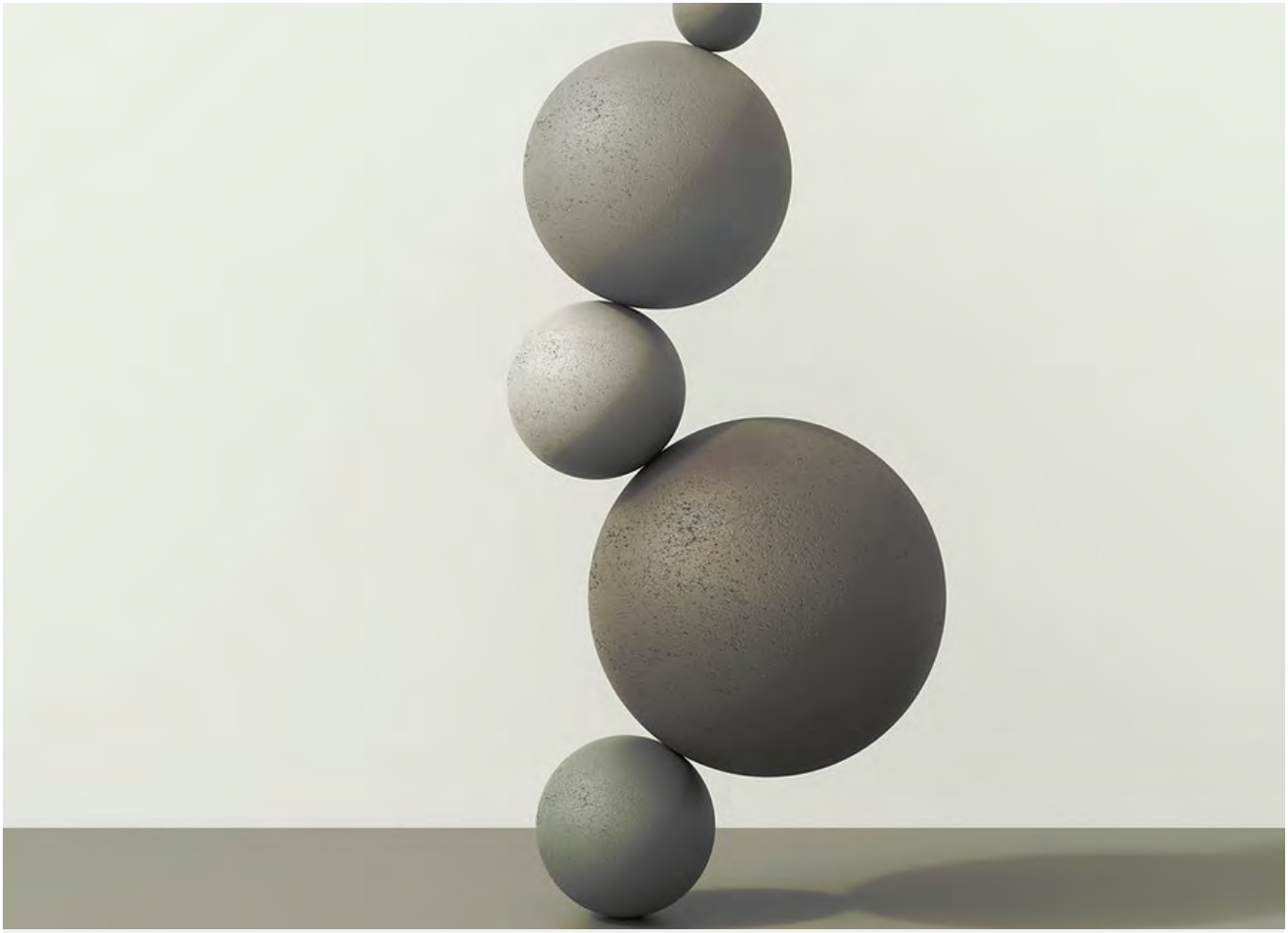

UNILATERAL OPTION ARBITRATION CLAUSE: A FLEXIBLE FORUM FOR DISPUTE RESOLUTION OR POTENTIALY INVALID ARBITRATION CLAUSE?

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Authors: Djordje Novčić, Partnr, Ivana Petković, Senior Associate, Dušan Žegarac, Associate

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I Introduction

Arbitration clauses, in their nature, impose on the parties an obligation to refer their disputes to arbitration as set forth in the arbitration agreement. Such agreements are vastly symmetrical – they provide both parties with the equal right to invoke arbitration proceedings. On the other hand, the "unilateral option arbitration clauses" or "asymmetric arbitration clauses" (hereinafter: UAC) represent a type of arbitration clauses under which the parties are conditioned to initiate legal proceedings in front of a court of particular jurisdiction, while at the same time offering one or more parties a choice to refer their dispute to arbitration[1]. Such arbitration clauses are also known as "asymmetric" or "hybrid" as they provide only one party (the beneficiary) with the option to bring their action to arbitration.

The unilateral option arbitration clauses are most commonly used in financing transactions in which one party's intention is to be brought to court in the jurisdiction of their own choosing but wishes to retain flexibility to pursue assets and secure enforcement against the other party in arbitration[2]. As such, UACs are usually included in contracts considered to be higher risk for the beneficiary of the option, whereas similar clauses may also found in charter-parties, tenancy, construction and employment contracts[3].

However, a question is raised on the international recognition and enforceability of such arbitration clauses and their respective agreements. National courts in different jurisdictions employ a different approach when deciding to recognize or enforce the UACs. This article sets out to explore the feasibility and practicality of the UAC considering their flexibility on the one side, and their validity and recognition in different jurisdictions on the other, with a focus on the statutory provisions and the case law of the arbitration organized by the Chamber of Commerce and Industry of Republic of Serbia.

1 Dr Andreas Respondek and Frederike Marina Löwenthal, The Troubled Waters of Asymmetric Arbitration Clauses, Law Gazette, 2020.

2 Sherina Petit, Katie Chung, Andrey Panov, Marc Robert, Benjamin Grant and Mina Morova Nosherwan H Vakil, Asymmetric arbitration agreements, Norton Rose Fullbright, International Arbitration Report 2017.

3 Pavlo Malyuta, Compatibility of Unilateral Option Clauses with the European Convention on Human Rights, Journal of Law and Jurisprudence 8(1), 2019.

II Advantages of UAC

When deciding on a dispute resolution clause, the parties opt for an advantageous forum for dispute resolution under a particular agreement while also excluding potentially unfavorable jurisdictions.

By implementing a UAC in the contract, the beneficiary of the option usually enters the agreement with higher risk but retains an ability to choose between litigation and arbitration.

In selecting the preferred forum, the beneficiary therefore may take into consideration the procedural aspects, language of the proceedings, cost and speed of proceedings, enforceability of an award in international context, etc. Therefore, the UACs aim to preserve the advantages of both litigation and arbitration [4]. However, when applying the UAC's, their recognition and enforcement in different jurisdictions should be considered, as discussed further bellow.

4 Raluca Papadima, The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be, Campbell University School of Law, Scholarly Repository, 2021.

III Principle of Equality of Treatment and Party Autonomy

Central to the debate in question are two of the essential principles of international arbitration: the principle of equality of treatment and party autonomy.

On one hand, the UACs reflect the parties freedom to decide for the proceedings to be conducted and decided by the arbitral tribunal of their own choosing. As such, Article 32 of the Arbitration act of the Republic of Serbia[5] prescribes: „The parties are free to mutually agree on the rules of procedure by which the arbitral tribunal will act on or to refer to specific arbitration rules, in accordance with the provisions of this law."

Similarly, Article 19 of the UNCITRAL Model Law[6] specifies: "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". Consequently, the principle of party autonomy in arbitration not only allows the parties to submit their disputes to arbitration, but also allows the parties to adjust the course of the proceedings to their specific needs. Additionally, it may be argued that UACs portray the "bargaining power" of the parties, which may not always be equal when willingly entering (commercial) contracts[7].

5 Arbitration Act of the Republic of Serbia ("Official Gazette of RS", no. 46/2006).

6 UNCITRAL Model Law on International Commercial Arbitration.

7 Kevin Cheung, Unilateral Option Clauses to Arbitration: The Debate Continues, Kluwer Arbitration Blog, 2020.

III Principle of Equality of Treatment and Party Autonomy

Be that as it may, when it comes to the principle of equality of treatment, it could be argued that applying UACs could potentially raise the issue of equality between the parties, both at the stage of negotiations, as well as in the legal proceedings initiated under such asymmetric arbitration clause.

Article 18 of the UNCITRAL Model Law envisages: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". As UACs provide only one party with the choice of particular forum of dispute resolution, it could further be argued that such clauses are "inherently imbalanced".

Such, to a certain degree "one-sided" clauses, can however often be present in commercial contracts and are not always be deemed as contrary to the principle of equality of treatment. Therefore, the UACs should not by themselves be considered contrary to the said principle of equality of treatment, but the provisions of each arbitration clause should further be explored [8].

Another potential issue to be discussed is whether by concluding the UAC, a clear intent of the parties to arbitrate is present. Both the UNCITRAL Model Law and the Arbitration act of the Republic of Serbia define arbitration agreement similarly 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 their legal relationship. Thus, according to the relevant provisions of UNCITRAL Model Law, a clear intent to arbitrate is a requirement which must be fulfilled in order for an arbitration agreement to be valid. Therefore, it is left to courts in their jurisdictions to decide on the validity of such arbitration agreements by applying the law of their respective jurisdiction [9].

8 Kevin Cheung, Unilateral Option Clauses to Arbitration: The Debate Continues, Kluwer Arbitration Blog, 2020.

9 Raluca Papadima, The Uncertain Fate of Asymmetrical Dispute Resolution Clauses in Arbitration around the Globe: To Be or Not to Be, Campbell University School of Law, Scholarly Repository, 2021.

IV Recognition of the UACs in Serbia

When it comes to recognition and applying the UACs in the arbitration proceedings organized in the Republic of Serbia, the case law appears to be largely corresponding.

In one case before the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce[10] , the parties agreed on the optional arbitration clause, by which either the arbitral tribunal at the seat of the claimant, or arbitral tribunal at the seat of respondent would have jurisdiction in settling the dispute. The tribunal found that by such an agreement, the parties reserved the right to submit a dispute to resolution to any of the agreed jurisdictions by submitting a statement of claim in one of the two agreed seats of arbitration. The arbitral tribunal thus found such alternative arbitration clauses to be legally valid and allowed.

In another case before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce[11] , the tribunal found that beside the arbitration clause, the agreement also contains the clause by which the jurisdiction of the court at the seat of the buyer is contracted. Consequently, the arbitral tribunal found that both the arbitration organized by the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce as well as the court may be competent for the resolution of the said dispute.

The tribunal also found in another case before the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce[12] for the alternative arbitration clause to be legally valid in the case when the claimant and respondent concluded two contracts, both of which contained a different arbitration clause. Thus, the tribunal also decided that the arbitration in which the claimant submitted the SoC should have jurisdiction.

10 Case no. T-15/99 of the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce.

11 Case no. T-8/05 of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce

12 Case no. T-19/02 of the Foreign Trade Court of Arbitration at the Yugoslav Chamber of Commerce

IV Recognition of the UACs in Serbia

By analyzing the case law in the arbitration organized in the Republic of Serbia, it is clear that the tribunals predominantly favor the party autonomy when deciding on the validity of UAC's. The tribunals find the UAC's to be legally valid both in case when two different arbitration clauses are contracted, as well as in the case when the jurisdiction of arbitral tribunal and the court are alternatively contracted.

V Recognition and Enforcement of UACs in other jurisdictions

Finally, a question is raised on the recognition and enforcement of UACs in other jurisdictions in the world. The positions of the courts appear to be largely different when deciding on the matter.

The courts of England and Wales in generally found the unliteral arbitration clauses to be valid and enforceable, while the courts of France issued several decisions refusing to enforce the UAC's[13].

The German courts generally uphold the unilateral option arbitration clauses as valid unless they violate the "good morals" or display "unreasonable advantage" for one of the parties. On the other hand, the Russian courts generally regard that the UACs violate the principle of equal procedural rights[14].

In one survey on unilateral option arbitration clauses from 2021[15] , the research was conducted on recognition and enforcement of UACs in jurisdictions around the world. The researchers found that, out of 98 countries where the research was conducted, 60 jurisdictions were deemed as to "generally having no issues" or "issues unlikely" when recognizing and enforcing the UAC.

Considering the results from the survey, we may come to a conclusion that the UACs generally are accepted as valid in jurisdictions around the world if the parties carefully consider their provisions and their rationale when implementing them in the arbitration agreement.

13 Sherina Petit, Katie Chung, Andrey Panov, Marc Robert, Benjamin Grant and Mina Morova Nosherwan H Vakil, Asymmetric arbitration agreements, Norton Rose Fullbright, International Arbitration Report 2017.

14 UNILATERAL OPTION CLAUSES SURVEY – 2021, Clifford Chance, London 2021.

15 KUNILATERAL OPTION CLAUSES SURVEY – 2021, Clifford Chance, London 2021.

V Conclusion

The unilateral option arbitration clauses offer a wider flexibility for the parties when it comes to choosing how to settle their future disputes. As such, they often arise from the contracts deemed to be of higher risk for the beneficiary of such option.

Nevertheless, issues on the recognition and enforceability of such clauses may appear when applying them in different jurisdictions. The parties, however, can alleviate such risk by designating governing law and seat of arbitration favorable for the application of the UACs. Additionally, the enforceability of such clauses should especially be taken into consideration in the jurisdiction:

- of the governing law of the agreement.
- of proposed court or arbitration proceedings (if such are different from the jurisdiction of the governing law);
- in which the parties are domiciled; and
- in which the parties' assets are located (where an award or judgment would potentially need to be enforced)[16].

The drafters of UACs may also need to review not just the domestic law, but a number of foreign laws as well.

Ultimately, when drafting the UACs, the parties should take special consideration as the consequences of including them in agreements connected with an unfavorable jurisdiction may range from the clause being declared null and void (in which case the courts would declare to have jurisdiction over the dispute) to the arbitral award being unenforceable.

16 Marie Berard, Melissa Brown, Nicole Mah, Courts' attitude towards unilateral option clauses, International Law Office, 2021.

Authors

Djordje Novčić
Partner
E: djordje.novcic@jpm.law

Ivana Petković
Senior Associate
E: ivana.petkovic@jpm.law

Dušan Žegarac
Associate
E: dusan.zegarac@jpm.law

JPM | PARTNERS
8a Vladimira Popovića,
DELTA HOUSE, V Floor
11070 Belgrade, Serbia
T:+ 381/11/207-6850
E: office@jpm.law

www.jpm.law