UNILATERAL OPTION CLAUSES IN COMMERCIAL ARBITRATION

by Judita Perényiová

LL.M. SHORT THESIS
COURSE: International Commercial Arbitration
PROFESSOR: Tibor Várady
Central European University
1051 Budapest, Nador utca 9.
Hungary

ABSTRACT

Unilateral option clauses combine arbitration and choice of court options. They allow one of the parties but not the other to choose whether to refer an existing dispute to arbitration or to court proceedings. Unilateral option clauses encompass not only those where one of the parties is expressly named as the one vested with the option, but also those where the option is given with regard to certain types of claims which may arise or which are likely to arise only against one of the parties. In most jurisdictions these clauses are upheld and enforceable, however, courts of some countries have invalidated them, thus leaving the party vested with the option with the forum he sought to prevent. This thesis aims to provide a comprehensive analysis of court decisions which indicate the approach of national courts to unilateral option clauses in a commercial setting. It will deal to some extent with decisions which were not made in a commercial setting and with decisions that concern clauses which provide for unilateral choice between courts which are, however, relevant with regard to unilateral option clauses. The thesis will show that some recent decisions have brought even more uncertainty as to whether unilateral option clauses will function as intended, thus tempering the benefits offered by the flexibility of such clauses. Furthermore, this paper also considers the potential pitfalls, which should be born in mind when drafting a unilateral option clause.

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INTRODUCTION

Unilateral option clauses (hereinafter UOCs) combine arbitration and choice of court options with a more favorable position for one of the parties.[1] They provide for a common method of dispute resolution, while one of the parties may exercise the option to refer the case to the other forum. "Standard arbitration clauses provide the often praised flexibility which has made arbitration attractive in general."[2] However, in some instances litigation offers a more suitable solution for a given type of dispute. Since jurisdiction clauses are typically agreed upon before the controversy arises, it is hard to predict the nature of the dispute and therefore complicated to forecast the type of forum that would best fit the needs of one of the parties.

"The concept of 'mutuality' is an appealing one. It seems to connote equality, fairness, justice.... But symmetry is not justice and the so-called requirement of mutuality of obligation is now widely discredited."[3] However some courts were not reluctant to invalidate unilateral option clauses solely on the grounds of lack of mutuality. What is even more alarming is that such decisions were made also in a commercial setting where a certain degree of imbalance in the obligations of the parties is a natural element of contracts.

The aim of one of the parties to refer some disputes to the other forum may be absolutely justified. The creditor for instance may want to preserve the right to derogate from the default dispute resolution and opt for the forum where the assets of the debtor are located or the licensor may seek remedies that only court decisions can provide. If one of the parties is in a more favorable position, it does not necessarily mean that the other party is in worse

1 Dragulev Deyan, "Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability" *Journal of International Arbitration*, 21 (Kluwer Law International 2014, Volume 31 Issue 1).

2 Ibid. at 22.

3 Christopher R. Drahozal, "Nonmutual Agreements to Arbitrate", 537 (*The Journal of Corporation Law, 2002)* citing Joseph M. Perillo and Helen Hadjiyannikas Bender, Corbin on Contracts § 6.1 (rev.ed 1995).

position. The party not vested with the option still has his claim and has a forum to resort to. The available forum may be absolutely appropriate due to the nature of the claim it has. Unilateral option clauses by themselves must not encompass an unjustified imbalance in the rights of the parties, yet sometimes they are invalidated solely on the grounds of lack of mutuality or based on unfairness or luck of equality. The attitude of courts to unilateral option clauses is very diverse and so is the reasoning employed by them. Their approach is influenced by forum nationality UOCs are upheld in most jurisdictions, while in some jurisdictions, there is a tendency to hold them invalid. To overcome uncertainty it is important to examine the likelihood of upholding UOCs in the jurisdictions where they might be applied.

The objective of this thesis is to provide answer whether UOCs would function as intended in various jurisdictions. It aims to cover as many court decisions indicating the approach of national courts to unilateral option clauses in a commercial setting as were accessible.[4] It will deal to some extent with decisions which were not made in a commercial setting and with decisions that concern unilateral jurisdiction clauses which are, however, relevant with regard to unilateral option clauses. Furthermore, this paper also considers the potential pitfalls, which should be born in mind when drafting a unilateral option clause. In the first chapter I will describe the nature of UOCs, the benefits they provide and the problems associated with them. In the second chapter I will analyze the decisions in those jurisdictions where UOCs are likely to be invalidated. One of the countries in this group is France, which upheld a UOC in the past, but in a very recent decision it invalidated a unilateral jurisdiction clause. I will analyze how other jurisdictions reacted to this decision and what implications it may have on the decisions of other countries. Other countries

[4] Deyan, *supra* note 1, at 32 mentioned that China (Decision of Beijing Higher People´s Court 1999) and Poland (19/10/2012, V CSK 503/11; Decision of 24/11/2010, II CSK 291/10) have also rendered decisions concerning OUCs, both invalidating them, but these decisions were not accessible for me due to language reasons.

invalidating UOCs are Germany, Russia and Bulgaria. This group thus contains some of the major economies and it is very important to know why they held UOCs invalid. The third chapter will analyze the decisions in those jurisdictions which upheld UOCs. Special attention will be devoted to English decisions, which have not only steadily upheld UOCs but also answered some questions concerning their operation. In the fourth chapter I will devote special attention to US cases due to the fact that the problem concerning UOCs is much more complex there, due to different application of defenses against UOCs by different states and the possible preemption of these defenses by federal law. I will try to find patterns in the decisions, analyze the various defenses employed by courts and also the possible conflicts between federal and state law. I will also indicate the likely future course of decisions and introduce the opinions which are gaining ground and which suggest that courts in the US may not decide on the unconscionability of arbitration clauses at all.

CHAPTER 1: BACKGROUND TO UNILATERAL OPTION CLAUSES

The aim of this chapter is to introduce the nature of unilateral clauses and outline some of the reasons why parties consider them. Moreover it describes the problems associated with a unilateral option clause (hereinafter only "UOC") when the party not vested with the option tries to circumvent it.

1.1 Definition and Nature of Unilateral Option Clauses

UOCs combine arbitration and choice of court options.[5] They allow one of the parties but not the other to choose whether to resort with an existing dispute to arbitration or to court proceedings. These clauses are also referred to as "asymmetrical", "one-sided", "one-way", or "hybrid" jurisdiction or option clauses "optional jurisdiction clauses" or "nonmutual agreements to arbitrate". "The unilateral option clause bears the features of jurisdiction clauses but is further enhanced by its multilayered structure."[6] UOC as any other jurisdiction clause is a contractual clause which "derogates from the dispute settlement venue that should normally hear any disputes arising out of the agreement. 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."[7]

UOCs may take different forms. They provide for a method of dispute resolution which is common for both parties (i.e. either arbitration or state litigation) while one of the parties is also given the right to opt for the other method of dispute resolution. The option may be defined various ways, one of the parties may be expressly named as the one having

5 Deyan, *supra* note 1, at 21.

6 Ibid. at 21.

7 Ibid. at 22.

the option, or the option may be given to certain types of claims which may arise or which are likely to arise only against one of the parties (e.g. debt collection, where only the creditor may be the claimant). "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."[8] UOCs thus capture the "imbalance between the commercial (and real-life) standing of the parties to these clauses"[9].

1.2 Why Consider Unilateral Option Clauses

UOCs are basically dispute resolution clauses that provide for a more elaborate mechanism. "Standard arbitration clauses provide the often praised flexibility which has made arbitration attractive in general."[10] Moreover, due to the fact that 149 states have adopted the New York Convention[11] foreign arbitral awards are typically easier to enforce than foreign judgments in absence of a specific enforcement treaty. However, in some cases litigation might serve the needs of the plaintiff better, especially if the award will not be enforceable at the location of the debtor´s assets, or the court procedure provides for a more effective solution against a non-participating party in form of a default judgment, or when the plaintiff needs access to broader judicial discovery not provided for in arbitration. In addition to that, litigation concerning smaller amounts might be cheaper, or in complicated disputes, the

8 Ibid, at 25.

9 Ibid. at 20.

10 Ibid at. 22.

11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations diplomatic conference on 10 June 1958.

plaintiff might want to preserve the possibility of having the decision reviewed. On the other hand, the stronger party might want to prevent the weaker party from to taking full advantage of a particular dispute resolution method. Another possibility is that the party not vested with the option to refer its claim to different forum would not benefit from such option, as due to the nature of its claim the other forum would not be more suitable for him.

Since arbitration or other jurisdiction clauses are typically agreed upon before the controversy arises, it is hard to predict the nature of the dispute and therefore complicated to forecast the type of forum clause that would fit the needs of the stronger party best. UOCs preserve for the stronger party the advantages of both court and arbitration proceedings, while at the same time prevent the weaker party from exercising a forum selection which would be inconvenient for the stronger party. Once a dispute arises, and its nature is known, the stronger party may exercise its choice and bring its claim to that forum contemplated by the clause which assists him best.

UOCs are most often used where there is imbalance in the commercial standing of the contracting parties however there are contracts where these clauses appear more regularly than in others. Loan agreements with banks and financial institutions are a typical example. The Loan Market Association[12] listed the following advantages of unilateral jurisdiction clauses which "allow the lenders to take proceedings in any court of competent jurisdiction but restrict obligors to taking proceedings in the courts of a specified jurisdiction only:

(a) they maximize a lender's ability to sue the obligors in any jurisdiction in which the obligors may have assets (this flexibility is likely to be particularly valuable if some of the obligors' assets are located in a jurisdiction whose laws do not permit direct enforcement of judgments of the specified jurisdiction's courts);
(b) consequently there may be less need for Lenders to analyze the best courts in which to proceed against the obligors until a dispute actually arises; and
(c) the lenders should be exposed to litigation from the obligors in the specified courts only."[13]

[12] The web page of the Loan Market Association is http://www.lma.eu.com/landing_aboutus.aspx

[13] Loan Market Association "Decision of the Cour the Cassation in MME X v. Rotschild and Jurisdiction Clauses in LMA Facility Documentation"
http://www.lma.eu.com/uploads/files/LMA%20Jurisdiction%20Clause%20note%20-2024%20Jan%202013.pdf

UOCs which offer the possibility for the lender to take the dispute to arbitration as well in addition to court proceedings offer even more advantages due to the flexibility provided by arbitration.

1.3 Problems Associated with Unilateral Option Clauses

The options contemplated by the UOC crystallize once a suit has been brought. Thus the forum is reduced to the one, where the proceeding has been started. However, the proceedings does not always go smoothly.[14] There are problematic scenarios associated with the use of UOCs that may occur once a proceeding has been initiated.

The scenarios, which are more frequent, occur when the stronger party may choose between arbitration and litigation while the weaker party may bring its claim only to arbitration. There are two possibilities, how this may be problematic:

a) If the stronger party exercises his option the weaker party should comply with the clause and accept the selected jurisdiction. The weaker party might however refuse to accept the chosen jurisdiction and seek to have the dispute resolved in litigation; or

b) Regardless of the fact that the weaker party is bound to refer the case to the arbitral tribunal specified in the clause, the party disregards its obligation and turns to litigation.

In both of these scenarios the weaker party is in breach of its obligations under the UOC. The court should not accept jurisdiction unless the weaker party challenges the clause arguing that it is void due to lack of mutuality, unconscionability or on other similar grounds.

(accessed: March 29, 2014).

[14] Deyan, *supra* note 1, at 33.

The other scenario occurs when the stronger party may choose between arbitration and litigation while the weaker party may bring its claim only to state court. A possible problem may arise when the weaker party initiates a court proceeding and the stronger party wishes to benefit from the arbitration option and requests stay or termination of the litigation in order to compel arbitration.

The situation becomes even more complicated where the weaker side is a consumer, who enjoys the special protection of consumer law (specially in the European Union) or an employee. UOCs concerning employees are quite frequent in the USA. On the other hand employment matters are generally excluded from arbitration in the European Union. This thesis did not intend to cover decisions which concern consumers or employees. I will analyze those cases only when they have implication on how courts may decide cases in commercial setting.

The attitude of courts to UOCs is influenced by forum nationality. They are upheld in most jurisdictions including US (with some exemptions) and England, while in some jurisdictions (i.e. France, Russia, Bulgaria) there is a tendency to hold them void. As a consequence, in the latter countries the only possible redress the stronger party might seek is the jurisdiction of the court determined by international private law, which is in fact the one it tried to prevent. "However, the differing attitudes towards "one-sided" dispute resolution clauses in many jurisdictions mean that the benefits offered by the theoretical flexibility of UOCs are often tempered by real-world uncertainty as to whether they will function as they are intended."[15]

[15] Marie Berard and James Dingley, "Unilateral option clauses in arbitration: an international overview", (*Practical Law, 2013),* http://uk.practicallaw.com/7-535-3743 (accessed: March 11, 2014).

CHAPTER 2 - JURISDICTIONS WHERE UNILATERAL OPTION CLAUSES ARE LIKELY TO BE INVALIDATED

In most countries, the faith of the unilateral arbitration clauses has not been decided. As decisions are rare, in order to find out what is the likely outcome, I will also analyze decisions concerning unilateral jurisdiction clauses, where in addition to the court which is common for both parties, one of the parties may resort with an existing dispute also to a different court. In my analysis I will start with Germany, which was largely influenced with the aim to protect weaker parties and I will discuss why this decision might have implications on decisions in other European Union (EU) member states. Then I will analyze a French decision upholding a UOC and a recent, much criticized decision of the French Cour de Cassation striking down a unilateral jurisdiction clause which might have implications on UOCs. Moreover I will analyze a decision of the Bulgarian Supreme Court of Cassation which is similar with the reasoning to the recent French decision. Lastly, I will analyze two Russian decisions, which illustrate the Russian policy to prevent foreign forums from deciding cases related to Russia.

2.1 Germany

German law does not bar UOCs in general.[16] In Germany, arbitration clauses as contracts have to be considered from both procedural and contractual perspective. "The starting point is that there is nothing in German arbitration law which prohibits optional or unilateral clauses."[17] General contract rules which are applicable also to UOCs provide that

[16] Deyan, *supra* note 1, at 21.

[17] Simon Nesbitt, Henry Quilan, "The Status and Operation of Unilateral Optional Arbitration Clauses" www.kluwerarbitration.com (accessed: Sept. 30, 2014).

"legal transactions which are contrary to public policy are void."[18] In addition to that if a UOC is contained in a contract of adhesion, the provisions of civil code regulating standard terms are applicable. They provide that "provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user." [19] One major difference between standard form contracts and negotiated contract in German law is that "In the case of a standard form contract …, the court cannot amend or adapt a clause by disapplying its offending elements. The partial invalidity of a clause in a standard form contract will therefore result in the invalidity of the entire clause. In a negotiated contract, however, the judge can uphold the remainder of the clause, provided it can be assumed that the parties would have opted for arbitration without limitation, even if they had known that the limitations were invalid."[20]

A German court decided about a UOC, which was contained in a contract of adhesion in 1998.[21] The clause provided for litigation as the default dispute resolution method, but it also permitted one of the parties to refer the dispute to arbitration regardless of the fact whether it was claimant or defendant. The court invalidated the clause. It held that this was unfair because "the party without the benefit of the clause had no choice but to refer its disputes to the court, whereupon the other party could render those proceedings nugatory by opting for arbitration …The claimant would therefore have incurred unnecessary costs in bringing the proceedings."[22] The English Court in the case of *NB Three Shipping Ltd v Harebell Shipping Ltd*.[23] upheld a similar clause. It is possible that the German court would have also upheld the clause had it not been contained in a contract of adhesion or had it

[18] German Civil Code Section 138.

[19] German Civil Code Section 307(1).

[20] Nesbitt, *supra* note 17, referring to BGH, 4 November 1992, VIII ZR 235/91, BGHZ 120, 108, 122 and German Civil Code article 139.

[21] BGH (Federal Court of Justice), 24 September 1998, III ZR 133/97, NJW 1999, 282, 283.

[22] Nesbitt, *supra* note 17.

[23] High Court of Justice Queen's Bench Division Commercial Court, [2004] EWHC 2001.

provided for steps parties were obliged to take in order to prevent incurrence of costs for the claimant or compensation for the costs incurred by the claimant.

The aim to protect weaker parties is characteristic for consumer protection legislation which is very extensive in the European Union. This case might thus have implications also for other jurisdictions within the European Union. Member states were obliged to implement the Council directive 93/13/EEC on unfair terms in consumer contracts until January 1995. The aim of this directive is to protect consumers against unfair terms in contracts which have not been individually negotiated. As a result, much stricter standards apply to consumer contracts of adhesion. The Directive contains an indicative list of the terms which may be regarded as unfair. One of these items is a term "requiring the consumer to take disputes exclusively to arbitration."[24] Some of the states have not implemented a list of unfair terms, some have implemented this list as a grey list, where the terms are presumed to be unfair, and some as a blacklist, where the terms are absolutely unlawful clauses.[25]As a result in most states a term requiring the consumer to take disputes exclusively to arbitration would be considered to be an unfair term and as a result it will not be binding on the consumer. Under the Directive consumer means "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession."[26] However, member states may adopt a wider definition of "consumer" and some of them in fact have broadened it to include also other weaker parties. In addition to this, some member states did not limit the application of their unfair term legislation to consumers. Consequently, it also applies in a commercial setting.

[24] Terms referred to in article 3 (3) 1. (q).

[25] H.-W Micklitz, J Stuyck, E. Terryn, *Cases Materials and Text on Consumer Law*, (Oxford-Portland, 2010).

[26] Article 2 (b).

To conclude, if the law of a member state applies to a contract with a UOC and it was not individually negotiated, the legislation concerning the unfair terms shall be consulted at first place in order to find out whether the UOC is binding on the other party.

2.2 France

There are two cases in France that concern asymmetric dispute resolution clauses. The first concerned a UOC, which was upheld. The second decision, which casts shadow on the previous decision, concerned a unilateral jurisdiction clause which was invalidated.

2.2.1 Sicaly v Grasso

Sicaly v Grasso[27] concerned a UOC, which was concluded between a French company Grasso and a Dutch company (Sicaly). The default dispute method of dispute resolution was litigation, but Grasso could chose to submit the dispute to arbitration. When a dispute arose, Grasso initiated an arbitration proceeding. Sicaly attempted to refer the dispute to a French court arguing that ”such an optional clause could only mean that the parties had no intention to submit their dispute to arbitration. The court disagreed and refused to consider the clause null and void.”[28] It held that “the clause demonstrated with sufficient clarity that Sicaly had accepted the possibility that disputes falling within the scope of the agreement could be submitted to arbitration, and had therefore impliedly waived the benefit afforded by article 14 [Civil Code].”[29] The Cour de Cassation, confirmed this decision. “Though this appears to be

[27] S.A. Sicaly v Grasso Stacon Koninklijke Machine Fabrieken NV, Cour d'appel d'Angers, Premiere chambre civile, 15 May 1974: Bull. civ. I, no. 143.

[28] Nicolas Bouchardie and Celine Tran, “Arbitration in France”, (*Practical Law)* http://www.whitecase.com/files/Uploads/Documents/Arbitration-in-France.pdf (accessed: March 10,2014).

[29] Ibid.; Article 14 Civil Code provides as follows: “An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he

the only reported case to have been heard in France, commentators generally hold the view that the case was correctly decided, and that there is no reason why, under French law, such clauses should not be upheld."[30]

2.2.2 Ms X v Banque Privée Edmond de Rothschild

Rothschild [31] is inconsistent with the previous case and has been subjected to much criticism. In this case, the Cour de Cassation considered the validity of a unilateral jurisdiction clause. The jurisdiction clause provided for the "exclusive jurisdiction of the Courts of Luxembourg"[32] but the bank reserved "the right to bring an action before the Courts of the client's domicile or any other court of competent jurisdiction."[33]

Mrs X, a French national brought an action for damages against Rothschild before the Paris courts.[34] Rotschild challenged the jurisdiction of the Paris court. The court held that: "by reserving the Bank's right to bring an action in Mrs X's place of domicile or in any other court of competent jurisdiction ... the clause was potestative in nature, for the sole benefit of the Bank, and therefore was contrary to the objectives and the finality of the prorogation of jurisdiction provided for in Article 23 of the [Brussels] Regulation."[35]

The case is more than peculiar. It was wrongly decided for a number of reasons. First, Article 23 of Brussels Regulation provides that the parties may select the court of which

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may be called before the courts of France for obligations contracted by him in a foreign country towards French persons." (Translated by : Georges Rouhette, www.legifrance.gouv.fr, accessed: March 14, 2014).

30 Nesbitt, *supra* note 17.

31 Cour de cassation, first civil chamber, Case No 11-26.022 (26 September 2012).

32 Maxi Scherer and Sophia Lange, "The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?" http://kluwerarbitrationblog.com/ (accessed: March 7, 2014).

33 Ibid.

34 Ibid.

35 Scherer, *supra* note 32; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation).

Member State shall have jurisdiction and "such jurisdiction shall be exclusive unless the parties have agreed otherwise." So the regulation expressly allows the parties to decide on non exclusive jurisdiction. Second, the Regulation as an EU legislative act should have an interpretation autonomous from the law of the member states.[36] Third, the contract was governed by Luxemburg law and the French court applied the French concept of "potestative" to interpret it. Last, According to article 1170 Civil code: "the doctrine of potestativité describes a situation in which performance of a contract is made subject to the occurrence of a condition precedent entirely within the power of only one of the contracting parties."[37] It is clear from the wording of the mentioned article that this doctrine is not applicable to UOCs.

One of the interpretations of this decision is that the court invalidated the clause, because, Rotschild´s right to select jurisdiction was too wildly defined as "any other court of competent jurisdiction" and if it were narrower the court might have upheld it. If this interpretation applies the decision would conflict with an earlier decision of European Court of Justice, where it held that "it is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or courts to which they wish to submit their disputes" [38] An interesting fact is that the court never considered this case from a consumer protection perspective.

This decision was criticized in the English case *Mauritius Commercial Bank v. Hestia Holdings*[39] where the court had upheld a very similar jurisdiction clause. Regardless of the wide criticism, this decision might have influence on many jurisdictions influenced by French law.

[36] Deyan, *supra* note 1, at 38.

[37] Scherer, *supra* note 32.

[38] Coreck Maritime GmbH and Handelveem BV and Others, Case C-387/98.

[39] Mauritius Commercial Bank Limited v Hestia Holdings Limited, Sujana Universal Industries Limited, High Court of Justice Queen's Bench Division Commercial Court, [2013] EWHC 1328 (Comm).

2.3 Bulgaria

In a case from 2011 the Commercial Chamber of the Bulgarian Supreme Court of Cassation invalidated a UOC.[40] The clause in a loan agreement provided that "the lender might initiate proceedings against the borrowers before the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry (BCCI) or any other arbitration institution, or before the Regional Court of Sofia."[41]

The Lender initiated an arbitration the before BCCI, which decided for the lender. The borrower sought to set aside the award. The court invalidated the award holding that: "the right of the lender to choose at its own discretion the dispute solving body … falls within the category of 'potestative' rights. The essential characteristic of a 'potestative' right is the entitlement of one person (or a group of persons) to affect unilaterally the legal position of another person (or a group of persons), where the latter are obliged to bear with the consequences. Due to the intensity and potentially detrimental effects of 'potestative' rights on third parties, they exist only by virtue of law and are not subject to contractual arrangements."[42]

The reasoning of this case is very similar to the reasoning in Rotschild, but it as a entirely domestic dispute, is based only on Bulgarian law, and therefore the criticism of Rotschild may not be applied here. As this case was decided by the highest court in Bulgaria it is very unlikely that any Bulgarian court would uphold a UOC.

[40] Judgment No. 71 in commercial case No. 1193/2010.

[41] Gilles Cuniberti, "Bulgarian Court Strikes Down One Way Jurisdiction Clause" (2012) http://conflictoflaws.net/2012/bulgarian-court-strikes-down-one-way-jurisdiction-clause/ (accessed: March 8, 2014).

[42] Ibid.

2.4 The Russian Federation

"Russian courts have been approving of unilateral clauses in general. However, a recent decision has made a stark difference."[43] In this part of my thesis I will first analyze a decision which upheld a UOC then I will analyze a very controversial decision of the Presidium of the Supreme Arbitrazh Court of the Russian Federation (SAC).

2.4.1. Red Burn Capital v Zao Factoring Company Eurocommerz

In Red Burn[44] the court upheld the validity a UOC. The arbitration clause provided for arbitration at the London Court of International Arbitration (LCIA), however it also provided that if Red Burn objected to arbitration before the appointment of arbitrator he could demand that the dispute be heard by a state court.[45] The court of first instance refused Red Rurns motion and terminated the court proceedings. The appellate court reversed the decision. On further appeal "the SAC found that the dispute resolution clause was valid and effective and that Red Burn could elect to bring its claim before the Russian courts."[46] The court noted that "the credit agreement provided greater rights to the finance party (i.e. Red Burn) in respect of the choice of forum. The court also considered the commercial positions of the parties and found it reasonable that the agreement protected the interests of the party at risk (i.e. the finance party)."[47]

Upholding the UOC in this event meant that the Russian court could decide the disputes concerning a Russian company.

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43 Deyan, *supra* note 1, at 30.

44 Red Burn Capital v Zao Factoring Company Eurocommerz,case No. A40-59745/09-63-478.

45 James Stacey and Angela Taylor, "Unilateral jurisdiction Clauses in the UK" (*IFRL, Sept 23, 2013*).

46 Francesca Albert, Herbert Smith:, "Russia: An improvement in relations between the Russian courts and international arbitration" (2011), http://kluwerarbitrationblog.com/ (accessed: March 7, 2014)

47 Ibid.

2.4.2 Russkaya Telefonnaya Kompaniya and Sony Ericsson Mobile Communications Rus

The dispute concerned a Russian company Russkaya Telefonnaya Kompaniya ("**RTK**") and Sony Ericsson Mobile Communications Rus. a Russian subsidiary of Sony Ericsson ("**Sony Ericsson**").[48] The jurisdiction clause provided for ICC arbitration in London as a default forum while Ericson was also granted the option to refer disputes to a court of competent jurisdiction in respect of claims for outstanding payments for the goods delivered.[49]

In 2009, RTK commenced proceedings before the Arbitrazh Court of the City of Moscow, seeking delivery of replacement goods. In reliance on the dispute resolution clause, Sony Ericsson successfully argued that the court did not have jurisdiction and the claim should be left without consideration.[50] The decision was affirmed at the next two levels of appeal, both courts holding that the clause was in accordance with the freedom of contract.[51] RTK filed a supervisory appeal with the SAC, and a panel of three judges held that the clause violated the principle of procedural equality, and referred the matter to the Presidium of SAC.[52]

The Presidium found that "one of the guarantees of fair dispute resolution is that the parties should have equal rights to present their positions to the courts or other adjudicatory authorities (including arbitral tribunals) and that the principles of adversarial proceedings and procedural equality of the parties mandate that the parties should have equal procedural

[48] case No. VAS-1831/12.

[49] Berard, *supra* note 15.

[50] Timur Aitkulov, Julia Popelysheva, "The Supreme Arbitrazh Court of the Russian Federation rules on the validity of dispute resolution clauses with a unilateral option" http://kluwerarbitrationblog.com (accessed: March 8, 2014).

[51] Ibid.

[52] Ibid.

opportunities."[53] The presidium thus held that: "based on the general principles of protection of civil law rights, an agreement on dispute resolution cannot grant only one party under a contract the right of recourse to a competent state court and deprive the second party of an analogous right. Where such an agreement is concluded, it is invalid as violating the balance of the parties' rights. Accordingly, a party whose right is infringed by such an agreement on dispute resolution also has the right of recourse to a competent state court, having exercised the guaranteed right to judicial protection on equal terms as its counterparty."[54]

The effect of the decision is not entirely clear there are two interpretations of it. First, that the whole clause was invalidated and, the second and more preferable, that the unilateral nature of the clause fell away and it was in effect converted into a bilateral option clause with both parties having the opportunity to opt between arbitration and litigation.[55] Thus "formally, the clause was not held to be void. However, the substance of the clause was altered and it was deprived of its purpose"[56]

The decision does not indicate that the Russian courts would refuse to enforce arbitral awards made in similar proceedings. But "the decree opens door to parallel proceedings in Russia aimed at torpedoing arbitration proceedings. Currently, parallel proceedings in Russian courts are commonly used by Russian respondents as a means of avoiding enforcement of arbitral awards in Russia."[57] As a result, if a party would like to exclude the jurisdiction of Russian courts, it would have to conclude a clause which refers disputes exclusively to arbitration.

An interesting fact about both decisions is that both were decided so Russian courts have jurisdiction. This is in line with the policy "made obvious only a few days after Mr.

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Deyan, *supra* note 1, at 31.

[57] Aitkulov, *supra* note 50.

Putin's inauguration in May when Anton Ivanov, chairman of the Supreme Arbitration Court, promulgated a new legal vision ending "unfair competition" posed by foreign courts. Mr. Ivanov went so far as to suggest that, in some cases, punitive action could be brought against persons involved in legal procedures against Russian citizens abroad if the court rulings contradicted Russian law. He threatened 'quid pro quo reprisals', such as freezing assets or a visa blacklist against defendants, attorneys and judges responsible for unfair rulings against Russians."[58]

As a result, I believe that the decisions of Russian courts concerning UOCs would be made so as to comply with this policy, and make possible that Russian courts decide disputes concerning Russian law and Russian nationals.

2.5 Lessons Learned from Cases Invalidating Unilateral Jurisdiction Clauses

This chapter has demonstrated that courts stroke down UOCs, for different reasons. In Germany, a UOC in a contract of adhesion was invalidated as the structure was such that it might have resulted in extra costs for the weaker party. Non negotiated contracts are looked at with great suspicion within the EU, what is not always limited to consumer protection setting. Consequently, if the substantive law of a member state applies to a contract of adhesion with a UOC, the legislation concerning the unfair terms shall be consulted at first place in order to ascertain, that the UOC will be upheld.

The French Cour de Cassation has invalidated a unilateral jurisdiction clause with a decision which is seriously flawed and much criticized. In addition to that, similar were upheld in England and Italy. It may however still impact decisions in France and in other

[58] Charles Clover, "Russian court move seen as power grab", *Financial Times,* http://www.ft.com/cms/s/0/ea1bd9ac-3a0f-11e2-a00d-00144feabdc0.html#axzz2vHgV9sF1 (accessed March 7, 2014).

countries which are largely influenced by French law. The Supreme Court in Bulgaria has also held a UOC invalid, due to lack of mutuality. The case was not limited to consumer setting therefore it is very unlikely that any Bulgaria would uphold a UOC in commercial setting. The situation is Russia is in line with the publicly announced policy of fighting foreign jurisdictions deciding cases concerning Russian law. A recent decision concerning a UOC has deprived the UOC of its purpose, with the effect of allowing a Russian court which would not have jurisdiction to decide.

If a party wants to exclude the jurisdiction of courts in the jurisdictions included in this chapter, the only certain avenue is to include an exclusive arbitration clause, or in Germany in the event of a contract of adhesion, to prevent the weaker party from incurring extra costs.

CHAPTER 3: STATES UPHOLDING UNILATERAL OPTION CLAUSES

Most states have upheld UOCs. England has the steadiest and most complex judicature. Therefore I will first analyze the decisions of English courts. Later in this chapter I will briefly analyze the decisions from other jurisdictions where UOCs were upheld.

3.1 England and Wales

English courts have a steady jurisdiction of confirming UOCs. All of the cases I will analyze in this thesis took part in a commercial setting. Due to the consumer protection legislature, it is, however, not excluded that UOCs in consumer related claim would be invalidated.

3.1.1 The Validity of Unilateral Option Clauses

The tendency to uphold arbitration clauses with unequal obligations to refer disputes to arbitration has been continuous since the decision in the case *Woolf v Collis Removal Service*[59] from 1947 with one exception. In *Woolf* the arbitration clause contained in the contract required the customer, but not the warehouseman to refer his claims to arbitration. The court upheld the clause noting that "there is nothing in its unequal operation to divest it, in our view, of the character attributed to arbitration clauses in general"

In *Tote Bookmakers Ltd v Development & Property Holding Co Ltd*,[60] (1985) the Chancery decision decided that a unilateral right to refer disputes to arbitration does not create

[59] Court of Appeal, [1948] 1 K.B. 11.

[60] Chancery Division, [1984], 2 W.L.R. 603.

an arbitration agreement. The court based this decision on a previous case,[61] which did not concern arbitration. This case was wrongly decided and it was overruled the very next year by *Pittalis v. Sherefettin*.[62]

In *Pittalis*[63] (1986), the court upheld a UOC stating: "I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant…. I do not think it is correct to say that the clause must give bilateral rights of reference. All that is necessary is that there shall be a contract which gives right of reference." The court thus absolutely rejected that the lack of mutual rights to chose forum could be ground to invalidate a UOC.

3.1.2 Operation of Unilateral Option Clauses

In addition to the validity of UOCs courts in England also addressed the question how they should operate in practice. The first case which addressed that issue was *NB Three Shipping Ltd v Harebell Shipping Ltd*.[64] In *NB Three Shipping*, the charterparty provided that the charterers were limited to bringing proceedings in the courts of England, but also permitted the owner to bring proceedings to arbitration and in addition to the Courts of England in any other court which had jurisdiction by virtue of any convention. The clause also provided that: "Any dispute arising from the provisions of this Charterparty or its

[61] Baron v. Sunderland Corporation [1966] 2 QB 56.

[62] In the Supreme Court of Judicature, [1986] WL 408148.

[63] In *Pittalis* a tenancy agreement concluded for 21 years provided that the landlord can adjust the rent according to the rules in the tenancy agreement. If the tenant disagreed with the assessment of the landlord, he could refer the matter to arbitration. The landlord had no such right. When the dispute arose, the tenant resorted to arbitration and the tenant argued that as the arbitration clause was unilateral it was invalid.

[64] *Supra* note 23.

performance which cannot be resolved by mutual agreement which the Owner determines to resolve by arbitration shall be referred to arbitration." When the dispute arose, the charterers brought a claim to an English court, which was in fact the only forum they could chose. The owners promptly wrote to the charterers expressing their surprise that they were not consulted before court proceeding whether they wanted to opt for arbitration, and insisted that they could still exercise this option.

Few days later they sent another letter informing the charterers that they are exercising their option. The owners requested stay of the court proceedings. The charterers claimed that since they already brought a court proceeding, the owners could not exercise their option to refer the case to arbitration. The court ordered a stay pending arbitration. It emphasized that, the objectives of the English Arbitration Act is "to give the parties' autonomy over their choice of forum" and the clause operated so that "once Owners exercise their option the parties have agreed that the disputes should be arbitrated."

The court pointed at the "commercial sense of the clause as a whole" which was "designed to give better rights to owners." The court held that the charterers could not bypass the Owners' determination to have disputes resolved by arbitration they "can obtain no advantage from jumping the starting gun." The court noted that: "It would have been better had the precise circumstances in which the option could be exercised or lost were spelt out with greater clarity, but this failure does not… render the clause unenforceable." Furthermore it emphasized that the option of the owners is not open ended, "it would cease to be available if owners took a step in the action or they otherwise led Charterers to believe on reasonable grounds that the option to stay would not be exercised."

Another question concerning the operation of arbitration clauses was resolved by *The Law Debenture Trust Corporation Plc v Elektrim Finance B.V.*[65] The question which arose

[65] High Court of Justice Chancery Division, [2005] WL 1630790.

was the opposite of that solved in *NB Three Shipping*. The trust deed provided for arbitration, but the parties agreed that notwithstanding that clause for the exclusive benefit of the trustee, the trustee shall have the exclusive right, at his option, to apply to the courts of England. The guarantor initiated arbitration. The trustee maintained that regardless of the fact that the guarantor initiated arbitration, his right to refer the dispute to court still existed. The trustee objected to the jurisdiction of the arbitral tribunal and commenced court proceedings. The guarantor requested stay of the proceedings.

First, the court had to decide who should determine the question of jurisdiction. The court decided that it was competent to decide that question, as (1) it did not involve wide ranging factual enquiry, (2) the judge did not think it was right that the arbitrators in this case should decide the jurisdiction dispute as the trustee never agreed to his jurisdiction and it would be unfair if arbitrators whose very authority he was disputing would decide that very dispute, (3) it was the most cost-effective thing to do, as cost would be incurred in the arbitration and it was likely that the court would nevertheless have to review the decision.

Then the court moved on to decide the question of jurisdiction. The court analyzed the clause, which provided that the trustee had "exclusive right" to apply to the courts of England, which right was "at his option." The court found the wording of the clause clear and unequivocal and held that the trustee has "exclusive" right, i.e. the trustee has this right while the guarantor does not. The court, therefore, held that the trustee "cannot be forced to arbitrate if it wishes to commence its own proceedings covering the same subject matter." There is, however, one limitation to the right of the trustee, if it "starts an arbitration it would have waived its right (or option) to go by way of litigation. By the same token, if it participates sufficiently in an arbitration, it may well be held to have waived its rights to exercise its

option."As the trustee did not participate in the arbitration proceedings, the court held that the trustee had right to refer the case to court and refused to stay the court proceeding.

These cases demonstrate that English Courts have steady tendency to uphold UOCs. In addition in *NB Three Shipping* and *Law Debenture* the court not only confirmed the decision in *Pittalis* to uphold UOCs but also clarified that if the clause is sufficiently clear, the party who is granted the unilateral option to choose jurisdiction, can exercise this option not only as the plaintiff but also as the defendant, regardless of the fact whether his exclusive option comprises of the right to refer the case to litigation or arbitration. The party vested with the option may exercise its right provided that, it did not take a step in the action it is objecting or it did not lead the other party to believe on reasonable grounds that he would not exercise its right. In order to avoid costs, it is advisable for the party not vested with the option to attempt to agree on the option.

In many jurisdictions, when a court proceeding may be commenced on multiple forums, the basic rule is that the court first seized of a given matter will decide the case. It is in fact the rule contained in the Brussels Regulation[66] and Lugano Convention.[67] In the above disputes however, the courts decided differently. They found that the clause was drafted for the benefit of only one of the parties, and the right of the party vested with the option to choose between the forums was preserved even after the first party commenced the proceedings. This result might seem odd to many practicing lawyers. I nevertheless believe that the above cases were decided correctly. The UOCs were drafted clearly for the benefit of one of the parties, and there would be no commercial rationale behind a holding that the party not vested with the option to choose forum could bypass the other parties right to select forum.

[66] Supra *note* 35.

[67] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007) (Lugano Convention).

3.2 Australia

The High Court of Australia decided a case concerning a UOC in the case *PMT Partners Pty Ltd (In Liq) v Australian National Parks & Wildlife Service.*[68] The Case concerned a rather complicated arbitration clause of a construction contract concluded between the principal and the contractor. Under the clause, only the contractor had the option to request the dispute to be referred to arbitration. In order to have the opportunity to exercise this right he had to follow a multistep procedure, submit the dispute to the Superintendent within 14 days after the difference arose, if dissatisfied with the decision submit the dispute to the principal within 14 days as of the previous decision, and if dissatisfied with this decision as well within 28 days as of its receipt send a letter to principal requiring that the matter be submitted to arbitration.

The clause further provided that: "If, however, the Contractor does not, within the said period of twenty-eight days, give such a notice to the Principal requiring that the matter at issue be referred to arbitration, the decision given by the Principal pursuant to the last preceding paragraph shall not be subject to arbitration. Where a notice is given by the Contractor to the Principal pursuant to the last preceding paragraph requiring that the matter at issue be referred to arbitration no proceedings in respect of that matter at issue shall be instituted by either the Principal or the Contractor in any court unless and until the arbitrator has made his award in respect of that matter at issue." Consequently, if the above described process was followed, the only available forum for both parties was arbitration.

One of the questions before the court was whether the above clause constituted an arbitration agreement. "Arbitration agreement" is defined in section 4 of the Commercial Arbitration Act 1985 to mean, unless the contrary intention appears, "an agreement in writing

[68] High Court of Australia [1995] HCA 36.

to refer present or future disputes to arbitration". In its decision the Supreme Court refused the interpretation of the appellate court, which held that in order to constitute an arbitration agreement both parties have to be bound to refer disputes to arbitration.

The Supreme Court stated that: "It is of fundamental importance that statutory definitions are construed according to their natural and ordinary meaning unless some other course is clearly required. It is also of fundamental importance that limitations and qualifications are not read into a statutory definition unless clearly required by its terms or its context." The Court concluded that: "the terms of the definition of 'arbitration agreement' in section 4 of the Act extend to an agreement whereby the parties are obliged if an election is made, particular event occurs, step is taken or condition is satisfied (whether by either or both parties) to have their dispute referred to arbitration." The court, thus, held that the clause in question did not constitute a simple UOC, but rather a UOC which could be invoked by the party which is vested with the option, if prior to exercising the option the procedures stipulated by the clause were followed.

An interesting fact in this decision is that the in absence of previous Australian decision on UOCs, the Supreme Court referred to the *Pittalis* and also to works of English scholars. It proves that Common Law jurisdictions are likely to take into account each other's decisions. This case also shows that Australian courts will not only uphold UOCs, but also more complicated constructions of arbitration clauses.

3.3 Hong Kong

In *China Merchants Heavy Industry and JGC Corporation*[69] the Court of Appeal had to decide about the operation of a clause which was not an UOC, but the implications are significant also with regard to UOCs.

Under the arbitration clause, if a dispute could not be settled by mutual agreement, JGC was required to state its decision, which was binding until completion of the works. Once the decision had been notified to the contractor, the contractor was required to continue carrying out works. If the contractor did not agree with JGC´s decision, it should have notified JGC within 15 days after the date of the above decision that it wished to refer the dispute to arbitration.

It was common ground between the parties that all the steps were followed, except for the last one, the contractor never notified JGC that it wished to arbitrate. The contractor commenced court proceedings and JGC requested the court to stay the proceedings.

By referring at *Pittalis* the court concluded that there was no doubt that a "clause in an agreement which gives only one of the parties the right to refer any dispute of difference is an arbitration agreement within the meaning of Art. 8(1)" of UNCITRAL Model Law[70] on International Commercial Arbitration, which applies in Hong Kong. The court held that the fact that the party failed to exercise its right to refer a dispute to arbitration did not render the arbitration clause inoperative. As the arbitration clause was not inoperative, the court ordered stay of proceedings.

[69] In the High Court of the Hong Kong Special Administrative Region, Court of Appeal, CACV 112/2001.

[70] Art. 8(1) of the UNCITRAL Model Law provides as follows:"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

This case has two significant implications. First, if the UOC sets a time limit for the party, whose only recourse to dispute resolution is arbitration, and this party fails to exercise its right within the time limit, it would be left with no recourse to dispute resolution. Second, Courts in Hong Kong would uphold UOCs and would likely take into account the later decisions of English courts about UOC, which is significant due to the fact that the English cases have addressed issues concerning operation of UOCs.

3.4 Italy

Unilateral jurisdiction clauses "have consistently been upheld by the Italian Corte di Cassazione, broadly on the basis that the parties should, in principle, be free to agree how to determine their disputes, including granting one party only the option to refer a dispute to arbitration."[71] One such case is from 1970.[72]

In two recent cases Italian courts also upheld unilateral jurisdiction clauses. One of them was decided by the Milan Court of Appeal.[73] The other one was *Grinka in liquidazione v Intesa San Paolo, HSBC*[74] where the Supreme Court decided a dispute concerning a clause under which one of the parties was bound to refer disputes to English courts while the other could bring a claim before Italian courts or any other court having jurisdiction under international conventions. The Supreme court held that "the parties' asymmetrical position with respect to jurisdiction was consistent with Article 23 of Brussels Regulation,[75] which

[71] Nesbitt, *supra* note 17.

[72] Corte di Cassazione, Judgment No. 2096 of 22 October 1970 .

[73] Milan court of Appeal September 22, 2011, Sportal Italia v Microsoft Corporation also upheld a unilateral jurisdiction clause.

[74] Supreme Court, Case 5705, April 11 2012.

[75] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation).

provides that a choice of jurisdiction will be exclusive unless the parties have agreed otherwise', thus admitting that the parties may opt for non-exclusive jurisdiction clauses."[76]

The clause in this case was similar to the one in *Rotschield*, where the French Court of Cassation invalidated the clause, holding that it was contrary to Art. 23 Brussels Regulation. It is interesting to compare these decisions as the potestative doctrine is present in both laws[77] "but the Italian Supreme Court found nothing wrong with the possibility for one of the contracting parties to choose among various jurisdictions, despite the fact that such a choice depends on the mere will of that party."[78]

Due to the constant judicature upholding unilateral jurisdiction clauses it is very likely that Italy would also uphold UOCs.

3.5 Spain

The Court of Appeal of Madrid in a recent decision,[79] has upheld a UOC. The clause formed part of a commercial agreement between a Spanish company and a Dutch company and its Spanish subsidiary and provided for choice between arbitration in two different institutions, and litigation.

The court held that "there is nothing in Spanish law undermining the effect of unilateral clauses"[80] and "the combination of arbitration and court litigation options can be justified on the grounds of party autonomy."[81]

[76] Claudio Perrella, "Italian Supreme Court Considers Unilateral Jurisdiction Clauses"(Mondaq, April 8, 2013).

[77] Article 1355 Italian Civil Code.

[78] Perrella, *supra* note 76.

[79] Decision of 18 Oct. 2013 of Court of Appeal of Madrid.

[80] Deyan, *supra* note 1, at 28.

[81] Ibid.

3.6 Lessons Learned from Cases Upholding Unilateral Jurisdiction Clauses

The cases in this chapter have demonstrated that courts in England and Wales, Australia, Hong Kong, Italy and Spain are very unlikely to invalidate UOCs in commercial setting. The most significant decisions are those from England, which also address the operation of UOCs. If the clause is sufficiently clear, the party who is vested with the option to choose jurisdiction, may exercise its option not only as the plaintiff, but also as the defendant, regardless of the fact whether its exclusive option comprises of the right to refer the case to litigation or arbitration. This right is exercisable until it takes a step in the action it is objecting or leads the other party to believe on reasonable grounds that it would not exercise its right. In order to avoid costs, it is advisable for the party not vested with the option to attempt to agree on the option. The decisions from England are very significant as other Common law jurisdictions are very likely to follow them.

A very important thing one has to bear in mind with regard to UOCs in Hong Kong is that, if the UOC sets a time limit for the party, whose only recourse to dispute resolution is arbitration, and this party fails to exercise its right within the time limit, it would be left with no recourse to dispute resolution.

CHAPTER 4 - UNILATERAL OPTION CLAUSES IN THE USA

"There is no settled case law invalidating unilateral clauses in the US."[82] Courts have faced unilateral clauses in a priori imbalanced agreements such as employment contracts, consumer contracts, franchise contracts, where there is a line of decisions that jurisdiction options may be contrary to the law. "A growing number of courts -albeit still a minority refuse to enforce arbitration clauses with asymmetric obligations to arbitrate, either on the ground that the clause is unconscionable or that it lacks mutuality of obligation."[83] The reason for different approaches of various state courts to UOCs lies in the different approaches of courts to contract law defenses and to arbitration itself which might be further complicated in the future with different interpretations of the provisions of the Federal Arbitration Act (FAA).

In this chapter, I will introduce the defenses some courts in the US use to invalidate UOCs, I will explain how FAA may preempt those defenses, and I will introduce some new approaches claiming that some of the defenses can be used only by arbitrators or cannot be used at all.

4.1 The Federal Arbitration Act and the defenses it permits to use

"The FAA was enacted by the Congress in 1925 in response to widespread judicial hostility to arbitration agreements."[84] "The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings."[85] "In the last three decades, as the Supreme Court has expanded the

[82] Berard, *supra* note 15, at 27.

[83] Christopher R. Drahozal, "Nonmutual Agreements to Arbitrate", 537 (*The Journal of Corporation Law, 2002)*

[84] Hall Street Associates, L.L.C. v. Mattel, Inc.,552 U.S. 576 (2008).

[85] AT&T Mobility LLC v. Concepcion, 563 U.S. 321 (2011).

scope of the FAA,[86] arbitration clauses have become a routine part of consumer, franchise, and employment contracts."[87] Consequently, unilateral clauses in imbalanced agreements started becoming of important concern in the mid- 1980´s. The court decisions concerning UOCs are important also from the perspective of commercial arbitration, as some of them concern commercial parties, while many others are not expressly limited to a noncommercial setting.

The "primary substantive provision of the FAA "[88] is Section 2, which provides, in relevant part, as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Whereas there is no general federal law of contracts, and therefore no uniform rules applicable to the revocation of contracts, the validity and enforceability of UOCs must be determined by "reference both to the applicable statutes and to otherwise applicable law as shaped by the courts."[89]

The US Supreme Court has noted that this provision is reflecting both a "liberal federal policy favoring arbitration"[90] and the "fundamental principle that arbitration is a matter of contract."[91] The court concluded that "in line with these principles, courts must place arbitration agreements on an equal footing with other contracts"[92], and "enforce them

[86] FAA was originally regulating only "the enforceability of agreements to arbitrate that applies to all contracts involving interstate commerce in both state and federal court". (Southland Corp. v. Keating, 465 U.S. 1, 12 1984) The Supreme Court has gradually adopted a broad interpretation of interstate commerce.

[87] David Horton, "Unconscionability wars" (*Northwestern University Law Review*, Vol 105, No 1, 2012), 388

[88] Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, (1983).

[89] Hans Smit, "The unilateral arbitration clause, comparative analysis", (*American Review of International Arbitration*, 2009).

[90] *Supra* Note 87 .

[91] Rent–A–Center, West, Inc. v. Jackson, 561 U.S., 130, (2010).

[92] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, (2006).

according to their terms."[93] It has been generally accepted that since the clause refers to defenses that are grounds for revocation of any contract "§ 2's saving clause permits agreements to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability."[94]

Consequently, arbitration clauses cannot be invalidated by "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue."[95] Thus, courts cannot apply stricter standards in order to invalidate arbitration clauses.

4.2 Defenses applied by US courts to invalidate unilateral option clauses in arbitration

"The battleground for litigants challenging the validity of arbitration agreements has been effectively limited to the realm of challenges to a contract's validity that are applicable to all contracts generally under state law."[96] The main problem is that the line between generally applicable contract defenses and defenses which derive their meaning from the fact that an agreement to arbitrate is at issue might be very thin and some courts tend to develop special case law applicable to arbitration which is derived from generally applicable contract defenses.

In my thesis I will analyze only those defenses the use of which in inconsistent and confusing with regard to UOCs. Nowadays the most often used defense to invalidate UOCs is unconscionability. The line between the generally applicable contract defenses and defenses that single out arbitration clauses is especially thin here. Some state courts have developed

[93] Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, (1989).

[94] Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, (1996).

[95] Ibid.

[96] Arthur M. Kaufman and Ross M. Babbitt, "The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Road", 102, http://heinonline.org, (accessed: March 14, 2014).

special case law applicable to UOCs, which in effect adapted the original doctrine of unconscionability to the special nature of arbitration, while at the same time these states are claiming that they are applying general contract defenses. These states' courts invalidated UOCs claiming that they are unconscionable due to lack of mutuality.

Another often used defense to invalidate UOCs is lack of consideration. This ground is problematic, if the arbitration clause is approached separately from other parts of contract. An additional concern is the use of mutuality of obligation defense which is not commonly accepted and is deemed to be archaic, but which nevertheless reappeared in some states. "Some courts have found that mutuality of obligation is an element of a contract's validity, and that its absence may invalidate arbitration agreements."[97]

First, I will analyze the today rarely used mutuality of obligations defense and the lack of consideration defense. I will analyze them together as they are much intertwined and many courts confuse or combine them. Then I will analyze how the unconscionability doctrine is used to invalidate UOCs. This defense has been frequently applied in some states to invalidate UOCs.

4.3 Mutuality of obligations doctrine and consideration and mutuality of remedies

This subsection explains how courts applied the doctrine of consideration and the controversial doctrine of mutuality of obligations in order to invalidate arbitration clauses. The mutuality of obligations doctrine is one of the most confusing doctrines in US law. "Taken alone, no universal definition of the term has even existed in the context of contract law; the term becomes doctrinally significant depending on the context in which it is

[97] Ibid, at 102.

found."[98] Restatement (second) of contracts does not include an exact specification of the "mutuality of obligation" doctrine. In the comments to § 73 it provides that it has sometimes been asserted in the form "both parties must be bound or neither is bound." What causes the main confusion stems from the fact that the doctrine of mutuality of obligations has sometimes been considered to be "part of the central requirement of consideration in any contract."[99] The meaning of consideration is, however, much more complex and much more developed.

Based on case law, consideration consists of two elements 1) it is something bargained for exchange and 2) it constitutes legal detriment to the promise and legal benefit for the promisor. "Contract law has never required that the precise terms of the exchange be symmetrical, beyond some minimum requirement of value being given on each side."[100] Consequently, no inquiry on adequacy of consideration is needed[101] as long as the promise is not illusory.[102] It has been for instance held that moral obligation might be sufficient consideration under certain circumstances,[103] or that "Restricting the lawful freedom of action upon faith of the promisor´s agreement is sufficient consideration."[104] Obligation is only one type of consideration; therefore mutuality of obligations cannot be considered an inevitable part of consideration.

It has also been suggested that the doctrine of mutuality of obligation which is commonly expressed in the phrase that in a bilateral contract "both parties must be bound or

98 Ibid.

99 Ibid.

100 Drahozal, *supra* note 83 at 539.

101 Batsakis v. Demotsis , 226 S.W.2d 673 (1949).

102 Restatement (second) of contracts (1981) (§ 77 "Where the apparent assurance of performance is illusory, it is not consideration for a return promise.").

103 Webb v. McGowin, 168 So. 196 (1935) (Moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original liability or duty resting on the promisor).

104 Hamer v. Sidway, 124 N.Y. 538, (1891).

neither is bound" is "over-generalization because the doctrine is not one of mutuality of obligation but rather one of mutuality of consideration."[105] "Phrasing the rule in terms of mutuality of obligation rather than in terms of consideration has led to so-called exceptions and judicial circumventions.... It has been suggested that the term 'mutuality of obligation' should be abandoned."[106]

Restatement (second) of contracts itself provides that: "If the requirement of consideration is met, there is no additional requirement of (a) gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) "mutuality of obligation." It is emphasized in the comments to the restatement that the above cited section "negates any supposed requirement of mutuality of obligation."[107] "The requirement of mutuality of obligation has been denounced as defunct by a majority of courts and rejected as an issue of contract law by no less an authority than the Restatement (Second) of Contracts."[108] Consequently, the doctrine of mutuality of obligations has no place in modern US contract law. Nevertheless, some courts applied it in order to invalidate arbitration clauses.

Another controversy results from the fashion some courts applied the consideration doctrine. It has been generally accepted by courts that "individual elements of a contract need not correspond to identical obligations by the other party."[109] Thus what is important is that consideration has to be present in the entire contract, not in its individual clauses, the contract has to examined in its entirety. "The rule that an arbitration clause in an agreement is to be judged independently from the remainder of the agreement was developed in a different

[105] Black's Law Dictionary (9th ed. 2009) referring to John D. Calamari & Joseph M. Perillo, The Law of Contracts § 4–12, at 226 (3d ed. 1987).

[106] Ibid.

[107] Restatement (second) of contracts § 79.

[108] Kaufman, *supra* note 96, at 102.

[109] Ibid, at 103.

context for a different purpose; it disposed of efforts to frustrate the effectiveness of an arbitration clause ...The courts reached the conclusion that, unless the ground for invalidity taints the arbitration clause itself, the arbitration clause is independent of the remainder of the agreement, granting the arbitrators rather than the court the power to rule upon assertions of invalidity affecting other parts of the agreement." [110] Yet when some courts applied consideration as a defense, they did it contrary to the above rule. They did not look at the contract as a whole, but only at the arbitration clause which forms its part and arrived to the conclusion that the clause is invalid due to lack of consideration. This application of consideration was flawed. What makes the whole situation even more confusing is that courts often confuse the doctrine of mutuality of obligation and the doctrine of consideration.

Another, less often used defense to invalidate unilateral option "the equitable doctrine of mutuality of remedy –that a contract will not be specifically enforced ... unless both parties at the time it is executed have the right to resort to equity for its specific enforcement.[111] The doctrine of mutuality of remedy has been quite generally repudiated, especially as the exceptions gradually swallowed it,"[112] yet courts occasionally still used it as a defense against UOCs.

In the recent years fortunately this trend has changed, and courts in the US with the exception of Arkansas overruled the decisions refusing enforcement of arbitration clauses on these grounds.

[110] Smit, *supra* note 89.

[111] Norris v. Fox, 45 F. 406, (D.C. Mo. 1891).

[112] Drahozal, *supra* note 83 at 538.

4.3.1 Hull v. Norcom, Inc.

Hull [113] was decided by United States Court of Appeals, Eleventh Circuit in 1985. The employment contract concluded between Hull and his former employer Norcom Inc. contained a broad arbitration clause, but permitted Norcom "in the event of breach by Hull of the terms and conditions of this agreement to be performed by him" and in other cases specified in the agreement "to institute and prosecute proceedings in any court of competent jurisdiction." Hull brought an action to court and Norcom moved to compel arbitration.

The court defined the issue of appeal as "whether the district court erred in finding the arbitration clause in the employment contract invalid for lack of consideration." Hull argued that the arbitration provision was void because "the parties lack a mutual obligation to arbitrate." Norcom argued that "New York law requires consideration, not mutuality of obligation." He contended that "ample consideration to support Hull's agreement to arbitrate was contained in the employment contract. For example, paragraph 2 of the agreement provide[d] that Hull shall be paid a $60,000 per year base salary plus an incentive based on sales." The court held that "the consideration underlying the agreement between the parties is insufficient to support the enforcement of an arbitration provision which is unilaterally binding." it further stated that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims."

Thus, the court held that consideration has to be present in the arbitration clause itself and consideration in the contract as a whole is insufficient to support a UOC.[114] What is a

[113] Hull v. Norcom, Inc., 750 F.2d 1547, (1985).

[114] Drahozal, (in Drahozal, *Supra* note 83 at 543) agrees (and so do I) "with the leading treatise on arbitration law who reject this conclusion as follows: The *Hull* case is incorrectly decided. Contrary to its assertion, the court did not decide the case by applying "general contract" principles of New York. There is, of course, no New York "general contract" principle that each provision in a contract must have its own consideration. The *Hull* court simply decided the case on the basis of New York arbitration law. New York law, according to the court, required *arbitration* clauses to have their own consideration. That law treated arbitration differently than would general New York contract law. This adverse discriminatory treatment is invalid under *Southland Corp. v.*

confusing in this decision among other things is that the court argued that "as in any bilateral agreement, both parties must be bound or neither is bound" (what is deemed to be the definition of mutuality of obligations) while it stated that "it is consideration that is necessary, not mutuality of obligation."[115]

4.3.2 Sablosky v. Edward S Gordon Co.

The New York Court of Appeals subsequently rejected the *Hull* approach in *Sablosky*.[116] The clause was drafted so that the employer could elect to have the case decided by arbitrators while the employee was not granted that option. The court rejected the mutuality of obligations doctrine (it named it mutuality of remedy).

It held 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." In the reasoning, the court pointed at previous cases rejecting the mutuality of obligations doctrine[117] and at the "similar views of leading commentators."[118] The court concluded that the mutuality of obligations rule was not a general applicable contract rule and therefore refused to apply it in arbitration context. The court has thus correctly found that consideration for the entire agreement as opposed to consideration only for the arbitration clause is sufficient to uphold the agreement.

Keating (U.S. 1984), and the court should have so held. If there was any doubt of this at the time of *Hull*, it has been removed by the language.., from Perry v. Thomas (U.S. 1987)."

[115] The court referred in its discussion to the Riccardi v. Modern Silver Linen Co., Inc., 45 A.D.2d 191, (1974).

[116] Sablosky v. Edward S. Gordon Co. 535 N.E.2d 643 (N.Y. 1989).

[117] The court referred to Walter v. Hoffman, 267 N.Y. 365 (1935) and Epstein v. Gluckin, 233 N.Y. 490 (1922).

[118] The court referred to : Restatement (Second) of Contracts § 363, comment c. at 183 ["the law does not require that the parties have similar remedies in case of breach"]; Farnsworth, Contracts § 12.4, at 822 [speaking of the "now discredited 'mutuality of remedy' rule"]; 5A Corbin, Contracts §§ 1178–1204; 11 Williston, Contracts § 1433, at 884 [3d ed. Jaeger]).

4.3.3 Other cases upholding unilateral arbitration clauses

Except for courts in Arkansas, "today, virtually all courts hold that the doctrine of mutuality of obligation does not preclude enforcement of nonmutual arbitration clauses"[119] One of the most cited is *Harris v. Green Tee Financial Corp.*[120] where the court held that "parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate" In *Doctor's Associates., Inc. v. Distajo,*[121] the court found that "where the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole covers the arbitration clause as well". In *Kelly v. UHC Mgmt. Co*.[122] the court has stated that "assuming that they do not contain 'mutuality of obligation,' the court is of the opinion that such mutuality is not required for a valid arbitration agreement to exist. All that is required is consideration. Because the agreements do not lack consideration, they are enforceable contracts."

4.3.4 Arkansas cases

While virtually all courts have rejected to apply the doctrine of mutuality of obligation to invalidate unilateral arbitration clauses the Supreme Court of Arkansas is a major exception. In several cases it has invalidated arbitration clauses applying the mutuality of obligations doctrine. Arkansas which is claiming to be very consumer friendly is strongly arguing even today for maintaining its mutuality of obligations requirement.[123]

[119] Drahozal, *supra* note 83 at 544.

[120] 183 F.3d 173 (1999).

[121] 66 F.3d 438, (1995).

[122] 967 F.Supp. 1240 (1997).

[123] Katherine B. Church , "Arkansas and mandatory arbitration: Is the feeling realy mutual," (*Arkansas Law review, 2012*,) http://international.westlaw.com (accessed: March 16, 2014).

- **Showmethemoney Check Cashers, Inc. v. Williams**

In *Showmethemoney*[124] "borrowers filed a class-action lawsuit against a creditor alleging that he had violated the usury law." The Check Cashing Agreement contained a broad arbitration clause, but it allowed Showmethemoney to collect money in court proceedings. While the court recognized that arbitration is "as a matter of public policy strongly favored" it nevertheless invalidated the arbitration clause. The court stated that the "essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations." The court explained the concept of mutual obligations as follows: "A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the mutual promises made by the parties; and if the promise made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. ... Mutuality of contract means ... that neither party is bound unless both are bound."

Thus, the court concluded that the mutuality of obligations doctrine is an element of consideration. The court held that a contract, "which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other." The court in its reasoning among others referred to *Hull* (1985) which by that time has long been overruled by *Sablosky* (1989).

- **E-Z Cash Advance, Inc. v. Harris**

In *E-Z Cash Advance, Inc. v. Harris*[125] debtors brought class action against E-Z. The court found the arbitration agreement invalid on similar grounds than in *Showmethemoney*. The

[124] Showmethemoney Check Cashers, Inc. v. Williams 27 S.W.3d 361 (2000).

[125] 60 S.W.3d 436 (2001).

main difference is that here the arbitration clause was not expressly unilateral. The contract contained a broad arbitration clause which retained for both of the parties "the right to seek adjudication in small claims tribunal for disputes within the scope of such tribunal´s jurisdiction." The court pointed at the fact that due to the line of E-Z´s business, it is difficult to imagine what other disputes remain which E-Z would be required to submit to arbitration. The borrowers on the other hand could only resort with their claims to arbitration. Thus the court held that an arbitration clause which allows only a specified kind of claims to be litigated is a UOC if due to the nature of the claim it may arise only to one of the parties. The court held that the clause in question was a UOC and invalidated it.

4.4 Mutuality in the unconscionability context

In this subsection I will analyze how courts apply the unconscionability doctrine in order to invalidate arbitration clauses. As of the late 1990´s the lack of mutuality started to be used in the context of unconscionability in order to invalidate UOCs. "Unlike the doctrine of mutuality of obligation, which applies to all contracts and thus would invalidate nonmutual arbitration clauses even in contracts between sophisticated parties, unconscionability generally requires some procedural element and thus is focused on consumer and employment transactions."[126] However some UOCs which were invalidated due to unconscionability formed a part of commercial contracts.

Unconscionability has become a favored defense against arbitration because it is one of the few state law defenses not preempted by the FAA.[127] In the recent decades the doctrine

[126] Drahozal, *supra* note 83 at 547.

[127] Anne Fleming: "The rise and Fall of the unconscionability as the law of the poor" (2014), 2 referring to " Paul Thomas, Conscionable Judging, 62 HASTINGS L.J. 1065 (2010). http://scholar.harvard.edu/files/afleming/files/fleming_rise_and_fall_of_unconscionability_january_2014_glj.pdf (accessed: March 17, 2014).

of unconscionability has developed mainly in the light of arbitration clauses as most of all unconscionability cases heard at courts concern arbitration agreements.[128]

There is no uniform definition of unconscionability, "neither the U.C.C. nor the Restatement defines"[129] it. "Because unconscionability is not defined, it has been described as amorphous and chameleon-like. A few formulations seem to recur. For instance, courts frequently describe unconscionability as existing in the case of contracts that no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other. Other courts have described unconscionable contracts or terms as being those that shock the conscience." [130] These definitions are far more extreme than those used when those used to invalidate arbitration clauses.

The doctrine which was developed mainly in connection with arbitration clauses and "which prevails in most jurisdictions today consists of a two-pronged test."[131] "Procedural unconscionability hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print."[132] "Substantive unconscionability arises when a term is "overly-harsh" or "one-sided." [133]

[128] Ibid at 2, 3, refering to: " Paul Thomas, Conscionable Judging, 62 HASTINGS L.J. 1065 (2010) (finding that the vast majority of unconscionability cases decided between 2005 and 2008 by the California Courts of Appeal – 89 out of 119 – challenged arbitration agreements); HASTINGS BUS. L.J. 47 (2006) (reviewing all unconscionability cases decided by the California Courts of Appeal from August 27, 1982 to January 26, 2006 and finding 114 cases challenging arbitration agreements (with 53% success rate) and 46 cases challenging ordinary contracts (with an 11% success rate)); Susan Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 BUFF. L. REV. 185 (2004) (finding that 68.5% of all unconscionability cases from 2002-2003 – 235 total – challenged arbitration agreements rather than ordinary contracts and that arbitration cases had a higher success rate – 50.3% compared to 25.6%)."

[129] Stephen Friedman, "Arbitration Provisions: Little Darlings and Little Monsters" (*Fordham law review, 2011*), 2041.

[130] Ibid at 2042.

[131] Horton, *supra* note 87, at 393.

[132] David Horton, "Unconscionability in the Law of Trusts," (*84 Notre Dame L. Rev. 1675, 2009*) 1694–95.

[133] A & M Produce Co., supra, 135 Cal. App. 3d 478 (1982).

Supreme Court of California citing previous cases summed it up in *Armendariz v. Foundation Health Pyschcare Servs., Inc.*[134] as follows:

> "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.[135] But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.[136] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."

However, courts in some states do not share the view that both types of unconscionability have to be present at least to a certain degree and they "invalidate contract terms on a showing of just one type."[137] In Fiser v. Dell Computer Corp.[138] for instance, the court based its decision solely on finding the arbitration clause substantially unconscionable. It held that the "terms and conditions" "did not constitute a contract of adhesion because there was no evidence that the Plaintiff could not avoid doing business under the particular terms mandated by Defendant." It nevertheless concluded that "the terms are unenforceable because there has been such an overwhelming showing of substantive unconscionability."[139]

There is no uniform definition of the adhesion contract. The New Mexico Supreme Court stated that "When a court makes an analysis into whether a particular contract is adhesive, it typically inquires into three factors: (1) whether it was prepared entirely by one party for the acceptance of the other, (2) whether the party proffering the contract enjoyed superior bargaining power because the weaker party could not avoid doing business under the

[134] Armendariz v. Foundation Health Pyschcare Servs., Inc. 24 Cal.4th 83 (2000).

[135] Stirlen v. Supercuts, Inc., supra, 51 Cal. App. 4th 1519 (1997).

[136] *Supra* note 132.

[137] Paul Bland, "Fighting mandatory arbitration clauses" (2012), www.international.westlaw.com (accessed: March 7, 2014).

[138] Fiser v. Dell Computer Corp 144 N.M. 464 (2008).

[139] A similar decision was reached in Scott v. Cingalar Wireless, 161 P.3d 1000 (2007).

particular terms, and (3) whether the contract was offered to the weaker party without an opportunity for bargaining on a take-it-or-leave-it basis."[140]

However, some states fail to employ this analysis thoroughly and fail to consider whether the party had the opportunity to avoid doing business under the particular terms and whether the weaker party had the opportunity to bargain. There is also a difference in the opinion, whether the mere fact that a contract of adhesion was used is sufficient by itself to find procedural unconscionability.[141] In addition to that some states hold that lack of mutuality of obligations in the arbitration clause is sufficient grounds to hold the clause substantial unconscionable.

By applying the doctrine of unconscionability, the courts can reach essentially the same result as when applying the doctrine of mutuality of obligations or when they apply the requirement of consideration only to the arbitration clause. Most courts uphold the unilateral option arbitration clauses even in consumer, employment and franchise contracts,[142] however at least two states (Montana and California) invalidated these clauses as unconscionable.

4.4.1 Montana

Both below discussed cases occurred between parties that that were not typical weaker parties. Both parties that were considered to be "weaker parties" by the courts were in fact more sophisticated first was a licensed practicing attorney who ordered an advertisement and

[140] Supra *note* 137.

[141] In Clerk v. First Bank of Deleware 735 F.Supp.2d 170 (2010), the court applying the following analysis "adhesion is one prepared by a party with excessive bargaining power and presented to the other party on a take-it-or-leave-it basis" held that the contract was adhesive and that this finding was sufficient to find procedural unconscionability.

[142] See e.g. Conseco Fin. Serv. Corp. v. Wilder, 47 S.W.3d 335 (2001) "There is no inherent reason to require that the parties have equal arbitration rights.... The exceptions, moreover, are not unreasonable."; Harris v. Green Tree Fin. Corp., 183 F.3d 173 (1999) "the mere fact that Green Tree retains the option to litigate some issues in court, while the Harrises must arbitrate all claims does not make the arbitration agreement unenforceable.

the second was a franchisee who was an owner of two hotels. One would justifiably anticipate that due to the more sophisticated character of the "weaker parties" in these cases, the standards of unconscionability applied by the court would be much higher, but in fact they were not.

- **Iwen v. U.S. West Direct**

Iwen,[143] a licensed practicing attorney in Montana, brought a suit against a telecommunication company to recover damages for negligently constructed Yellow Page advertisement. The defendant moved to compel arbitration. The contract was printed on the back of an order form and contained a broad arbitration clause which allowed litigation of "an action by publisher for the collection of the amounts due under this agreement." The court concluded that the contract was a contract of adhesion by applying the following test: "a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." The court then went on to determine whether the clause was unconscionable. In order to conclude it was substantively unconscionable it had to satisfy one of the following conditions: "the arbitration provision is not within Iwen's reasonable expectations," or it is "within Iwen's reasonable expectations but, when considered in its context, is unduly oppressive, unconscionable, or against public policy". The court concluded that it satisfied the second condition by holding hat it lacked mutuality of obligations as the "drafter had the unilateral right to settle a dispute for collection of fees pursuant to the agreement in a court of law." Thus, here the court held that lack of mutuality of obligations is sufficient to conclude that a contract is substantively unconscionable. It thus used the archaic

[143] Iwen v. U.S. West Direct, a Div. of U.S. West Marketing Resources Group, 293 Mont. 512, 977 P.2d 989, Mont (1999).

doctrine of mutuality of obligations in a different setting and, not as a compulsory element of consideration but as an element of the unconscionability doctrine. The court arrived to the same result; it held the UOC invalid.

- **Choice Hotels Intern., Inc. v. Ticknor**

The Choice Hotel case[144] concerned a dispute which was clearly in commercial setting. Ticknor owned and operated at least two hotels the one in question and another in Colorado. He operated these properties under franchise agreements with two different franchisors and chose to operate one of his hotels with Choice hotels. The franchise agreement which was a Choice´s pre-printed standard form instrument contained an arbitration clause" which provided for arbitration except for claims against Ticknor for indemnification, actions for collection of moneys owed by Ticknor under the franchise agreement, or actions seeking to enjoin Ticknor from using the trademarks in violation of this agreement. The district court denied motion to compel arbitration. United States Court of Appeals, Ninth Circuit considered in appeal "whether FAA preempts state law governing the unconscionability of adhesion contracts." The circuit court agreed with the district court that the arbitration provision was unenforceable due to unconscionability. In making that conclusion the district court relied on *Iwen*. First it decided that the contract is one of adhesion, as Ticknor was "forced to accept or reject it without negotiation." The court held so by pointing out that there was no evidence that Ticknor negotiated the agreement.[145] Then it

[144] Choice Hotels Intern., Inc. v. Ticknor, 275 F.3d 1164 (2002).

[145] The Circuit court reasoned that: "Like the contract at issue in Iwen, the Franchise Agreement was a standardized, form agreement that Ticknor was forced to accept or reject without negotiation. Choice argues that the presence of two addenda indicate that the contract was negotiable. However, the record belies this. The addenda were drafted by Choice after a site visit and presented to Ticknor in the same "take it or leave it" manner as the original Franchise Agreement. There is no evidentiary support in the record for Choice's argument that Ticknor negotiated the changes embodied in the addenda. In fact, Ticknor testified that he had not requested Addendum No. 1, which reduced Ticknor's liquidated damages, and that it was added by Choice unilaterally "because of the disagreements they'd had with franchisees in the past." He also testified that the second

applied the second step in the Iwen analysis in order to ascertain whether the contract is "(1) not within that party's reasonable expectations, or (2) if within those expectations, it is unduly oppressive, unconscionable, or against public policy." The court concluded that the arbitration provision in this case "lack[ed] mutuality of obligation, [was] one-sided, and contain[ed] terms that [were] unreasonably favorable to the drafter." The court held that the holding in *Iwen* was not limited to a consumer setting as it applied generally applicable contract defenses. It thus found that it was applicable to "a commercial transaction between supposedly sophisticated business owners."The circuit court held that Montana law under which the arbitration clause was found unenforceable as unconscionable was not preempted by FAA as Montana law used "general principles that exist at law or in equity for the revocation of any contract" to invalidate arbitration clauses. The court thus claimed that "Montana's interpretation of its unconscionability law did not violate the FAA because that interpretation was applicable to all adhesive contracts and did not single out adhesive arbitration agreements for special treatment."[146]

Tashima, circuit judge dissented with the majority, and made many remarks in his opinion with which are not easy to counter. Tashima pointed out that "Montana has used the adhesion doctrine to protect unsophisticated consumers in consumer transactions with no meaningful choice. The rule of adhesion has never been applied to commercial contracts between sophisticated business organizations" He concluded that "application of the adhesion doctrine to this commercial contract is anomalous" as Tickmore was not an "unsophisticated consumer under any definition of the term and this is not a consumer transaction."

addendum, which listed specific changes and additions Ticknor was required to make to the hotel, was created after Rod McKee, one of Choice's management personnel, inspected the Bozeman hotel site without Ticknor's presence or input. To dispute this, Choice submitted the affidavit of its Senior Vice President and General Counsel, Michael J. Desantis, stating that, "according to [Choice's business] records, plaintiffs ... negotiated several changes to [the Agreement]." However, Desantis did not participate in any such negotiations (Ticknor had never even met him), and Choice did not present any of the business records that purportedly reflected the negotiations."

[146] Kaufman *supra* note 96, at 105.

Furthermore, he pointed out that Ticknor was an experienced and sophisticated franchisee who owned and operated at least two hotels each under a different franchise agreement. He added that, unlike the plaintiffs in the cases the court has cited, Ticknor has not claimed that "it had no other viable alternatives." Quite to the contrary, "the record suggests that plaintiff made a conscious decision to change [its] affiliation ... [It] willingly accepted the negotiated burdens of the new franchise agreement in return for the expected benefits... In other words, plaintiffs had not only a theoretical, but also an actual, choice. No adhesion contract was crammed down [its] throat." Last, Tashima pointed out that it makes absolutely sense for some claims to be litigated and not arbitrated, as litigation is more suitable for some kinds of claims than arbitration.[147]

In my opinion, what is alarming in this case is that in a clearly commercial setting, basically two findings were sufficient for the court to conclude that the contract was unconscionable and thus invalid. First it was not proven that the franchisee negotiated the contract, second, the contract lacked mutuality of obligations. In the light of everything stated above, one can clearly conclude that these conditions are unsatisfying in any setting, let alone in a commercial one. First, the fact that someone did not negotiate does not mean that he could not and second mutuality of obligation doctrine has no place in US contract law.

4.4.2 California

"California is notorious for providing its citizens with avenues out of forum selection clauses. This has also been the case with more than one arbitration clause. While courts in California have declined to invalidate mutual arbitration clauses when unconscionability is

[147] Ticknor argued that "It makes sense that indemnification claims are not required to be arbitrated because they invariably arise out of third-party claims which are often already in litigation, where the convenient remedy, if tender of the defense is rejected, is to bring a third-party claim for indemnification. As for trademark claims, the classic remedy for infringement is a federal court injunction, a remedy an arbitrator has no power to enforce."

raised as a defense, they have invalidated arbitration agreements under the unconscionability analysis where there is a lack of mutuality of remedy."[148]

What is important to note with regard to California is that courts are prone to hold contracts unilateral even where they are seemingly bilateral, but differentiate between claims which are to be arbitrated and which are not, if arbitration is the only recourse with regard to those claims which are likely to be brought only by the weaker party.[149]

- **Armendariz v. Foundation Health Psychcare Services, Inc.**

Armendariz[150] is the leading case concerning arbitration clauses in California. Former employees initiated court proceedings for wrongful termination, and employer moved to compel arbitration. One of the issues in front of the court was whether a "nonmutual requirement that employees arbitrate wrongful termination claims was substantively unconscionable" and whether it rendered the entire arbitration clause unenforceable. The court started by determining whether the arbitration clause was adhesive. The court concluded that there was little doubt as to the adhesive nature of the contract at hand "as it was imposed on employees as a condition of employment and there was no opportunity to negotiate. " The court then moved on to find whether it was substantively unconscionable as well. The court emphasized that lack of mutuality did not make the contract lack mutual consideration.[151] It concluded rather that non-mutual arbitration clauses imposed on an employee were unconscionable. It found that "although parties are free to contract for asymmetrical remedies

[148] Drahozal, *supra* note 83 at 550.

[149] E.g. in Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778 (2002) claims which were to be arbitrated (intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information) were more likely to be brought by employee.

[150] *Supra* note 133.

[151] The court thus rejected the mutuality of obligations defense, moreover it refused to evaluate the arbitration clause separately from the contract in order to find that it lacked mutual consideration.

and arbitration clauses of varying scope... the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.“ The court thus concluded that the requirements placed on adhesive contracts with regard to mutuality are stricter. The court held that in order to escape unconscionability the employer would have to have “reasonable justification” for the clause – “other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum.” The court however did not find any reasonable justification, it stated that “the fact that it is unlikely that an employer will bring claims against a particular type of employee is not, ultimately, a justification for a unilateral arbitration agreement“[152]

The court then considered whether it could uphold the clause if it separated its unconscionable part. It held, however that as the agreement lacked mutuality, there was “no single provision to strike on.” “Rather, the court would have to, in effect, reform the contract …by augmenting it with additional terms.” As such reformation by augmentation was not authorized by any statute, the court held that it must invalidate the entire agreement.

This decision illustrates that California examines procedural unconscionability only superficially as it does not examine whether the weaker party tried to negotiate, and that California developed a special unconscionability rule for arbitration which invalidates UOCs unless the stronger party can justify the lack of mutuality with something other than his desire to maximize its advantage.

[152] “Plaintiffs were lower-level supervisory employees, without the sort of access to proprietary information or control over corporate finances that might lead to an employer suit against them.“

- **Bolter v Harris Research**

In *Bolter,*[153] the arbitration clause which was reviewed was a UOC. However this issue was not assessed. The reason why I included this case into my thesis is to show that California courts may hold arbitration clauses unconscionable and thus invalid also when they take place in commercial setting. The clause was assessed due to the fact that under the arbitration clause Bolter, the franchisee, was obliged to arbitrate his claims in Utah what would have caused him financial hardship. The court found that the contract was adhesive as it was concluded between a "large wealthy international franchiser" from Utah and a small "Mom and Pop" franchisee from California who could not negotiate the terms of the arbitration clause which were imposed on them after they became established franchise owners.

However, in this case the court stroke down only the "place and manner" terms which it found unduly oppressive and thus unconscionable.

4.4.3 Cases Rejecting to Find Unconscionability for Lack of Mutuality

This paper deals two cases where the court rejected the find unconscionability for lack of mutuality. Both took part in consumer setting, which indicated that courts will uphold these clauses also in consumer setting even if the position of the parties is very unbalanced.

- **In re FirstMerit Bank, N.A.**

In *In re FirstMerit Bank*[154] purchasers of mobile home filed a suit against the bank,

[153] 87 Cal.App.4th 900 (2001).

[154] In re FirstMerit Bank, N.A., 52 S.W.3d 749 (2001).

and the bank moved to compel arbitration. The contract between the parties contained a wide arbitration clause which "also permitted the bank to seek judicial relief to enforce its security interest, recover the buyers' monetary loan obligation, and foreclose." The purchaser argued that the agreement's terms are unconscionable as they oblige the weaker party to arbitrate their claims, while they permit the stronger party to litigate their claims. The court unconscionability analysis considered "whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." The court held, that given the usual nature of mobile home financing agreements and the need of the bank to protect its security interest, the arbitration clause was not unconscionable.

One of the differences between this case and the cases that lead to the invalidation of unilateral arbitration clauses due to unconscionability is in the test used by the court. The court did not use the two-pronged unconscionability analysis used in the previous cases. Moreover the court recognized that the judicial procedure may protect the banks interest better and therefore considered the UOC justified.

- **Conseco Finance Servicing Corp. v. Wilder**

Conseco[155] also concerned purchasers of mobile homes who claimed that the arbitration clause in the contract with the bank was unconscionable. The clause contained a wide arbitration clause but permitted the bank to use judicial relief to enforce a security agreement, to enforce the monetary obligation, or to foreclose on the Manufactured Home.

[155] Conseco Fin. Serv. Corp. v. Wilder, 47 S.W.3d 335 (2001).

The court pointed out that determination of unconscionability is "inherently fact-sensitive" and "courts must address such claims on a case-by-case basis." As opposed to the cases from California and Montana, here the court did not hold that the mere fact that the contract was of adhesion sufficed to conclude that it was procedurally unconscionable. To the contrary, the court carefully analyzed the clause and the circumstances under which it was concluded. It found that it "was not concealed or disguised within the form," "its provisions were clearly stated" and it did not "alter the principal bargain in an extreme or surprising way." In addition to that the purchasers have not denied that they have read it. Finally, the purchasers "have not alleged that they attempted to bargain for a different or for no arbitration clause; nor have they alleged that the principal benefit they sought from this bargain-credit to purchase a mobile home-was not reasonably available to them from other sources."

As to the substance of the clause, the court noted "that there is no inherent reason to require that the parties have equal arbitration rights." The court held that the exceptions to the clause were reasonable, as the claims which Conseco might litigate under the agreement might be litigated expeditiously. In this case thus, despite of the fact that the weaker party was a consumer, and a contract of adhesion was used, the court held that the clause was not unconscionable and upheld it.

4.5 The Preemptive Effect of FAA on the Defenses Used to Invalidate Unilateral Option Clauses

The Supreme Court and other courts have developed a constant judicature which has given FAA a wide preemptive effect.[156] In *Preston v. Ferrer* [157] the Supreme Court held that

[156] Southland Corp. v. Keating 465 U.S. 1 (1984), Perry v. Thomas 482 U.S. 483 (1987), Allied-Bruce v. Terminix Co 513 U.S. 265 (1995), Mastrobuono v. Shearson Lehman Hutton, Inc. 514 U.S. 52 (1995), Doctor's Associates, Inc. v. Casarotto. 517 U.S. 681 (1996).

[157] Preston v. Ferrer, 552 U.S. 346, 353 (2008).

"when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." It can be inferred from § 2 FAA that it only allows defenses that are generally applicable to all contracts. It is not straightforward, however what happens when a generally applicable defense is used in a fashion which disfavors arbitration or, as relevant here in a way that disfavors UOCs. The US Supreme Court has not ruled yet on any rule specifically disfavoring UOCs, but in a very recent case *AT&T Mobility LLC v. Concepcion*,[158] it has delivered a decision which may have a big impact on the future decisions of courts and which may also signal the attitude of the Supreme Court to UOCs.

The issue in *AT&T Mobility* was whether California´s Discovery Bank rule, which classified most collective-arbitration waivers in consumer contracts of adhesion as unconscionable, was preempted by FAA. The Concepcions claimed that the Discover Bank rule, originated in "California's unconscionability doctrine" and "California's policy against exculpation," and therefore was a reason that "exist[ed] at law or in equity for the revocation of any contract under FAA § 2" The court ruled that because it stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress California's Discover Bank rule [was] pre-empted by the FAA."[159] In the reasoning the court pointed out the fact that "although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"[160] Furthermore it stated that "a federal statute's saving clause 'cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other

[158] 563 U.S. 321 (2011).

[159] The court quoted Hines v. Davidowitz, 312 U.S. 52 (1941).

[160] The court quoted Geier v. American Honda Motor Co., 529 U.S. 861 (2000).

words, the act cannot be held to destroy itself."[161] It is worth to mention that the court also noted that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."[162]

The similarities between California's Discover Bank rule and California's rule invalidating UOCs in arbitration are more than obvious. Both of these rules were derived from the unconscionability doctrine, both have disproportionate impact on arbitration agreements and "stand as an obstacle to the accomplishment of the FAA's objectives." It is quite likely that if the US Supreme Court were to assess whether general contract defenses as they are used in some states to invalidate unilateral arbitration clauses were preempted by the Federal Arbitration Act, it would dismiss those defenses.

4.6 Who May Invalidate Arbitration Clauses and May All of the Defenses Be Applied

In this part of my thesis I would like to point to some theories which have been developing in the last two decades and which are gaining ground among scholars and also some judges.

The provisions which are causing confusion are §§ 2 and 4 FAA. Justice Thomas who provided the swing vote in *AT&T Mobility LLC v. Concepcion* and reluctantly joined the majority opinion remarked in his concurring opinion that § 2 FAA[163] allows only defenses which create grounds for revocation of any contract. "The use of only revocation and the conspicuous omission of invalidation and nonenforcement suggest that the exception does not

[161] The court quoted American Telephone & Telegraph Co. v. Central Office Teleph. Inc.,524 U.S. 214 (1998).

[162] *Supra* note 158.

[163] § 2 FAA provides that "[a] written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

include all defenses applicable to any contract but rather some subset of those defenses."[164] Justice Thomas suggested that this clause has to be interpreted in the context of other provisions of FAA. That other provision is § 4 FAA which regulates the proceedings taking place when a party moves to compel arbitration. It states that:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration … is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof."

When § 4 FAA is read together with § 2 FAA it evokes the question whether courts can hear generally applicable contract defense claims regardless of the fact that they are not related to the making of the contract, and consequently, whether § 4 FAA allows courts to hear unconscionability challenges to arbitration clauses at all. The reason behind this claim is that "unconscionability revolves, in part, around substantive fairness, not the making of the arbitration clause. Thus, the claim proceeds because unconscionability does not fall within § 4, judges cannot employ the rule,"[165]

There are two theories suggesting how to read these clauses. First, there is the theory which suggests that court cannot hear such claims while arbitrators can is called "anti-court theory"[166] The other theory goes further and claims that according to § 4 FAA, claims concerning issues other than those regarding the making of arbitration agreement cannot be heard at all, thus no-one can hear unconscionability claims against arbitration clauses. This doctrine is called the "anti-unconscionability theory.[167] Justice Thomas provided the following reasons for his conclusion. " Reading §§ 2 and 4 harmoniously, the "grounds ... for the revocation" preserved in § 2 would mean grounds related to the making of the agreement.

[164] Justice Thomas quoted Duncan v. Walker, 533 U.S. 167 (2001).

[165] Horton, *supra* note 87, at.389.

[166] Ibid.

[167] Ibid.

This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake...Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause."

There are of course numerous opinions against these doctrines[168] and also some suggesting they are correct.[169] It would be interesting to see whether courts would apply these theories that are gradually gaining some ground.

4.7 Lessons Learned from US Cases

Given the conflicting case law it is challenging to draw a conclusion. It is even more complicated given the fact that in *Conseco,* for instance, the court upheld a UOC in a contract of adhesion concluded with a consumer, but in *Choice Hotels* another court invalidated a contract concluded with a franchisee who was in a much better bargaining position. Some courts consider the unilateral character of arbitration agreements as cost efficient and commercially justified solutions, whereas others declare them substantially unconscionable without the slightest attempt to consider their commercial reasonableness.

Courts which invalidate UOCs deem unilateral not only those clauses which provide for arbitration of only the claims of one of the parties, but also those where some kinds of disputes are carved out which are more likely to be brought by only one of the parties. These courts fail to recognize that it is reasonable to exclude from arbitration some kinds of actions such as foreclosure, collection or trademark and intellectual property disputes where arbitration is a less efficient or inefficient means of dispute solution. In California UOCs may

[168] E.g. Horton, *supra* note 87.

[169] E.g. Friedman, *supra* note 129.

survive if the stronger party can justify the lack of mutuality with something other than its desire to maximize its advantage. It is not an easy task to find such justification as California courts are prone to strike down unilateral clauses.

A very big question is whether the standards for unconscionability are really being met when courts strike down UOCs. The FAA

> "permits an arbitration agreement to be set aside only upon such grounds as may be used for the revocation of any contract. Anyone who has ever litigated a breach-of-contract case understands just how difficult it is to revoke a contract. Unconscionability sets an even higher standard. A lawyer can spend an entire career litigating contract disputes and never be successful in setting aside a contract, or any clause in it, on grounds of unconscionability."[170]

Yet some courts seem to be applying much lower standards to set aside arbitration clauses. "Courts hold too often that the unconscionability standard is satisfied only by finding that the arbitration clause was in a preprinted form which was presented as a take-it-or-leave-it form by a party which had greater bargaining power."[171]" It is however theoretically possible that even a standard form take-it-or-leave-it contract which contains a UOC is reasonable and fair.[172] The analysis of the court becomes distorted when the consideration or the unconscionability of the arbitration clause is approached separately from the rest of the contract.

In addition to this, there are some crucial factors missing in the courts assessment when they invalidate UOCs. First, whether the contract was really a "take-it-or-leave-it contract," i.e. whether the weaker party really did not have a different option than accepting it. Second, the courts fail to analyze whether the weaker party did not have opportunity to negotiate the terms. If the weaker party attempted to negotiate and a stronger party turned him down this condition would be satisfied. However it seems to me as if courts were applying

[170] Kaufman *supra* note 96, at 109.

[171] Ibid.

[172] Ibid.

reversed burden of proof. Unless the stronger party proves that the weaker party negotiated, the courts hold that it did not have an opportunity to negotiate, regardless of the fact whether it tried to negotiate at all. Third, are the terms of the arbitration clause really such as to "shock the conscience." I doubt that the mere fact that the clauses lack mutuality is sufficient to meet this condition.

These conditions are unsatisfying in any setting, let alone in a commercial setting. I believe that the analysis of the courts is too superficial and does not justify setting aside of the UOCs. It would be interesting to see whether courts invalidating UOCs change their attitude towards them under the impact of the *AT&T Mobility LLC v. Concepcion* decision or whether the Supreme Court would decide that the defenses used to invalidate UOCs were preempted by FAA.

CONLUSION

This paper shows the different approach of various jurisdictions to unilateral option clauses. While most courts would not strike down on a unilateral option clause per se, there is a number of jurisdictions where courts have invalidated such clauses for various reasons such as lack of mutuality, unfairness or unconscionability. Some courts reason with lack of balance regardless of the position of the parties. This argument by itself cannot stand in a commercial setting, as lack of balance is a natural element of commercial contracts, and it is rarely an argument to invalidate imbalanced clauses unless there is breach of mandatory rules. Some recent decisions have disturbed certainly with regard to unilateral option clauses. The uncertainty as to whether unilateral option clauses would function as intended is an obstacle in some jurisdictions for inserting them into contracts. Therefore it is important to know, whether there were decisions indicating the possible future approach of courts to such clauses. This thesis attempted to assess all reported cases in order to provide a guideline whether unilateral option clauses would be upheld in various jurisdictions.

It was shown that common law jurisdictions generally uphold unilateral option clauses in a commercial setting. However, some decisions of US courts in California, Montana and Arkansas, have stroke down on unilateral option clauses and many other states have not rendered any decisions concerning the validity of such clauses. I have argued that the standards to apply general contract defenses to invalidate unilateral option clauses which were employed by some US courts were not met. Thus it is quite likely that the US Supreme Court would dismiss the defenses used by courts to strike down unilateral option clauses.

This paper has shown that due to a recent French decision, entrepreneurs must be careful inserting unilateral option clauses in contract in countries which are influenced by French law. If a unilateral option clause is to be applied within the European Union in a

contract of adhesion, parties are advised to carefully study the unfair term legislature of individual member states, which might be extended to a non consumer setting. Another major jurisdiction, Russia is likely to strike down any unilateral option clause which it finds incompatible with its policy of fighting foreign jurisdiction deciding Russian related cases.

This thesis also attempted to provide some guidelines as to how unilateral option clauses operate. The operability of clause is significantly dependent on its drafting. English cases have demonstrated that provided that the clause is sufficiently clear and further conditions are complied with, the party who is granted the unilateral option to choose jurisdiction, can exercise this option not only as the plaintiff but also as the defendant, regardless of the fact whether his exclusive option comprises of the right to refer the case to litigation or arbitration. A Hong Kong case has on the other hand shown that poor drafting may deprive the party from recourse to any judicial remedy.

The future of unilateral option clauses in many countries have not been decided yet. In other countries, the court invalidated such clauses disregarding the explicit will of the parties. To conclude, when drafting a unilateral option clause, one must very carefully inspect the likely position of the jurisdiction where the clause will be applied towards unilateral option clauses in order to prevent that the clause will be invalidated and the party will be left with the forum it sought to prevent.

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