international law). If compared, scenario 1 and scenario 2 demonstrate, *inter alia*, one significant difference: a clause drafted with the elements of scenario 1 can potentially face negative treatment (as analysed in note 12 and sections 3.2[a]–3.2[c] *infra*) as it confers an enormous advantage on one party to bypass the moment of ‘crystallization’ and still make, some may argue, a discretionary election.

The following sections of this study analyse these particular situations within the operation of the mechanism of the unilateral clauses from the perspectives of both description and prescription.

3 APPROACHES TO UNILATERAL JURISDICTION CLAUSES

3.1 REVIEW OF INTERPRETATION IN DIFFERENT JURISDICTIONS

In general terms, there have been two different approaches to unilateral clauses and this differentiation is to a great extent based on forum nationality.

It is difficult to contend that there is a certain jurisdiction which is *ab initio* hostile to this type of jurisdiction clause. A large number of jurisdictions have a line of case law confirming unilateral clauses.¹⁴ However, there have been several reported decisions that indicate an unstable attitude toward unilateral clauses. Two recent decisions, in France and Russia, have cast a shadow on the use of unilateral clauses and raised concerns that an antagonistic movement may have started to develop, while one even more recent Spanish decision confirmed a unilateral clause, thus bringing a further twist in the tale and increasing the state of flux and unpredictability in the area.

¹³ See the analysis *supra* n. 12.

¹⁴ However, it should be borne in mind that it is difficult to make an overall assessment since many jurisdictions do not have publicly available systems of reporting of cases.

3.1[a] *Common Law Jurisdictions*

Common law countries have a steady tendency of confirming unilateral clauses. There is a line of dicta by English courts regarding the effect of unilateral clauses. In *NB Three Shipping Ltd. v. Harebell Shipping Ltd.*,¹⁵ Morison J. declared that, there is nothing that makes such clauses invalid, there is nothing contradictory in granting to one party a ‘better’ position than the other party to a contract. Subsequently, it was stated in *Law Debenture Trust Corp. PLC v. Elektrim Finance B.V., Elektrim S.A., Concord Trust*¹⁶ by Mann J. that a unilateral clause gives an additional advantage to one of the parties to a contract but this should be treated in the same vein as any other contractual clause giving advantage and not as a peculiarity on its own.¹⁷ Most recently, the established position of the English courts was affirmed by the High Court in *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.*,¹⁸ where Popplewell J. made a ruling confirming a unilateral clause. As a matter of their underlying rationale, the English courts have followed the reasoning that such clauses are inserted in commercial agreements and serve the needs of businesses, which are subject to overarching party autonomy. It should be noted that some of these cases have arisen out of complex financing transactions with several parties in a cross-border scenario. This, however, raises the question how the English courts would deal with a clause where a party is an individual, and, more importantly, a consumer. It may be suggested that it would be difficult to refuse effect to a clause to which a company is not a party solely on that basis since, although these clauses are most often used in a commercial context, this is not a formal prerequisite to their validity. However, the position may be different in cases involving consumers, where the considerations of consumer protection law would be applicable.¹⁹ Furthermore, the clause may also fall into the ambit of assessment under the reasonableness test of section 11 of the Unfair Contract Terms Act 1977.

In the other two major common law jurisdictions, US and Australia, there is no settled case law invalidating unilateral clauses. US courts have faced unilateral clauses in a priori imbalanced agreements such as employment contracts, where there is a line of decisions that jurisdiction options may be contrary to the law.²⁰

¹⁵ [2005] 1 Lloyds Rep. 509.

¹⁶ [2005] EWHC 1412 (Ch).

¹⁷ *Ibid.*, para. 44.

¹⁸ [2013] EWHC 1328.

¹⁹ Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), reg. 5; *see also infra* s. 3.2[e] for a wider discussion.

²⁰ In *Hull v. Norcom Inc.*, 750 F.2d 1547 (11th Cir. 1985), the Court of Appeal of the Eleventh Circuit did not make express reference in its reasoning to the position of the employee, which was a party to the unilateral clause in the case. However, the case law that the majority cited and on which it relied suggests that as a matter of general assessment of unilateral clauses, US law does not hold a hostile

In the Australian case of *PMT Partners Pty. Ltd. (In Liq.) v. Australian National Parks & Wildlife Service*,²¹ the High Court of Australia upheld a unilateral clause,²² reasoning that the true and plain meaning following from the construction of the jurisdiction clause and the legislation did not support any restriction of a party's right to elect between arbitration and litigation, as provided by the clause in the dispute.

3.1[b] *Continental Jurisdictions*

It would be incorrect to draw a sharp line of distinction between the approaches of common law and continental jurisdictions. There is no unified common law or continental theory or practical treatment of the clause. Most reported jurisdictions²³ hold the clauses valid. However, what is disturbing is that, in some jurisdictions, there have been decisions – significantly, of highest court instances – ruling to the contrary. This gives rise to the concern that continental law takes issue with unilateral clauses.

German law does not preclude the effect of unilateral clauses in general.²⁴ German courts have not refused to enforce unilateral clauses. There have been decisions of German courts which invalidated unilateral clauses on grounds of unfairness contrary to section 138 of the German Civil Code. This has happened, for instance, in a case where the clause was significantly imbalanced and gave manifest advantage to only one of the parties.²⁵ The German courts seem also to have demonstrated concern with respect to the asymmetric position of the parties²⁶ due

attitude. The point raised in the case was whether an arbitration clause would fail where there is no mutuality, i.e., one of the parties (the employer) is not restricted to bringing its claim only to arbitration. Although it was found that mutuality was lacking, the Court of Appeal referred to *Ricardi v. Modern Silver Linen Co., Inc.*, 45 A.D.2d 191, 356 N.Y.S.2d 872 (1974) and its reasoning that there may not be identical rights and obligations for each of the parties; however, there should be consideration, i.e., promises on both sides, not strict mutuality. The arbitration option failed due to lack of promises that both parties, and not only the employee, would abide by the arbitration option. To some extent this case may be considered an isolated one, not only due to the employment context but also due to absence of a single unilateral clause, as its elements were in fact scattered in two other clauses which did not refer to each other. However, the suggestion that there should be consideration, if not mutuality, from both parties, is a rationale that stands. See further *infra* ss 3.2[a]–3.2[b].

²¹ [1995] H.C.A. 36.

²² *Ibid.* paras 15–29.

²³ Simon Nesbitt & Henry Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses*, 22 Arb. Intl. 133, 143–148 (No. 1, 2006); Gary Born, *International Commercial Arbitration*, 731–735 (Kluwer Law International, 2009).

²⁴ Nesbitt & Quinlan, *supra* n. 23, at 144.

²⁵ BGH, judgment, 26 Jan. 1989, X ZR 23/87 (Zweibrücken).

²⁶ See, e.g., BGH, judgment, 24 Sep. 1998, III ZR 133–97 (Jena). The facts of the case are very similar to *NB Three Shipping Ltd. v. Harebell Shipping Ltd.*, although the result is substantially different. This suggests that the approach taken by the English High Court would not lead to a positive result in every jurisdiction.

to the possibility that after the party with a state forum option has initiated proceedings, the one with an arbitration option in its favour may seek recourse to section 1029 of the German Civil Procedure Code and request a stay of the state court litigation in order to refer the matter to arbitration instead. In effect, this would render the state forum option devoid of any operability since any attempt to use it may face counter-action stopping the litigation in favour of arbitration.

Both older and more recent Italian case law tends to approve of unilateral clauses.²⁷

A very recent decision of the Court of Appeal of Madrid, Spain,²⁸ has reviewed a unilateral clause and declared that there is nothing in Spanish law undermining the effect of unilateral clauses. The clause was inserted in a commercial agreement between a Spanish company and a Dutch company and its Spanish subsidiary and provided for choice between arbitration in The Hague under the Arbitration Rules of the Netherlands Arbitration Institute, and court litigation in the Netherlands. Spanish courts refused to hear a dispute arising out of the agreement due to lack of jurisdiction, which was confirmed by the Madrid Court of Appeal since, according to it, the combination of arbitration and court litigation options can be justified on the grounds of party autonomy.

However, a number of jurisdictions (for instance, France, Russia, Bulgaria, Poland, and China) have taken a different approach, which makes the position of the clauses unpredictable in some jurisdictions.

Older case law of the French courts seems to approve of unilateral clauses.²⁹ But the latest decision of the Cour de Cassation on the matter in *Mme 'X' v. Banque Privée Edmond de Rothschild*³⁰ (the 'Rothschild case') has raised concerns that the French courts (and other courts on civil law roots³¹) may change their attitude toward unilateral clauses. In this particular case, there was a unilateral clause providing for prorogation, and the clause was held to fall squarely within the ambit of Article 23 of the Brussels I Regulation. The Cour de Cassation held the clause to be null and void on grounds that it provided for a potestative condition, which

²⁷ Corte di Cassazione, judgment, 22 Oct. 1970; *Grimka in liquidazione v. Intesa San Paolo*, Simest, HSBC, Case 5705, Corte di Cassazione, judgment, 11 Apr. 2012; *Sportal Italia v. Microsoft Corp.*, Corte D'Appello di Milano, Judgment, 22 Sep. 2011.

²⁸ Decision of 18 Oct. 2013 of Court of Appeal of Madrid (Audiencia de Madrid, Sección 28).

²⁹ Cour d'Appel d'Angers, Decision, 25 Sep. 1972; Cour de Cassation, Decision, May 15, 1974.

³⁰ First Chamber of Cour de Cassation, Decision No. 11-26.022, 26 Sep. 2012.

³¹ Indicative of this trend is the argument put forth in *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd & Sujana Universal Industries Ltd.*, where the English High Court was invited to consider that the proper law applicable to the jurisdiction clause should be Mauritian law (which Popplewell J. rejected), and since Mauritian law is based on French law, the English court should make a ruling in accordance with the *Rothschild* decision. Although unsuccessful, this argument is an example of the power that the *Rothschild* decision holds.

is contrary to French law,³² and it contradicted with the object and purpose of Article 23 of the Brussels I Regulation, i.e., rules of prorogation.

The claimant, Mme 'X', a French national, contracted with Banque Privée Edmond de Rothschild for the settlement of an account in the Luxembourg branch of the bank but through the French branch of it. The dispute resolution clause chose the jurisdiction of the Luxembourg courts but only with respect to claims made by Mme 'X,' while the bank was entitled to bring a claim not only before the Luxembourg courts but also before (1) the courts of domicile of the respondent (Mme 'X'), or (2) any other competent court. The business rationale behind this structure of the clause was to allow the clause to cover the variety of possible forums reflecting the possible locations where the bank may seek the assets of its contractual counterpart. Implicitly, this wording of the clause indicates that the competent courts would be those having jurisdiction under the rules of private international law, i.e., the Brussels I Regulation in this case.

When dealing with this clause, the lower court, the Cour d'Appel, made a pronouncement that this type of clause is in general terms valid. However, the particular clause suffered from a defect due to its excessively broad scope. On appeal by the bank, the Cour de Cassation confirmed the decision of the Cour d'Appel. The clause was held invalid instead of being severed or interpreted restrictively. As a result, there was no prorogation in the contract and the competent court had to be determined in accordance with the rules of the Brussels I Regulation.³³ In stark contrast to its effect, the decision does not provide ample consideration of, and arguments for, the reasoning of the Cour de Cassation. It did not make clear in what terms the clause contravened the object and purpose of the Brussels I Regulation, which has left room for contention that the court used this expression as a formulaic rationale as more significant arguments were actually lacking. Furthermore, the court noted that the clause was in effect binding only upon the claimant Mme 'X' since the clause depended entirely on the intention of only one of the parties: the bank. This, the Cour de Cassation considered, made the clause 'potestative' (for a wider discussion of *potestativité* see section 3.2[c] *infra*). What can be inferred from the case is that there is dicta of the highest judicial instance in French law suggesting that unilateral clauses may be void.³⁴ Importantly, this was held not only by the Cour de

³² 'A potestative condition is that which causes the performance of the agreement to depend on an event which is in the power of one or another of the contracting parties to cause to happen or to prevent from doing so' (French Civil Code, Art. 1170); 'Every obligation is null when it has been contracted under a potestative condition on the part of him who binds himself' (French Civil Code, Art. 1174).

³³ That is, Brussels I Regulation, Arts 5–22.

³⁴ It is suggested as more reasonable to await further developments before drawing a final conclusion that French law has become irreversibly hostile to unilateral clauses, although there have already been such

Cassation but previously by the Cour d'Appel as well, which seems to indicate a general trend within French law.

Similar to France (and other continental jurisdictions), Russian courts have been approving of unilateral clauses in general. However, a recent decision has made a stark difference. The decision of the Presidium of the Supreme Arbitrazh Court of the Russian Federation³⁵ reviewed a jurisdiction clause in a dispute between Russian Telephone Company and Sony Ericsson Mobile Communications which arose out of an agreement regarding supply of cell phones. The clause provided for settlement before an arbitral tribunal constituted under the Rules of Procedure of the International Chamber of Commerce with the place of arbitration in London. However, Sony Ericsson reserved its right to seek recovery of Russian Telephone Company's debts in every competent court. Effectively, this made the clause one-sided as Sony Ericsson was not restricted to arbitration but could litigate in any jurisdiction competent in accordance with the rules of private international law, and the clause thus consisted of both a prorogation clause and an arbitration clause.

Russian Telephone Company filed a claim against Sony Ericsson in a Russian court, which was dismissed on two instances due to the provision arranging for arbitration in London. However, on final appeal before the Supreme Arbitrazh Court, the court made a ruling which did not dismiss the application and did not hold the clause invalid. The court did, however, discover a defect in the clause on the grounds that the clause created preferential treatment in favour of Sony Ericsson since it was entitled to choose the dispute resolution venue at its own discretion. This, held the Supreme Arbitrazh Court, was contrary to the fair balance between the parties, their equality and the right of fair trial, including the right to an equal opportunity to have a party's case heard by the dispute resolution body. The court relied on the case law of the European Court of Human Rights³⁶ and the Russian Constitutional Court.³⁷ According to the court, the clause violated the principle of equality of procedural rights of the parties since, reasoning on the basis of the general principles of civil law, a clause should not grant a certain scope of rights to one party but refuse it to the other. As a result, the Supreme Arbitrazh Court held that the clause should be interpreted as

doctrinal arguments put forth (see Cédric Tahri, *Illicéité d'une clause attributive de juridiction purement potestative*, Dalloz Actualités, 15 Oct. 2012).

³⁵ *Russkaya Téléfonnaya Kompaniya v. Sony Ericsson Mobile Communications Rus Ltd. Liability Co.*, Decision No. 1831/12, Supreme Arbitration (Commercial) Court of Russian Federation, 19 Jun. 2012.

³⁶ *Suda v. Czech Republic* (Appl. No. 1643/06); *Batsanina v. Russia* (Appl. No. 3932/02); *Steel and Morris v. United Kingdom* (Appl. No. 68416/01).

³⁷ Decisions Nos. 20-π (20 Jul. 2011); 4-π (27 Feb. 2009); 18-π (8 Dec. 2003), Constitutional Court of the Russian Federation.

allowing alternative recourse to state courts to both parties, not only to Sony Ericsson.

The clause was thus held to be valid but the court made a radical interference with its scope and structure, seeking to put both parties on an equal footing. In a sense, the court cured the defect in the clause instead of invalidating it. However, the effect that the drafters of the clause had sought was in result negated and the clause was transformed into encapsulating two parallel avenues for dispute resolution, alternative prorogation and arbitration clauses. Formally, the clause was not held to be void. However, the substance of the clause was altered and it was deprived of its purpose (the built-in preference in favour of Sony Ericsson) due to the ruling of the Supreme Arbitrazh Court.

In Bulgaria, a continental jurisdiction, there has also been a recent development regarding unilateral clauses.³⁸ The highest judicial court, the Supreme Court of Cassation, held a unilateral clause to be invalid on grounds very similar to the reasoning in the *Rothschild* case of the French Cour de Cassation. The Supreme Court of Cassation was seized with an application for setting aside of an arbitral award. The arbitration court at the Bulgarian Chamber of Commerce and Industry (BCCI) had decided a dispute on the basis of a dispute resolution clause in a loan agreement. According to the clause, the lender could seek resolution of a potential dispute in the arbitration court at BCCI, in another arbitration court or before a particularly indicated state court. The clause gave a manifest one-sided option to the lender while the borrower (although not explicitly stipulated) could possibly bring claim only in the state court. Like other continental civil law countries, Bulgaria treats jurisdiction clauses as procedural agreements which, as with all contracts, have to meet certain validity requirements. The Supreme Court of Cassation decided that the clause was null and void due to being contrary to the rules of morality and good faith (on the basis of Article 26 of the Bulgarian Obligations and Contracts Act). More specifically, the clause established a potestative right in favour of one party, the borrower, while potestative rights, according to the court, might be established only by statute and cannot be created by parties to a contract, which is outside the scope of party autonomy.

It should be noted that the parties to the clause were natural persons and not companies but the Supreme Court of Cassation made no reference to consumer protection or protection of 'weaker' parties, reasoning only on the basis of general principles of civil law. A possible explanation is that none of them could be presumed to be in a 'stronger' position (even more, they were not commercial enterprises at all), hence no protective rules could have been applied. However, it

³⁸ Decision No. 71 under Commercial Case No. 1193/2010, Second Commercial Chamber of the Supreme Court of Cassation, 2 Sep. 2011.

seems more likely that clauses in breach of the standard of fairness may be invalidated exactly in such a situation without a commercial element.

China and Poland also stand out from the bulk of reported cases. A Chinese lower instance court invalidated a unilateral clause on grounds of unfairness.³⁹ 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 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).⁴⁰

To recap, the past several years have demonstrated significant variation in the attitudes to unilateral clauses. If only the period October 2012–October 2013 is taken for consideration, it features three conflicting decisions of Continental courts – two countering the effect of unilateral clauses (French and Russian) and one supporting it (Spanish). The reasoning demonstrated in these decisions may give support to both sides in the argument whether such clauses should be regarded as valid or not. This unsatisfactory state of international practice calls for a detailed analysis of the pros and cons of unilateral clauses.

3.2 SHOULD A UNILATERAL CLAUSE FAIL?

Considering the analysis made above, there may be inferred several arguments on basis of which a court would hold a unilateral clause null and void.⁴¹ These may be classified as follows.

3.2[a] *Balance of Parties*

The case law on unilateral clauses has primarily concerned loan agreements and other contracts between commercial entities. It is more than reasonable to consider that there is a level of discretion for a court to intervene and strike down freely assumed obligations between companies.⁴² Although it is true that financial

³⁹ See, e.g., Decision of Beijing Higher People's Court, 1999.

⁴⁰ Decision of 19/10/2012, V CSK 503/11; Decision of 24/11/2010, II CSK 291/10.

⁴¹ The analysis in this study reviews the invalidity of the jurisdiction clause *on its own*. It does not review another argument frequently put forth: that the clause is invalid due to invalidity of the entire agreement between the parties. It is submitted that as a matter of principle such a view is not admissible due to the general principle of severability of dispute resolution clauses.

⁴² Continental doctrine likes to draw a line of distinction between civil/private law in general and the rules applicable to commercial enterprises/merchants ('*commerçants*' (France), '*Kaufleute*' (Germany)) that engage professionally and consistently in transactions for the purpose of generation of profit, which provides for their specific status. Common law has used the term 'commercial' in an extremely liberal manner without being guided by a general principle other than, presumably, the contract being

institutions, which are the most frequent beneficiaries of unilateral clauses, hold bargaining power of considerable strength, the commercial nature of the relationship (between lenders and borrowers) implies that the parties may negotiate more stringent clauses, including those that lead to a certain extent of imbalance in their contractual relationship.

Therefore, it is submitted that it is far more likely for a unilateral clause to fail if a consumer is a party rather than a company (see section 3.2[e] *infra* for a wider discussion of this argument) or if the contractual relationship is purely between natural persons. As a matter of theory, this is correct. There are jurisdictions where the capacity of consumers to derogate from mandatory regulation of competent court or applicable law are severely restricted or entirely ruled out.⁴³ However, in the *Rothschild* case, the reasoning of the Cour de Cassation did not rest on Mme 'X's capacity as a consumer, and this point was not argued in the Bulgarian decision where both parties to the invalidated clause were natural persons. Hence, these decisions, especially in the *Rothschild* case, seem to be general declarations of the nature and effect of unilateral clauses, regardless of the particular position of the parties. This, to a significant extent, poses a question with respect to the underlying rationale in drawing a line between commercial and non-commercial relations: the courts seem to invoke arguments of lack of balance regardless of the position of the parties.

It is often that the imbalance is rooted in the very essence of the drafting of the clause. Prima facie a unilateral clause is hopelessly imbalanced and, after all, serves the interests of only one party (or only one group of parties, in case of multilateral agreements). This designation potentially follows the natural lack of balance between the parties, especially regarding their bargaining power. In effect, one of the parties to the clause has to 'adhere' to the unfavourable terms of the clause. However, a commercial agreement may feature a long list of similarly imbalanced clauses, and lack of balance⁴⁴ is rarely a per se ground for invalidity if there is no breach of mandatory rules. In such instances, the courts seem to use broad formulas such as fairness, morality and justice, but, as with all legal

naturally part of business turnover, whether as a one-off deal or not (see, e.g. Michael Furmston (ed.), *Commercial and Consumer Law*, 1 (Pearson, 2010) where it is suggested that commercial law is based on, if not reduced to, sale of goods and probably related transactions). However, in both systems a *lex specialis* of consumer law has already developed (whether due to EU law influence or not) consisting of more stringent and protective provisions compared to 'commercial law' and 'commercial contracts', whatever the meaning of this term may be in different jurisdictions. For this, see also para. 2 of the comments to the Preamble to the Unidroit Principles 2010.

⁴³ See, e.g., German Civil Procedure Code, s. 1031; Austrian Civil Procedure Code, s. 617; Swedish Arbitration Act, s. 6; Italian Civil Code, Arts 1341 and 1342. French law prohibits domestic arbitration in consumer cases. Also note the restrictions of Brussels I Regulation, Arts 15–17. In US law similar results may be reached on grounds of the doctrine of unconscionability.

⁴⁴ As was mentioned in *The Law Debenture Trust Corp. PLC v. Elektrim Finance B.V.*, Elektrim S.A. Concord Trust, by Mann J. (see *supra* s. 3.1[a]).

standards,⁴⁵ the precise content and substance of such formulas become clarified within a particular case and context, making it difficult to reason by way of analogy from one situation to another. First, this disturbs certainty and, second, it is an easy tool to strike down any arrangement.

Furthermore, once a dispute has arisen and any of the parties has made the due election that is designated by the clause, the choice of court crystallizes – and there should not be any room left for recourse to other dispute resolution venues.⁴⁶ Therefore, the imbalance is effectively ‘cured’ at the stage where the (real) settlement of the dispute has to take place. However, it should be noted that the conclusion would be different if the options provided by the jurisdiction clause are such as to render one of the parties in a ‘better’ or ‘worse’ position *even after the election and the commencement of the dispute*, e.g., where the procedure for appointment of arbitrators or presentation of evidence is either highly unfavourable to one of the parties, or extremely beneficial to the other. This lack of balance would have its effect after the crystallization and would possibly tip the scales against validity of the clause if it comes to court review, especially in some jurisdictions.

3.2[b] *Inequality of Parties*

A unilateral clause puts one of the parties in a far more favourable position in terms of choice of dispute resolution body. However, this is an ambiguous statement. A unilateral clause confers a wider array of rights (i.e., an option of dispute resolution bodies in favour of one of the parties, if it acts as claimant), but does not impose obligations on the other party, or restrict its rights or lead to a waiver of rights. In other words, if the creditor is in a more beneficial position, this does not necessarily mean that the debtor is in a ‘worse’ position. It still has its claims and has a venue to bring them forth.

The other argument regarding inequality is that equality of parties is a general principle of fair trial,⁴⁷ and a unilateral clause directly conflicts with it (the

⁴⁵ Legal standards are very abstract and flexible concepts; their precise substance is clarified only in the circumstances where they are applied and to a significant extent under the influence of the context of the time, place, prevailing understandings, etc. at the moment of application. ‘Bona mores’ is a typical example of a legal standard. On legal standards, see, e.g., Jean-Louis Bergel, *Theorie general du droit* (Daloz 2003) at para. 185, and Roscoe Pound, *An Introduction to the Philosophy of Law*, 118 (Yale University Press, 1922), for very detailed views of both common law and civil law authors.

⁴⁶ A caveat to this argument is demonstrated by *NB Three Shipping Ltd. v. Harebell Shipping Ltd.* (discussed *supra*) where the English courts seem to have adopted a different view on the one-sided arbitration option.

⁴⁷ A fine example of a fair trial requirement which has a wide influence and recognition is Art. 6 of the European Convention on Human Rights and Fundamental Freedoms. The case law of the European Court of Human Rights have outlined a number of implications of this right: access to court,

position taken in *Russian Telephone Company v. Sony Ericsson* by the Russian Supreme Arbitrazh Court). The significance of the principle of equality of parties cannot be denied. However, it is suggested that the proper understanding of the principle is that it should be applied to a procedure that has already begun.⁴⁸ The unilateral clause grants options which are exercised by way of election at the commencement of litigation or arbitration and have no effect with respect to the rights of the parties in the course of proceedings once they have started. The recent *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.* decision of the English High Court included dicta confirming this:

The public policy to which that was said to be inimical was ‘equal access to justice’ as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice *within the forum chosen by the parties, not to choice of forum.*⁴⁹

What Popplewell J. has termed ‘equal access to justice’ in the decision may be considered to be based on the general concept of fair trial. This is why it is questionable to what extent the principle of equality may be applicable to unilateral clauses at all since they only influence the designation of jurisdiction and not the development of the proceedings. However, this view should not be taken too far. The case would be different if the clause is structured so that one of the parties is compelled to appear only in a court (or other dispute resolution body) where it would not have the benefit of fair trial *in the course of an already initiated procedure*. Such a clause, it may be argued, would be contrary to Article 6 of the European Convention on Human Rights (ECHR) and similar fundamental protection provisions of national legislation.

3.2[c] *Potestativité*

As noted in the reasoning underlying the *Rothschild* case, French law (and other civil law jurisdictions) cannot allow abrogation of the prohibition against making use of potestative conditions. ‘*Potestativité*’ is a continental legal concept. Continental jurisdictions consider that clauses dependent on conditions purely

procedural equality/equality of arms, adversarial process, disclosure of evidence, reasoned decision, appearance in person, effective participation, impartial tribunal, etc. See Clare Ovey & Robin White, Jacobs & White, *European Convention on Human Rights*, 151–169 (Oxford, 2002). This, however, would not mean that arbitration is incompatible with Art. 6, see *Nordström-Janzon v. The Netherlands* (Appl. No. 28101/95), European Court of Human Rights.

⁴⁸ With respect to procedural equality, it has been ruled by the European Court of Human Rights that it ‘implies that each party must be afforded a reasonable opportunity to present his case . . . under conditions that do not place him at substantial disadvantage vis-à-vis his opponent’ (*Dombo Beheer B.V. v. The Netherlands* (1993) 18 EHR 213, para. 33).

⁴⁹ *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.*, [2013] EWHC 1328, para. 43.

within the sphere of control of a debtor should be void, since thus the debtor may unilaterally effect changes in the position of the other party and even, more importantly, evade its obligations.⁵⁰

It is questionable to what extent this principle may be applied to jurisdiction clauses. They confer an option and one of the parties is entitled to exercise it. Whether the optional jurisdiction should be treated as a condition is controversial. Furthermore, usually *potestativité* also serves to prevent a creditor from making discretionary, capricious, unexpected or unilateral amendments and thus influence the scope of obligations of the debtor.⁵¹ However, creditor–debtor relations do not fit well in the framework of jurisdiction clauses⁵² where the aim is to designate a relation that would be realized in a court procedure. Although the clause incorporates a contract (a procedural one, as continental theory likes to consider it), it is difficult to denote the parties to it as merely creditor and debtor as there is no transfer of property or proprietary rights *stricto sensu* in this case and the rights arising in favour of the parties are of a very different nature. Application of *potestativité* is said to seek prevention of the one-sided exercise of discretionary power granted by a contract between private parties. But what if, assuming that such power is in fact granted, the exercise is based on an a priori agreed set of criteria? The rationale for application of the *potestativité* doctrine would lose its ground, and it may be suggested that a unilateral clause by its nature seems to contain the preconditions for making an election – a dispute arising within the agreed scope of the choice of court/arbitration – and is not purely arbitrary or discretionary.

However, in the case of arbitration options, it is somewhat difficult to reconcile this position with cases in the vein of *NB Three Shipping Ltd. v. Harebell Shipping Ltd.* In effect, the beneficiary of the arbitration option is given power under the arbitration element of the clause, read together with the English Arbitration Act 1996, to prevent the commencement of state court litigation. As Morison J. noted, there would be no point in the arbitration option if it could not grant such an advantage. In terms of commercial sensibility, this reasoning is correct and exposes the general approach of English courts to uphold the business rationale in contractual arrangements. There is no subsequent reported authority dealing with the same type of clause and *NB Three Shipping Ltd. v. Harebell Shipping Ltd.* stands as a sole case on the issue. While English law may favour this approach,

⁵⁰ Compare the English case law, *supra* n. 12, with the German case law *supra* s. 3.1[b].

⁵¹ See J. Ghestin, *La notion de condition potestative au siens de l'article 1174 du Code Civil* (1981), in *Etudes Dediées A Alex Weil* (Dalloz 1983).

⁵² On this point see case comment by P. Ancel & G. Cuniberti, *Journal des Tribunaux – Luxembourg*, 28 Feb. 2013, at 10.

it is not certain whether other jurisdictions would confirm the English court's interpretation of the arbitration law and a similar jurisdiction clause.

3.2[d] *Is a Unilateral Clause Incompatible with the Brussels I Regulation?*

As a matter of principle, a prorogation agreement bears the features set out under section 2.2 *supra* with respect to jurisdiction clauses, i.e., (1) to incorporate the intention of the parties to a dispute; (2) to deflect from default state court jurisdiction (derogatory effect); and (3) to establish a specific regime of dispute resolution between the parties (prorogatory effect).⁵³ Article 23 of the Brussels I Regulation makes no difference to this conceptual framework. It is an epitome of party autonomy, as declared in recital 14 to the Brussels I Regulation.⁵⁴

A prorogation agreement (agreement for choice of a national court with international jurisdiction) is typically, but not always, drafted so as to provide exclusivity of dispute resolution. The primary purpose of Article 23 of the Brussels I Regulation is to establish an avenue in favour of choosing a competent court other than the normally competent court under the rules of the Regulation (with some exceptions under Article 22 and, of course, the cases where the Regulation would not be applicable at all).⁵⁵

Exclusivity is not the primary purpose of prorogation. It is true that exclusivity in most cases matches the interests of the parties and ensures predictability and stability of their relations (which is another policy behind choice of forum in general). In spite of that, if a prorogation agreement indicates more than one state court as competent, it is questionable whether this might be incompatible with the provisions of Article 23.⁵⁶ As long as it is possible to ascertain the parties' intention to identify a particular state forum or particular class of state courts that are voluntarily conferred jurisdiction to hear the parties' dispute, on the level of principle and policy there is no reason to reject the validity of the clause, even where the potentially competent courts form a very wide array.

This is why the French Cour de Cassation's assessment of the prorogation clause in the *Rothschild* case is more than peculiar, and to a certain extent comes close to being absurd. Neither party autonomy, nor the explicit wording of Article 23 of the Brussels I Regulation, bar prorogation that grants a wider choice of state courts to only one party. If the court actually had in mind a different interpretation – that this clause breaches the substantive law applicable to the

⁵³ Ulrich Magnus & Peter Mankowski (eds), *Brussels I Regulation*, 382 (Sellier, 2007).

⁵⁴ See *ibid.* at 372.

⁵⁵ See Brussels I Regulation, Arts 67 and 71.

⁵⁶ Doctrine seems to approve such drafting: see *supra* n. 53, at 382–83 ('the parties may also agree on the pure addition of the jurisdiction of further courts').

prorogation agreement – these would be different grounds from those declared officially by the court. The decision lacks an abundance of legal discussion. It merely identifies that the dispute resolution mechanism structured by the clause conflicts with the object and purpose of Article 23. However, the Cour de Cassation made a reference to the French law concept of *potestativité* in making its assessment of the clause. Effectively, the court applied *lex fori*⁵⁷ in the course of dealing with the Brussels I Regulation. As the Regulation is an EU legal instrument, its concepts, including prorogation, should have autonomous interpretation.⁵⁸ Furthermore, the Brussels I Regulation is usually interpreted against its historical and legislative background, including the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.⁵⁹ According to the *Benincasa*⁶⁰ case heard by the Court of Justice of the European Union (CJEU) under the Brussels Convention, Article 17 (now Article 23 of the Regulation) should be interpreted independently from the substantive national law applicable to the contract, which reinforces the argument that the Cour de Cassation should not have applied *lex fori* and took the wrong approach in the *Rothschild* case. The Brussels Convention explicitly recognized, in Article 17, the possibility for wider options in favour of only one party and therefore such a clause should not have been held to be invalid. Construing the Brussels I Regulation in light of the Brussels Convention, there is no indication that this type of clause is not covered by the Regulation. In fact, such clauses have been previously covered by the Brussels Convention.

The Cour de Cassation reasoned that the clause in the *Rothschild* case was not compatible with the object and purpose of the Brussels I Regulation, which object and purpose be inferred from the recitals to the Regulation.⁶¹ In spite of the Cour de Cassation's interpretation, the Preamble to the Regulation does not provide any grounds for such conclusion.

If the other argument for invalidity is that unilateral jurisdiction gives rights to only one of the parties, this again seems to be a strange inference since the clause in the *Rothschild* case should clearly have met the prerequisites of prorogation: it deflected proceedings from objectively competent courts and made an explicit choice. In essence, the Cour de Cassation had at best missed out the

⁵⁷ For *lex fori* and characterization/qualification, see J. G. Collier, *Conflict of Laws*, 13–19 (Cambridge University Press, 2004).

⁵⁸ Suggested also by Ancel & Cuniberti, *supra* n. 53, at 8; on autonomous interpretation of Brussels I Regulation see, e.g., *Mulox IBC Ltd. v. Hendrick Geels* (Case C-125/92) [1993] ECR I-4075, I-4102 para. 10; also see *supra* n. 53, at 31–38.

⁵⁹ See *supra* n. 53, at 35.

⁶⁰ *Francesco Benincasa v. Dentalkit Srl* (Case C-269/95), para. 12.

⁶¹ See *supra* n. 49, at 36.

most substantial grounds for its conclusions which, given their significant impact, should have been better reasoned.

It should be noted that the (wrongful) application of *lex fori* to the Brussels I Regulation may have a significant impact not only in the court where the case is pending but also at the stage of enforcement. Following the *Krones A.G. v. Samskip*⁶² decision of the CJEU, the courts where the decision would be submitted for recognition and enforcement have to make an assessment only of its formal validity and compliance with the Brussels I Regulation and are not allowed to refuse recognition even if the first court has erred in its judgment of a unilateral clause. This may increase uncertainty, as a debtor may initiate a pre-emptive suit in a jurisdiction that does not favour unilateral clauses and subsequently rely on the decision even in courts of countries which approve such clauses in general.

This position may become even more complicated in view of the upcoming amendment of the Brussels I Regulation, which will take effect from 2015. Under the new version of Article 25 of the Regulation,⁶³ the courts would be able to assess the validity of a prorogation clause under the local law of the chosen court.⁶⁴ As a result, one and the same unilateral clause combining courts from two countries, if subjected to review, may find two different judicial treatments. If the unilateral clause is reviewed by a ‘unilateralism-friendly’ court such as an English court, it would find approval, while a French court would be able to reject the clause *on grounds of its national law even without making reference to the Regulation on its own*; and this decision would be enforceable in third countries, thus dispersing the effect of the denial of the validity of a unilateral clause internationally.

3.2[e] Consumer Perspective

The *Rothschild* case is a good example showing that unilateral clauses may be posited in a consumer scenario. It may be argued that this can potentially change radically the outcome from the assessment of these clauses.

First, some jurisdictions have significant restrictions on the ability to choose a dispute resolution venue for consumer disputes and the Brussels I Regulation also imposes restrictions so that claims against consumers may be brought only in particular courts.⁶⁵ Second, as far as substantive consumer protection rules are concerned, the cornerstone Council Directive 93/13/EEC of 5 April 1993 on

⁶² *Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts, Nürnberger Allgemeine Versicherungs-A.G., Krones A.G. v. Samskip GmbH* (Case C-456/11), para. 32.

⁶³ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

⁶⁴ Peter Hay, *Notes on the European Union's Brussels-I 'Recast' Regulation*, 13 *The Eur. Leg. Forum* 1, 2 (2013).

⁶⁵ See *supra* n. 43.

unfair terms in consumer contracts is applicable law in European countries either as implemented in EU Member State legislation or, to the extent possible, having direct (horizontal in these situations) effect as between consumers and commercial parties. The Directive states that contractual clauses which are contrary to good faith and have not been individually agreed should be stricken down as invalid if they provide for significant imbalance between the parties to the detriment of consumers. Clauses which are not individually negotiated are those drafted in advance so that the consumer is not able to influence the substance of the obligations arising therefrom. Such definition matches the notion of unilateral clauses. It is subject to debate to what extent such a clause may be detrimental to consumers, but certainly it may be argued that (1) there is an apparent imbalance in the relationship between the parties to the contract; and (2) the clause imposes certain restrictions on the consumer. Therefore, there is a degree of probability that unilateral clauses may be invalidated on grounds of consumer protection. This is even more pertinent where dispute resolution clauses are incorporated by way of reference to general terms and conditions of commercial parties, for instance banks.

3.2[f] *Lack of Mutuality*

Case law in both civil law and common law jurisdictions has considered jurisdiction clauses putting parties in unequal positions as invalid on grounds of lack of mutuality. A good example is older US case law⁶⁶ which has upheld such a view, although a possible explanation is that it has arisen out of treatment of cases with 'weaker' parties (e.g., employees). In some cases courts have adopted unconscionability⁶⁷ as grounds for invalidity of the clause. However, this line of case law seems to have already faded⁶⁸ and certain US courts seem to have forsaken the lack of mutuality argument.⁶⁹ The argument was based on the notion that lack of mutuality means lack of consideration and, as common law doctrine postulates, this would render a contract void, hence making such a clause a jurisdiction clause. However, it is sufficient to note that under general rules of

⁶⁶ See *Hull v. Norcom*, *supra* n. 2 and also refer to *supra* n. 20.

⁶⁷ But also note that unconscionability is a doctrine which is not well received everywhere in the common law world. English law consistently refutes the existence of such general doctrine: see Ewan McKendrick, *Contract Law*, 378–380 (Macmillan, 2007).

⁶⁸ See *supra* n. 21, at 732–733.

⁶⁹ *Sablosky v. Edward S. Gordon Co.*, 535 N.E. 2d 643 (1989) where the Court of Appeals of New York stated that '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 . . . there is no reason for a different mutuality rule in arbitration cases'; also *Pridgen v. Green Tree Fin. Serv. Corp.*, [2000] 88 E.Supp.2d 655: – 'Mutuality of obligation is not required for a contract to be enforceable', etc. See also *ibid.* n. 874.

contract law, consideration should be present, but need not be adequate,⁷⁰ i.e., the unequal position of the parties, including presumably the imbalanced consideration, should not be grounds for invalidity.

3.3 CONSEQUENCES FROM THE INVALIDITY OF A UNILATERAL CLAUSE

If the unilateral clause is structured so as to combine proceedings in a jurisdiction recognizing such clauses and one that does not, it is possible that one party will initiate judicial or arbitral proceedings, while the other may file its claim but in another forum on grounds that the unilateral clause is void and the seized court is competent to deal with the matter under the applicable private international law rules. As a result, two proceedings with two contrary outcomes may follow. It is quite possible to have significant problems with enforcement as well. If the matter has been decided in a EU Member State court, the decisions would be subject to the Brussels I Regulation regime. If a court decision has already been issued in the jurisdiction approving the unilateral clause, when the claimant contending that the jurisdiction clause is invalid attempts to enforce the decision, it would face the bar of Article 34 of the Brussels I Regulation, according to which enforcement cannot contravene a decision from another Member State.

It is important to take into account one more perspective to unilateral clauses. Where the parties have opted for an arbitration 'layer' in their jurisdiction clause, the party which has obtained a favourable arbitral award would be eager to enforce it in any jurisdiction where it may reach assets of the debtor. For instance, a bank which has obtained a favourable award is certainly keen on pursuing the debtor's assets wherever they might be. As the award would be subject to enforcement under the New York Convention, a defendant who has not succeeded in invalidating the clause within the arbitration procedure may be expected to seek reliance on Article V of the New York Convention, including the public policy exception. It is not unimaginable that courts in countries hostile to unilateral clauses would find unilateral clauses to fall within the scope of the public policy exception and refuse to enforce the foreign award (possibly on grounds similar to those analysed in section 3.2 *supra*).

4 RECTIFICATION OF UNILATERAL JURISDICTION CLAUSES

In spite of the arguments *supra*, which seek to outline the pitfalls associated with the view that a unilateral clause should be invalid, if it is assumed that a unilateral clause nevertheless features a significant defect it becomes even more important to

⁷⁰ See *supra* n. 67, at 88–89.

consider the possible avenues to sever the defect and preserve the agreement between the parties, although not with the initial content wholly intact. There should be a policy basis underlying the particular instruments which are suggested to be used for rectification, which are reviewed in turn *infra*.

4.1 POLICY ENDS

4.1[a] *Protect Party Autonomy*

Jurisdiction clauses are the paramount expression of party autonomy in private international relations. Since both parties to an agreement have made explicit expression of their intention to decline statutory jurisdiction and adopt a specific mechanism for settlement of a (potential) dispute, there is no rationale for rendering the clause entirely void and thus ineffective, as long as the defect does not include a fundamental infringement such as duress, error, unconscionability, incapacity or other statutory restrictions.⁷¹ In these situations not only the unilateral clause, but also any other dispute resolution clause, would be invalidated. The approach should be tailored to cater for the *differentia specifica* of the unilateral clause, i.e., its complex, multitiered and optional nature that provides one-sided preference. Therefore, if a court has to interpret the clause in a way detrimental to its integrity, it should still strive to protect party autonomy, albeit in apparently restrained scope. As a result, the parties should not end up with jurisdiction being determined by the private international law rules which would have been applicable if there had not been any dispute resolution clause inserted at all – the parties have made explicit determination that they would like to have their dispute settled in a particular manner different from that normally provided by statute.

4.1[b] *Protect Special Means of Dispute Resolution*

This policy rationale would be applicable in the case of a tiered system where arbitration is one of the options (compared to the case where the clause provides only for prorogation). Arbitration is, as a general principle, a specific manner of dispute resolution avoiding state court jurisdiction.⁷² Much national legislation exhibits preference for arbitrating disputes as to a large extent they follow and implement the UNCITRAL Model Law on International Commercial

⁷¹ In other words, the general approach adopted by courts should be *in favorem validitatis*. See Fouchard Gaillard Goldman, *International Commercial Arbitration*, 262 (Kluwer Law International, 1999).

⁷² See *ibid.* paras 8–11.

Arbitration,⁷³ so that arbitration proceedings should be capable of running independently of state court litigation or overriding it (staying or termination of the court case, depending on the jurisdiction).⁷⁴ Some continental case law⁷⁵ has also suggested that the implications of arbitration should be interpreted in favour of giving rise to the intention of parties that their disputes would be decided by arbitration (*in favorem validitatis / in favorem voluntatis*). It is suggested that this approach has enough merit to be taken as a general principle.

4.2 MEANS

4.2[a] *Partial Invalidity*

Partial invalidity of contracts, or severability of clauses, may be found within the legislation of most civil law jurisdictions.⁷⁶ Common law in certain jurisdictions upholds the principle as well.⁷⁷ If a part of the agreement is valid, there are neither policy nor practical reasons why it should fail and nullify the mutual intention of the parties. If this is applicable to entire agreements, *per argumentum a fortiori* it should be applicable to parts of agreements. Dispute resolution clauses are procedural agreements, as continental doctrine recognizes.⁷⁸ If parts from agreements may be severed, this should be the same for particular segments from the multilayered structure of clauses. Defects which do not render them *ab initio* void would be able to be cured by way of severance of the invalid from the valid parts. This would give rise to both preservation of party autonomy and legal certainty.

⁷³ See Nigel Blackaby & Constantine Patrasides, *Redfern and Hunter on International Arbitration*, 75–77 (Oxford, 2009); also see *ibid.* at 35–36; more specifically, Art. 8 of the Model Law.

⁷⁴ See, e.g., UK Arbitration Act, s. 9; German Civil Procedure Code, s. 1032; French Civil Procedure Code, Arts 1446 and 1448; US Federal Arbitration Act, s. 3; Law of the Russian Federation No. 5338-I on International Commercial Arbitration, Art. 8.

⁷⁵ See, e.g., BGH, SchiedsVZ 2007, 215 = BGH III ZR 22/06 v. 31.05.2007, where a German court upheld this and expressed the view that both German and Belgian law (at least) stand on the same side on this point. It is submitted that this is applicable in general, without limitation to these two jurisdictions.

⁷⁶ French Civil Code, Art. 1157; German Civil Code, Arts 134, 139; Italian Civil Code, Art. 1419; Spanish Civil Code, Art. 1284; Belgian Civil, Arts 1217–1218; Civil Code of the Russian Federation, Art. 180; Swiss Code of Obligations, Art. 20.2, etc.

⁷⁷ See, e.g., *Ailion v. Spiekermann*, [1976] Ch. 158 (UK); U.S. Uniform Commercial Code, s. 1-105; *Booker v. Robert Half Int'l, Inc.*, 315 F.Supp.2d 94, 106 (D.D.C. 2004).

⁷⁸ For Example, some views on dispute resolution clauses: 'Arbitration agreement is agreement on procedural issues' (*Sam v. Perin*, Paris Cour d'Appel, 8 Oct. 1998); 'procedural agreement' (ICC case no. 4504, 1986); 'jurisdiction agreement' (*supra* n. 53, at 394); 'contract to refer' (*Pittalis v. Sherefettin*, [1986] 2 All ER 227, 231).

4.2[b] *What to Sever?*

The part of a unilateral clause which is affected by a defect (assuming there are grounds for holding a clause defective, see section 3.2 *supra*) should fail. The nature of the defect should generally determine the part of the unilateral clause to be invalidated. Reasoning in light of the principles analysed above, the arbitration option, if conferred to both parties, should be upheld, while the more uncertain part, the universal court jurisdiction (as in the facts of the *Rothschild* case), should be declared invalid. If there is only court jurisdiction on both sides, the severed part should be that one granting a wider scope of rights, so that in effect both parties should become equal in terms of chosen places of dispute resolution. The purpose behind this interpretation is to put the parties on an equal and balanced footing (on the presumption that this lies at the root of the defect). Such severance would counter the risk of *potestativité* or arguments based on fair trial requirements.

4.2[c] *Restoring the Balance Expansively*

The third option is to seek the contrary instrument: not severing but expanding the clause with a view to bringing the parties into balance and equality, as discussed in section 4.2[b] *supra*. This was effected in the Russian case of *Russian Telephone Company v. Sony Ericsson*, where the one-sided option, arbitration, was extended to the other party as well, making it bilateral. As a result, both parties could sue in either the competent state court, or in the agreed arbitral tribunal, at their discretion.

5 CONCLUSION

Unilateral jurisdiction agreements have become attractive, mainly due to the strong business logic supporting their use in international contracts. Currently thousands of such jurisdictional agreements, in the areas of finance, property, shipping, sales, etc., have been concluded and may become subject to review and court scrutiny. As it has been observed in this article, many courts would not strike down such a clause *per se*, but there are a number of jurisdictions where in particular cases unilateral clauses have been refused valid effect on a variety of grounds, including fairness and equality. The inference that unilateral clauses currently face, and may face in the future, a serious backlash is disturbing, as unilateral clauses are primarily the product of the opportunity granted to contractual parties to mould their relationship in the best (lawful) manner that suits their interests. Uncertainty regarding whether a clause might be held invalid in some jurisdictions is a bar to their insertion in contracts, also.

However, there are lessons to be learned as well. The unilateral clause is on the verge of being ‘pathological,’⁷⁹ i.e., featuring an elaborate mechanism which is capable of becoming defective or inoperable, in general, or only in a particular context, which may as a result disrupt the ensuing litigation or arbitration, or both. There is an a priori deficiency and risk included in the very tenets of a unilateral clause: it may work somewhere but, as the review in this article suggests, it certainly would not work in all jurisdictions. The operability (and possibly the validity as well) of such a clause is to a significant extent dependent on its drafting. This is a *caveat* for the legal practitioners, who often fail to predict that such a clause, although well tailored for a common law jurisdiction, for instance, may on arrival before a French judge face abrogation for the variety of reasons analysed in this study. This is a *caveat* especially for the practice of international law firms, who may tend to use standard, boilerplate clauses without duly modifying them in view of the particular features of the contract in which the clause is to be inserted, the parties to it, and any related circumstances. This cautionary tale suggests that the wider and more imprecise the scope of the clause, the greater the risk that it may also shipwreck on the rocks of a hostile jurisdiction. But there is also a *caveat* for the courts. Some jurisdictions seem to have been unreasonably quick to find defects in such clauses, which are the result of the explicit intention of the parties (even more, commercial parties), albeit the clauses are asymmetrical. The reasoning seems to have utilized broad concepts such as justice, fairness and good faith which are instrumental for arriving at any result and can support reasoning both *pro* and *contra*.

This is why the study has attempted to sift through the case law and the doctrinal underpinning of unilateral clauses and suggest that there are solid arguments in favour of upholding unilateral clauses, in their entirety or at least partially – even if not in any context, then at least in some. However, the viability of this contractual mechanism, along with the business interests that it facilitates, should primarily be not the product of black letter law but of rational human conduct and understanding by contractual parties, clause drafters and dispute resolution bodies alike.

⁷⁹ See *supra* n. 72, at 261. Although the term has been coined to deal with arbitration clauses, here it is borrowed to be applied to any jurisdiction clauses.