UNILATERAL CLAUSES IN ARBITRATION: VALIDITY AND ENFORCEMENT

Anu Srivastava[*]

Abstract

Unilateral arbitration clauses are being rapidly used in various financial contracts to provide one of the parties a unilateral option to choose between arbitration and court proceedings. However, it may not always be prudent for the parties to include such clauses in their contracts because of the various issues relating to enforcement and validity of such clauses. While most jurisdictions have upheld the validity of such clauses, there have been instances where such clauses have been declared as being invalid on the grounds of non-mutuality, unconscionability, procedural inequality and potestativité.

The essay aims at analyzing the issues relating to the validity of such clauses in various jurisdictions focusing on the developments under English law and Indian law followed by two controversial decisions given by the French and the Russian Courts. While the position of such clauses is far from reaching a conclusion with respect to validity,

[*]Anu Srivastava is a fourth-year student at Gujarat National Law University, Gandhinagar. The author may be reached at anus11@gnlu.ac.in .

it depends on the facts and circumstances, position of the parties, the jurisdictions to which the parties are amenable to, the proper law of the contract and the law of the seat which need to be considered while drafting such clauses.

The position in India poses further complications due to conflicting opinions of High Courts on the validity of such clauses. The question of public policy also creates problems while looking at domestic and international arbitrations. It therefore becomes imperative for parties to consider such arbitration clauses carefully with reference to India as a seat of arbitration or as a place of enforcement.

I. INTRODUCTION

The principle of party autonomy is the bulwark of the mechanism on which arbitration proceedings work. Based on the principle, parties are free to choose the laws, forum, mode, manner, procedure and other aspects of an arbitration agreement. However, the principle of party autonomy does not extend to the extent of granting absolute freedom to violate mandatory laws which govern the arbitration proceedings. Unilateral arbitration clauses are one such type of arbitration clauses where the balance between a party's choices of an ADR mechanism needs to be weighed carefully against the legal validity, enforcement, unconscionability and procedural equality of such clauses.

One sided, split-option, hybrid, unilateral or asymmetric arbitration clauses are the nomenclature given to the type of optional arbitration clauses[1] where only one of the parties has the choice of referring the matter to arbitration or commencing proceedings before a Court.[2] Such clauses are generally of two types – clauses which provide an option to arbitrate or those which provide for an option to litigate. In the former case, all disputes are referred to litigation but one of the parties to the dispute is given the choice to commence arbitration proceedings. In the latter case, there is a binding arbitration agreement between the parties which provides for settlement of disputes but one of the parties retains the option to go to Courts. The important feature of both types of clauses is the lack of choice or non-mutuality with respect to the dispute resolution mechanism wherein one party has the right to bring an action either before a Court or an Arbitral Tribunal but the other party is deprived of this right.

This non mutuality or one sidedness of an arbitration clause arises as a result of unequal commercial position of parties in certain kinds of finance contracts where one party (generally the party with the unilateral option) is seen to have taken more risks pertaining to the contract. Depending upon the jurisdiction to which such clauses are amenable, the position of the parties and the drafting of the arbitration clause, unilateral clauses have been held as valid or invalid. Whereas most jurisdictions would uphold the validity of an unambiguous unilateral arbitration clause, two recent decisions of the French[3] and

[1]Simon Nesbitt & Henry Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses*, 22 ARBITR. INT. 133, 134-135 (2006).
[2]Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 (1) J. OF INT. ARBITR. 19, 21-22 (2014).
[3]X v. Banque Privée Edmond de Rothschild Europe, (2012) Cass. Civ. (1ère) (French Cour de cassation).

the Russian Courts[4] have considered such clauses to be invalid or unconscionable. This has raised a number of questions with respect to the implementation such clauses, essential ones being those of validity and enforcement. There may be instances where a particular unilateral clause although valid as per the law of the seat might be refused to be enforced in a different jurisdiction due to public policy considerations of non-mutuality, inequality and unconscionability. Another important question arises regarding the effect of invalidating a unilateral clause. Would this imply that the entire arbitration agreement is invalid or would the courts confer a similar option to choose the forum on the party deprived of such option?

Some of these issues would be addressed during the course of this essay accompanied by a discussion on the validity and enforceability of unilateral arbitration clauses in various jurisdictions. The effect of the Russian and French decisions on the international community regarding the validity of such clauses has also been considered.

II. JURISDICTIONAL ANALYSIS OF UNILATERAL CLAUSES

A. England

Case laws and available literature suggests that unilateral arbitration clauses would be held as valid and enforceable in England. Initial cases did suggest that a unilateral arbitration clause may be void for non-mutuality and not providing bilateral rights of reference but subsequent developments have rejected the non-mutuality arguments.

[4]Russkaya Telephonnaya Kompaniya v. Sony Ericsson Mobile Communications Rus Ltd. Liability Co., (2012) Decision No. 1831/ 12, Supreme Arbitration (Commercial) Court of Russian Federation.

The question of mutual rights of parties in case of an arbitration agreement was delved upon by the English courts in *Baron v. Sunderland Corporation.*[5] The case related to the implementation of the remuneration scales for school teachers as per the Burnham Report. The clause in the Report provided that the remuneration for teachers would be determined according to the scales and other provisions contained in the Report. The Report further provided for a Committee of Reference and the relevant clause read as follows:

> "*There shall be appointed a joint committee of reference consisting of 10 members nominated by the representatives of local education authorities… and 10 members nominated by the representatives of the teachers… and any question relating to the interpretation of the provisions of this report brought forward by a local authority acting through the authorities' panel or by any association of teachers acting through the teachers' panel… shall be considered and determined by the joint committee*."

Mr. Baron, a teacher claimed that he was entitled to additional salary in accordance with the provisions of the Report before the Court. The local educational authorities however, claimed that the aforesaid clause was an arbitration clause and sought for the court proceedings to be stayed to enable the matter to be referred to arbitration. The stay was refused by the Court of Appeal on the ground that the said clause did not provide for bilateral rights of reference. The Court noted that an arbitration agreement must always provide both the parties with the option to refer matters to arbitration. There was a complete lack on mutuality in the said matter and the clause was held as invalid.

[5]Baron v. Sunderland Corporation, (1966) 1 All ER 349.

This was followed by the judgment in *Tote Bookmakers Ltd.* v *Development and Property Holding Co. Ltd.*[6] but subsequently reversed in *Pittalis* v *Sherefettin*.[7] Both the cases involved similar rent review clauses which gave the tenant an option to refer the determination of rent to an independent surveyor in case he disagreed with the rent as determined by the landlord. The landlord on the other hand did not have any such option to refer the matter to an independent surveyor.

In *Tote Bookmakers*[8] the decision of the Court of Appeal in *Baron*[9] that an arbitration agreement must always provide for bilateral rights was regarded as ratio by the Court and the Judge considered himself to be bound by the aforesaid decision. However, in *Pittallis*[10] the Court overruled the decision in *Tote Bookmakers*[11] and held that there was no reason to render an arbitration agreement invalid because it conferred only on one of the parties a right to refer the matter to arbitration. In reaching this conclusion, the Court of Appeal relied on two judgments that were delivered prior to that of *Baron,*[12] namely, *Woolf* v *Collis Removal Service*[13] and *Heyman* v *Darwins*.[14] As per the decision in the former case, a unilateral clause is in essence mere machinery which even though one-sided would not make them invalid. In the latter case, it was categorically stated by the Court that arbitration clauses may be of varying natures and the parties are at a liberty to decide and define the matters which they want to refer to

[6]Tote Bookmakers Ltd. v. Development and Property Holding Co. Ltd., (1985) 2 WLR 603.
[7]Pittalis v. Sherefettin, (1986) QB 686.
[8]Tote, *supra* note 6.
[9]Baron v. Sunderland Corporation, (1966) 1 All ER 349.
[10]Pittalis, *supra* note 7.
[11]Tote, *supra* note 6.
[12]Baron, *supra* note 9.
[13]Woolf v. Collis Removal Service, (1948) 1 KB 11.
[14]Heyman v. Darwins, (1942) AC 356.

arbitration. Therefore, *Pittallis*[15] considered the observation made in *Baron*[16] as an *obiter* which was not binding upon the Court and unilateral arbitration clauses were recognized as being enforceable and valid.[17]

It has however been noted that these cases did not lay down a general acceptance for validity and enforcement of unilateral arbitration clauses. They were accepted as being valid only because upholding them seemed appropriate given the peculiar facts of these cases. For instance, in *Pittalis,*[18] the tenant's unilateral right to refer the assessment of rent arbitration was upheld because the landlord was protected by his own assessment of rent. The dispute would arise only if the rent as assessed by the landlord was not acceptable to the tenant. Therefore, it was reasonable for the tenant to have a unilateral right to have the rent assessed by an arbitrator. This issue was highlighted in *RGE (Group Services) Ltd.* v *Cleveland Offshore Ltd*.[19] which followed *Pitallis*[20] and the position of unilateral arbitration clauses still suffered from some uncertainty with respect to their validity being upheld in all factual contexts and not just those similar to *Pitallis*.[21]

The confirmation to the validity of unilateral arbitration clauses being applicable to all factual circumstances was finally laid down by *NB Three Shipping Ltd* v *Harebell Shipping Ltd.*[22] The arbitration clause in this case conferred jurisdiction on English Courts to settle disputes between the owners of the vessel and the charterers. The owners had

[15]Pittalis, *supra* note 7.
[16]Baron, *supra* note 9.
[17]Simon Nesbitt & Henry Quinlan, *The Status and Operation of Unilateral or Optional Arbitration Clauses*, 22 ARBITR. INT. 133, 136 (2006).
[18]Pittalis, *supra* note 7.
[19]RGE (Group Services) Ltd. v. Cleveland Offshore Ltd, (1986) 11 Con LR 78.
[20]Pittalis, *supra* note 7.
[21]*Id.*
[22]NB Three Shipping Ltd. v. Harebell Shipping Ltd., (2005) 1 Lloyds Rep. 509.

an additional unilateral right to refer the dispute to arbitration. The charterers (NB Three Shipping) commenced proceedings in the High Court while the owners (Harebell Shipping) wanted to exercise their right to refer the dispute to arbitration and sought for a stay on the High Court proceedings. The owners relied on *Pittalis*[23] to assert their case while the charterers contended that the exercise of the unilateral right to refer the dispute to arbitration could have been exercised only if the owners brought the claim before the Court. Morrison J. while dismissing the contention of the charterers clarified that the validity of unilateral clauses as laid down in *Pittalis*[24] was not limited to specific clauses based on the same factual context. As per *Heyman* v *Darwins*[25] the parties were free to agree on any type of dispute resolution mechanism even if it meant conferring unilateral rights of reference on one of the parties.[26] He further went on to explain that the unilateral option was not open ended. If the Owners took a step towards the action or led the Charterers to believe that the option would not be exercised, the option would cease to exist.

After the decision in *NB Three Shipping* the status and operation of unilateral clauses was accepted as being valid and enforceable for all circumstances. However, a subsequent question arose with respect trumping the reference to arbitration in situations where a unilateral arbitration clause would provide for disputes to be referred to arbitration while providing one of the parties with the right to bring proceedings in a Court. The validity of such clauses was addressed in *Debenture Trust Corp Plc.* v *Elektrim Finance BV and others.*[27] A

[23]Pittalis, *supra* note 7.
[24]*Id.*
[25]Heyman, *supra* note 14.
[26]The same was also observed in Lobb Partnership Ltd v. Aintree Racecourse Co. Ltd., (2000) BLR 65; '…there is no reason in principle why parties to a contract should not agree to give either of them a unilateral option to elect to arbitrate or litigate any claim for relief so as to bind the other to arbitration or litigation, as the case may be …'.
[27]Debenture Trust Corp Plc. v. Elektrim Finance BV, (2005) 1 All ER 476.

Unilateral arbitration clause providing an option to one of the parties to bring the dispute before Courts was upheld in this case, provided, that the party with the option had not participated in arbitration proceedings. In such cases, the party with the option to bring a claim before the Courts could also trump the arbitration proceedings if they had been commenced by the other party. However, the right to bring the dispute before State Courts would be considered to have been waived if such party proceeded with the arbitration proceedings.

Unilateral clauses to arbitrate have received recognition by Courts in England. However, certain issues may arise with respect to the operation of these clauses in Consumer disputes where the Consumer might be considered to be as occupying a weaker position with respect to negotiation.[28] The unilateral arbitration clauses providing an additional right to one of the parties to bring the dispute before State Courts might also be considered to be pathological for lack of certainty of a binding agreement to arbitrate.

B. India and Other Jurisdictions

There has been a slight ambiguity in India with respect to the validity of unilateral clauses. While earlier High Court cases on the point seem to suggest that such clauses are not valid and enforceable in India, more recent judgments look upon such clauses favorably.

Union of India v *Bharat Engineering Corporation*[29] considered a unilateral arbitration clause to be a contract of option which was contingent upon the exercise of that option and became binding only when the option was exercised. The said arbitration clause between the Railways and their Contractors conferred upon the Contractor a unilateral option to refer the dispute to arbitration. The Delhi High

[28]The Unfair Terms in Consumer Contracts Regulations, 1994, Statutory Instrument No. 3159, 1994, (United Kingdom).
[29]Union of India v. Bharat Engineering Corporation, (1977) ILR 2 Delhi 57.

Court considered the definition of an 'arbitration agreement' under Section 2 (a) of the Arbitration Act 1940 and held that it does not contemplate a contingent agreement or an agreement to agree in the future. The Court placed reliance on *Heyman* v *Darwins*[30] and concluded that for an arbitration agreement to be born, both parties must promise to submit differences to arbitration. As there is a like promise on each side, the contract is bilateral and promises become binding by mutual acceptance and create an immediate agreement. The law does not contemplate an arbitration agreement which is contingent or conditional or confers an option. This view taken by the High Court seems to be incorrect[31] and the reliance placed by the Court on *Heyman* v *Darwins*[32] also seems to be opposed to the interpretation of the same case as given in *Pittalis.*[33]

In another judgment of the Calcutta High Court,[34] the Court specifically differed from the Delhi High Court's decision and upheld the validity of a unilateral arbitration clause. As per the arbitration agreement, the petitioner Bank had the option to go to arbitration or not. The Court noted the decision in *Bharat Engineering Corporation*[35] and held that the position of law as laid down in the case has been dissented from by various authors and judgments.[36] The court took the view that in spite of option clause, the arbitration agreement remains valid. The Court concluded that there was valid

[30]Heyman, *supra* note 14.
[31]As discussed earlier, there is substantial case law in England to suggest that unilateral arbitration clauses would be valid.
[32]Heyman v. Darwins, (1942) AC 356 held that the parties were free to agree on any type of dispute resolution mechanism even if it meant conferring unilateral rights of reference on one of the parties.
[33]PITTALIS, *supra* note 7.
[34]New India Assurance Co. Ltd. v. Central Bank of India & Ors., (1985) AIR Cal 76.
[35]Union of India v. Bharat Engineering Corporation, (1977) ILR 2 Delhi 57.
[36]The Court relied on the judgment in Chetoomal Bulchand v. Shankerdas Girdharilal, (1929) AIR Sind 83 and Mulchand Sobhraj v. Radhakishin Parumal, (1926) AIR Sind 27.

arbitration agreement between the parties but both the parties had agreed that when future disputes will arise it would only be the privileged party who would have the right to make the reference, but the privileged party could also render the arbitration agreement infructuous by not exercising its option. This 'option' would not negative the existence of the arbitration agreement but would only restrict its enforceability.

The validity of unilateral arbitration clauses was further upheld in *Jindal* v *Fuerst Day Lawson.*[37] The arbitration clause in the said case provided the Buyer (Respondent) an option to either commence arbitration proceedings or to bring the dispute before the High Court in England. The judgment delivered by the Delhi High Court marks a significant departure from the case law decided earlier on the same point. The Court noted the aforementioned English Case Laws on the validity of unilateral arbitration clauses and held that there is no dispute as to the validity of such clauses anymore. The Court rejected the contentions raised by the Petitioners that unilateral arbitration clauses were against the public policy of India and would also be hit by Section 28 of the Indian Contract Act, 1872.[38]

The court decided in consonance with legal position in England with respect to unilateral arbitration clauses and also noted that mutuality was no longer a requirement for an arbitration clause to be binding. Further, the Court went on to say that,

> "*Even if the English law did not apply, then also upon a proper construction of the Disputes Resolution Mechanism as contained in Clause 17 of the General Conditions of Purchase,*

[37]Jindal Exports Ltd. v. Fuerst Day Lawson Ltd., MANU/DE/3204/2009.

[38]Reliance was placed on M/s. AVN Tubes Ltd. v. Bhartia Cutler Hammer Ltd., (1992) 2 ALR 8; where the Delhi High Court had considered the cumulative value of all the clauses which would affect arbitration and had held that the said agreement was clearly unilateral and not enforceable in a Court of Law.

> *there was an irrevocable open offer by the grantor of the option, namely, the petitioner to submit differences to arbitration and the power of acceptance vested in the option holder namely, the respondent. When the option was exercised and the offer accepted, the arbitration mechanism became mandatory with full implications thereof. Consequently, in my view, the petitioner's submissions that there was no legally valid arbitration agreement, is contrary to the facts of the case and untenable in law*."[39]

In the absence of a Supreme Court judgment confirming the validity of unilateral arbitration clauses, the status of such clauses is far from being resolved. It is important to note that the judgment given by the Single Judge of the Delhi High Court in *Fuerst Day Lawson*[40] is at variance with that of the Division Bench decision in *M/s. AVN Tubes Ltd.*[41] The Court in the former case extensively relied on English cases with respect to the validity of unilateral arbitration clauses and upheld the validity of such clauses. A probable reason for this could be the nature of the arbitration clause which allowed disputes to be brought before Courts in England. In the latter case however, the Division Bench in a short judgment held that unilateral arbitration clauses could not be upheld as being valid. There does not seem to be a general consensus in Indian Courts which could provide for a conclusive validity being granted to unilateral clauses.

The question of public policy also looms large when such clauses are considered in the Indian text and more so, when the threshold of public policy differs between domestic and International Arbitration.[42]

---

[39]Jindal, *supra* note 37.
[40]*Id*.
[41]M/s. AVN Tubes Ltd. v. Bhartia Cutler Hammer Ltd., (1992) 2 ALR 8.
[42]Oil & Natural Gas Corp. v. Saw Pipes, (2003) 5 SCC 705; Venture Global Engineering v. Satyam Computer Services, (2008) 1 SCR. 501; Bharat Aluminium

The enforcement of a foreign award arising from a unilateral arbitration clause may not be refused on the grounds of public policy but given the lack of case law upholding the validity of arbitration clauses, it seems to be open for Indian Courts to set aside a domestic award arising from a unilateral arbitration clause on the ground of it being patently illegal.[43] This lack of clarity on the status and operation of unilateral arbitration clauses raises far greater concern for parties while choosing to designate India as the 'seat' for arbitration proceedings.

International Law Firm Clifford Chance has analyzed the effectiveness of arbitration clauses in about 40 jurisdictions.[44] The survey notes that such clauses have been somewhat effective in most countries except for Bulgaria, Poland, Russia and Romania. In most civil law continental jurisdictions, arbitration clauses are considered as procedural agreements and are required to fulfill certain mandatory requirements for their validity. The refusal to uphold unilateral clauses in such jurisdictions mostly occurs when there are significant imbalances between the parties or one of the parties is at a manifest disadvantage.[45]

III. THE FRENCH AND THE RUSSIAN CASES: QUESTIONING THE VALIDITY OF UNILATERAL CLAUSES

Company v. Kaiser Aluminium Technical Services Inc, (2012) 9 SCC 552; Shri Lal Mahal Ltd v. Progetto Grano Spa, (2014) 2 SCC 433.

[43]Renusagar Power Co. Limited v. General Electric Company, (1994) Supp (1) SCC 644.

[44]Marie Berard, *Unilateral Option Clauses In Arbitration: A Survey As To Their Effectiveness*, CLIFFORD CHANCE, http://www.cliffordchance.com/briefings/2013/02/unilateral_optionclausesinarbitration.html.

[45]Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 (1) J. INT. ARBITR. 19, 25-32 (2014).

Despite ample jurisprudence to support the validity and enforcement of arbitration clauses, recent judgments from the French Cour de Cassation in *X* v *Banque Privée Edmond de Rothschild Europe*[46] and the Supreme Arbitrazh Court of the Russian Federation in *Russkaya Telephonnaya Kompaniya* v *Sony Ericsson Mobile Communications Rus Ltd. Liability Co*.,[47] have considered such unilateral arbitration clauses as being invalid.

In the *Rothschild*[48] case, a French National Mrs. X who was residing in Spain had a bank account with Edmond de Rothschild Europe's Luxembourg Branch. The clause in question provided that all disputes would have to be brought before Courts of Luxembourg with the Bank reserving the right to bring an action before the Courts of the client's domicile or any other court of competent jurisdiction. The Bank raised an objection before the French Court that the clause was incompatible with the relevant Private International Law Rules, in this case, Article 23 of the Brussels I Regulation.[49]

The Cour de Cassation while upholding the decision of the French Court of Appeal held such clauses to be invalid on the ground of being *potestative* in nature. The Court of Appeal had considered such clauses to be invalid on the ground that although the Brussels Regulations allow a party to choose between different jurisdictions, it was not within their discretion to select whatever Court they want to.

[46]Banque, *supra* note 3.
[47]Russkaya, *supra* note 4.
[48]Banque, *supra* note 3.
[49]Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and The Recognition And Enforcement Of Judgments In Civil And Commercial Matters, Official Journal L 012, 16/01/2001 P. 0001 – 0023. Article 23, Paragraph 1 of the Brussels I Regulation: If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

The Cour de Cassation however, shifted the focus to the potestative nature of the clause while declaring it to be invalid.

Under French law, the doctrine of '*potestativité*' is applied in situations where the performance of a contract depends upon the discretion of and is controlled by only one of the parties. Such types of contractual clauses are considered to be invalid and void. The same was considered by the Cour de Cassation while declaring the unilateral clause as being invalid. This was a stark departure from earlier case laws on the same point where French Courts had upheld unilateral arbitration clauses.[50]

The stance adopted by the French Court while declaring the clause as invalid has been widely criticised on the grounds of incorrect interpretation of the Brussels Regulation and Conflict of Law Rules. The criticism has also stemmed from the arbitration perspective because the purpose of invalidating contractual clauses due to potestative nature is to save a party from suffering from a manifest disadvantage and to avoid the one-sided exercise of discretionary power by the other party. The doctrine aims to avoid unconscionability and inequality of parties. However, potestative considerations should not be applied in a manner so as to render an arbitration agreement invalid which had been negotiated and agreed to by the parties. The commercial purpose of such clauses is lost when they are declared as being invalid because in most situations the unilateral right is given to the party which is in a commercially weaker position. Moreover, considerations of party autonomy lose their importance when such clauses are declared as being invalid even though specifically agreed to by the parties.[51]

---

[50]See Société Sicaly v. Société Grasso Stacon NV, Bull. (1974) I No 143, p. 122 Cass. Civ. (1ère) (French Cour de cassation); Société Edmond Coignet v. COMIT, Bull. (1990) I No 273, p. 193, Cass. Civ. (1ère) (French Cour de cassation).

[51]Maxi Scherer & Sophia Lange, *The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses*, KLUWER ARBITRATION BLOG,

A probable reason for the approach taken by the French Court in this case could be the said case was of the nature of a consumer dispute and the Court did not want to uphold the validity of the unilateral clause due the inherent inequality of bargaining power between the parties. It was however open for the Court to make a distinction for consumer disputes and other similar matters where it would be unconscionable to uphold the validity of such arbitration clauses.

The Russian Supreme Arbitrazh Court (SAC) also held a unilateral arbitration clause to be invalid in the *Sony Ericsson* case.[52] The Court here was concerned with an arbitration clause that provided for disputes to be settled by the ICC London with the seat of arbitration being in London. Sony Ericson had the additional right to seek the recovery of its claims before every competent court.

While looking into the validity of the clause the SAC held that for a fair dispute resolution procedure it was mandatory that the parties should have equal rights to present their case before adjudicatory bodies and even arbitral tribunals. The Court looked into the European Convention on Human Rights 1950 and relied on judgments given by the European Court of Human Rights[53] in coming to the conclusion that such clauses would be contrary to the principles of procedural equality of parties, would be adverse to the nature of dispute resolution process and would lead to a breach of balance between the parties.[54] The clause was therefore held as being invalid because it was unconscionable.

---

http://kluwerarbitrationblog.com/blog/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/#fn-7823-20.

[52]Russkaya, *supra* note 4.

[53]Batsanina v. Russia, Judgment of the European Court of Human Rights on 26 May 2009, Application No. 3932/02; Steel and Morris v. The United Kingdom, Judgment of the European Court of Human Rights on Feb. 15, 2005, Application No. 68416/01.

[54]Scherer, *supra* note 51.

The judgment of the SAC has been criticized as a judicial power grab where Russian Courts have been accused of protecting their sovereignty from encroachment by foreign jurisdictions.[55] It is pertinent to note in this context that while the SAC did consider unilateral arbitration clauses as unconscionable, the clause was not struck down or declared invalid. The SAC held that such unilateral options were invalid and not the entire arbitration clause. Therefore, the option of commencing arbitration proceedings or court litigation was provided to both the parties and not just Sony Ericsson, the 'unilateral' option was converted to a 'bilateral' option.

Both the French as well as the Russian Courts did not uphold unilateral arbitration clauses. However, both of them considered the effect and operation of such clauses differently. Whereas one of the Courts declared the entire clause as being invalid, the Russian SAC converted the unilateral option of reference into a bilateral one. The approach taken by the Russian court has been appreciated because the Court managed to maintain a balance between not allowing unconscionability in commercial clauses and yet upholding the intention of the parties to arbitrate the disputes between them.

IV. AFTERMATH OF THE FRENCH AND RUSSIAN DECISIONS: ISSUES FOR CONSIDERATION

The judgments of *Rothschild*[56] and *Sony Ericsson*[57] cases have caused much debate and deliberation across various jurisdictions. The decision of the English High Court in *Mauritius Commercial Bank*

[55]Charles Clower, *Russian Court Move Seen as Power Grab*, THE FINANCIAL TIMES, Dec. 4, 2012.
[56]Banque, *supra* note 3.
[57]Russkaya, *supra* note 4.

Ltd v *Hestia Holdings Ltd and Another*[58] has clarified the position under the English law continued to be the same even after the decision of the French Cour de Cassation. The contentions in this case sought to declare the arbitration clause as being invalid due to its one-sided nature while relying on the *Rothschild*[59] case. The clause was also argued to be hit by public policy as enshrined under Article 6 of the European Convention on Human Rights which provided for equal access to justice for all. While rejecting the contentions, the High Court clarified that the position under English law continued to be the same and there was ample jurisprudence to support the same.[60]

The position in England has remained unchanged even after the decision in the aforesaid two cases. However, it is yet to be seen if the position in other countries would be affected by them. It may be said that the decisions in *Rothschild*[61] should be read as only being applicable to consumer disputes where upholding unilateral clauses would render one party at a manifest disadvantage, and the decision in *Sony Ericsson*[62] should be read as being limited only to situations of standard form contracts where there is no opportunity given to the parties to negotiate. Despite the restrictive interpretation of these two judgments, a number of questions continue to pose a threat to the validity of unilateral arbitration clauses or at least to the parties who wish to resort to such clauses.

Firstly, issues of enforcement are bound to arise while considering unilateral arbitration clauses. Although valid in a particular jurisdiction, the awards arising out of such clauses might be refused

[58]Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and Another, (2013) EWHC 1328 (Comm).
[59]Banque, *supra* note 3.
[60]With respect to Article 6, the Court held that it is directed to access to justice within the forum chosen by the parties, not to choice of forum.
[61]Banque, *supra* note 3.
[62]Russkaya, *supra* note 4.

to be enforced at another jurisdiction where the enforcement is sought because such other jurisdiction might look at unilateral clauses from a different perspective. It may be another problem for the party seeking the enforcement to show that the said unilateral clause does not violate the public policy of the place of enforcement.[63] For instance, continental jurisdictions look at arbitration clauses as procedural agreements and thereby certain conditions need to be fulfilled for their validity. There may be no such requirement at another country such as England. As a consequence, the public policy requirements of the two jurisdictions would be different.

Secondly, when two jurisdictions with different opinions on unilateral clauses are involved, a party might file a pre-emptive suit in a jurisdiction which considers unilateral arbitration clauses as being invalid while at the same time it may seek to reap the benefit of the other jurisdiction which considers unilateral clauses to be valid. It may also happen that a party might institute proceedings in courts of one of the jurisdictions which does not consider unilateral arbitration clauses as valid seeking to declare the clause as invalid and to trump the arbitration proceedings already commenced by the other party so on the ground that the Court seized with the matter would be the competent forum to adjudicate the matter in accordance with the relevant rules of Private International Law.[64]

Therefore, it is important that unilateral arbitration clauses are carefully drafted keeping in mind the various jurisdictional approaches to the validity of such clauses. Position of the parties, wording of the clause so as to avoid it being treated as pathological and the jurisdictions involved are some of the important

[63]United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (10th June 1958) 330 U.N.T.S. 3, Article V.
[64]Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability*, 31 (1) J. OF INT. ARBITR. 19, 40-41 (2014).

considerations attached with the effective operation of such clauses. The jurisprudence on such clauses is yet to crystallize, more so, in the Indian context and it is yet to be seen how such clauses are interpreted in various other countries. However, it is beyond doubt that unilateral arbitration clauses are valid in a number of jurisdictions and would continue to be valid as such. Indian Courts are most likely to follow the UK approach while the anti-unilateral clause jurisdictions are likely to limit invalidating such clauses only to cases when there is an inequality of bargaining power between the parties. Most important of all, the drafting of the arbitration clause will be a decisive factor in determining the efficaciousness and validity of such unilateral clauses.