Unilateral jurisdiction clauses – Navigating the minefield

James Stacey and Angela Taylor advise caution when dealing with unilateral jurisdiction clauses.

A recent French Supreme Court decision, *Mme X v Banque Privée Edmond de Rothschild* No 11-26.022 [2013] ILPr 12 (26 September 2012) ruled that a one-way jurisdiction clause was invalid. This has given rise to much debate as to whether such clauses are in fact compliant with the EU Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the *Brussels Regulation*). It had previously been understood that such unilateral jurisdiction clauses were compliant with the Brussels regime. However, the recently recast Brussels Regulation does not clarify the position.

We will consider the background to this controversy, and seek to show that the decision is, in fact, inconsistent with the position under the Brussels regime and therefore wrong under EU law. We will also consider the effectiveness of unilateral arbitration clauses.

Unilateral jurisdiction and arbitration clauses

Unilateral jurisdiction clauses (also known as “hybrid”, “one-way” or “one-sided” clauses) are very common, as they afford the party in whose favour they operate flexibility on jurisdiction, permitting them to sue the counterparty in any competent jurisdiction while restricting that counterparty to just one jurisdiction.

They are particularly popular where the party in whose favour the option operates carries the primary commercial exposure under the contract, as it strengthens that party’s ability to protect its interests under the contract. Unilateral jurisdiction clauses have, therefore, become a standard provision for financial institutions, in particular, banks. For example, the jurisdiction clause in the LMA Single Currency Term Facility Agreement contains the following provisions:

“(A) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement [or any non-contractual obligation arising out of or in connection with this Agreement]) (a “Dispute”).

(B) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(C) This Clause is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.”

In the arbitration arena, there are more widespread objections and doubts about the validity of unilateral arbitration clauses, which allow one party to a contract the option of pursuing a dispute via arbitration as opposed
to litigation in the courts (or vice-versa). The validity of such clauses has been challenged in a broader spectrum of jurisdictions, as discussed below.

**Mme X v Banque Privée Edmond de Rothschild** No 11-26.022 [2013] ILPr 12 (26 September 2012)
Mme X (a Spanish national domiciled in Paris) opened a private bank account with the Luxembourg bank Edmond de Rothschild Bank (the Bank) via a French sister company of the Bank. In so doing, she signed up to the standard terms and conditions of the Bank. Those terms and conditions were governed by the law of Luxembourg and provided that Mme X submit to the exclusive jurisdiction of the Luxembourg courts. The Bank, however, had the right to take action before the courts of the domicile of Mme X (Paris) or "any other competent court".

Mme X blamed the Bank for a substantial lowering of the performance of her investments and issued proceedings against the Bank and its sister company, seeking damages before the Paris District Court.

The Bank and company challenged the jurisdiction of the Paris court on the basis that the jurisdiction clause in the terms and conditions restricted Mme X to bringing claims in the courts of Luxembourg.

Both the first instance court and the Court of Appeal dismissed the Bank’s jurisdictional challenge.

The Court of Appeal held that, while unilateral jurisdiction clauses are in principle valid, this clause was too broad, as it permitted the Bank to sue before "any other competent court". It ruled that the clause was "potestative", in that it was conditional on an event over which the Bank had full control and, as such, made the parties unequal.

The matter was appealed to the French Supreme Court, which upheld the lower court rulings, holding that the unilateral clause breached French law and was therefore void because it was "only binding upon Ms X, who was in fact the only one bound to apply to the Luxembourg courts".

In view of the French Supreme Court’s reasoning, the decision has been widely interpreted as invalidating all such unilateral jurisdiction clauses irrespective of their wording. However, as we shall see, the ruling was not followed by the English court.

**Mauritius Commercial Bank v Hestia Holdings** [2013] EWHC 1328 (Comm)
The case concerned a facility agreement between the claimant bank (MCB) and the defendant borrower (Hestia), which was guaranteed by the second defendant. The loan agreement was governed by Mauritian law, and it provided that disputes were to be referred to the exclusive jurisdiction of the courts of Mauritius. Following default by Hestia, the parties negotiated a rescheduling of the debts and entered into an Amendment and Restatement Agreement which contained an English governing law clause and a unilateral jurisdiction clause which provided that the English courts had exclusive jurisdiction to settle any dispute, though MCB could elect to bring proceedings "in any other courts in any other jurisdiction".

When Hestia defaulted again, MCB brought proceedings in England. Hestia challenged the jurisdiction of the English court on two grounds. The first was that the Mauritian governing law clause in the original facility agreement had not been validly replaced by the English governing law clause in the Restated Agreement and that, under Mauritian law, the unilateral jurisdiction clause was invalid by virtue of the reasoning in *Rothschild* (given that Mauritian law is based on French law).

The second ground of challenge was that the jurisdiction clause was invalid even if interpreted in accordance with English law. On the wording of the particular clause, it was contended by Hestia that the clause conferred a power on MCB to sue the borrower in any court in the world, rather than only in those courts which would
otherwise regard themselves under their own rules of private international law as having competent jurisdiction. So interpreted, the clause was, it was argued, invalid on the ground of public policy. The public policy to which it was said to be inimical was “equal access to justice”, as reflected in Article 6 of the European Convention on Human Rights (ECHR), which provides that “in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…”.

The Commercial Court, however, confirmed that the agreement was subject to English law and that the jurisdiction clause was valid under English law. The Judge (Popplewell J) rejected Hestia’s argument that the clause meant that the claimant could insist on suing or being sued anywhere in the world. Even if the clause had that meaning, this was the bargain to which the court should give effect. The jurisdiction clause was not therefore incompatible with fundamental principles regarding equal access to justice, such as Article 6 of the ECHR. Article 6 was directed at access to justice within the forum chosen by the parties, not to choice of forum.

Popplewell J observed that unilateral clauses have regularly been enforced by the court. He quoted from an article by Professor Fentiman in the Cambridge Law Journal entitled Universal jurisdiction agreements in Europe (CLJ (2013) 72 (1) (24-27)):

“Such unilaterally non-exclusive clauses are ubiquitous in the financial markets. They ensure that creditors can always litigate in a debtor’s home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimising the risk that a debtor’s obligations will be unenforceable. Such agreements are valid in English law…Indeed despite their asymmetric, optional character it is difficult to conceive how their validity could be impugned or what policy might justify doing so…”

While the judge concluded that Mauritian law was irrelevant (as English law was the governing law), he dealt briefly with the position if Mauritian law had been applicable. He concluded (on an obiter basis) that there was a good arguable case that under Mauritian law the jurisdiction clause would be treated as valid and effective notwithstanding the decision in Mme X v Banque Privée Edmond de Rothschild. The judge also noted the controversy surrounding the Mme X case and the criticism levelled at the decision both domestically and in the context of the Brussels Regulation.

Uncertain waters
The decision in MCB v Hestia, particularly given its pronouncement post-Rothschild, has been welcomed, as it affirms that under English law unilateral clauses are valid and enforceable. By contrast, the Rothschild decision has attracted much criticism. Primarily, the decision has been criticised on the basis that it is uncommercial and contrary to the principle of the sanctity of contract. The main specific points of objection centre on the French Supreme Court’s application of EU law and its attempt to interpret Article 23 of the Brussels Regulation, when such matters ought properly to be referred to the European Court of Justice (under Article 267 of the Treaty on the Functioning of the European Union). Further, the French Supreme Court sought to interpret Article 23 in the light of a legal concept deriving from French legislation governing conditions precedent, reaching a conclusion which contradicts earlier French authorities on the subject. This analysis has been criticised, with good cause, as being highly questionable.

The Rothschild decision has been cited as calling into question the validity of unilateral jurisdiction clauses under the Brussels Regulation. However, it is clear that the decision itself is, in fact, contrary to EU law as the Brussels Regulation makes provision for unilateral jurisdiction clauses. The Rothschild decision might be explained away as a rogue outcome, perhaps influenced by the fact that the claimant was an individual. However, unhappily, it is a decision of the highest court of France which to date remains unchallenged.
Unfortunately, the recently recast Brussels Regulation (which comes into force in relation to legal proceedings instituted on or after 10 January 2015), does not reaffirm that unilateral jurisdiction clauses are permitted under the Brussels Regulation. Given the significance of unilateral jurisdiction clauses to countless commercial contracts, it is regrettable that the recast Regulation has not put the issue beyond doubt. Any party considering entering into a unilateral jurisdiction clause where there may be a French nexus must, therefore, be aware of the Rothschild decision.

It should also be noted in this regard that the problem raised by Rothschild is not confined to cases in which France is the nominated jurisdiction. While the case is not binding on other EU jurisdictions, a borrower may seek a negative declaration in France or another favourable jurisdiction. Alternatively, a borrower may challenge the validity of a unilateral jurisdiction clause, and the court, in an EU jurisdiction outside France, may consider itself obliged (because of the Mme X case) to make a reference to the European Court of Justice, thereby leading to delay and uncertainty. Moreover, outside the EU, the Mme X case may be relevant in jurisdictions whose law is based on French law, for example Mauritius (although the English High Court took the view that there was a good arguable case that such unilateral jurisdiction clauses would be upheld there).

Unilateral arbitration clauses

The enforceability of unilateral arbitration clauses has been the subject of widespread global controversy with many jurisdictions – such as Russia, Romania, Poland and Bulgaria – refusing to recognise their validity, and a number of other jurisdictions – such as Japan, Singapore, Sweden, USA, Brazil, China and Kazakhstan – doubting their validity.

Again, it is clear under English law that unilateral arbitration clauses are valid and enforceable: it is a well-established principle of English law that the English courts will uphold parties' agreement as to the dispute resolution regime that applies to their contract.

However, the validity issue was brought into focus by a recent decision of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, which held that such unilateral arbitration clauses violated the principle of procedural equality (CJSC Russian Telephone Company v Sony Ericsson Mobil Communications Rus LLC (No A40-49223/11-112-401 1st Ruling: May 2012, 2nd Ruling: 19 June 2012). In that case, Russian Telephone Company (RTC) appealed decisions of the Moscow court at first instance (which had been upheld on appeal by both the Appellate Arbitrazh Court and the Federal Arbitrazh Court) that the unilateral arbitration clause in RTC's contract with Sony Ericsson Mobil should be upheld. The clause provided for all disputes between the parties to be referred to international arbitration, but gave one party (Ericsson) the option to refer disputes to the competent state courts. The outcome dictated whether RTC could continue with a claim it had brought in the Russian courts against Sony Ericsson over the quality of a small number of mobile phones supplied by Sony Ericsson to RTC. The court held that the party that was restricted to recourse to arbitration only (RTC), should also have the right to refer a dispute to the courts. The court effectively read the unilateral arbitration clause as a bilateral arbitration clause in order to balance the rights of each party as against the other.

By contrast, in a previous decision, the Russian court came to the opposite conclusion. In a 2009 case, Red Burn Capital v ZAO Factoring Company (Case no A40-59745/09-63-478), the Federal Arbitrazh Court upheld the validity of a unilateral arbitration clause. In that case, the claimants, Red Burn Capital, filed a claim in the Russian courts seeking debt recovery according to a credit agreement with Eurocommerz. The dispute resolution clause provided for LCIA arbitration, but also gave Red Burn the right to demand that the dispute be heard by a state court if it objected to arbitration before the appointment of an arbitrator, provided that such an election was validly made. In finding that the relevant clause was valid, the court noted that it was reasonable for Red Burn, being the finance party, to be able to choose either arbitration or litigation in the Russian courts, because the finance party bore the risks associated with advancing the loan.
In *Red Burn*, the (lower) Federal Arbitrazh Court was happy to uphold such a clause on the basis that the party bearing the risk should have greater flexibility when it came to resolving a dispute. By contrast, in *RTC*, the Supreme Arbitrazh Court’s rationale in holding that the clause was invalid was that such a clause breached the “balance of rights of the parties”. The *RTC* case therefore represents a significant change in the Russian court’s attitude, which has potentially far-reaching implications. The Court in that case did not clarify the consequences of its ruling. Accordingly, the decision might be interpreted as invalidating unilateral jurisdiction clauses as well as unilateral arbitration clauses. However, the more logical outcome would be that the *RTC* decision renders a unilateral arbitration clause bilateral (so both parties have the option to refer a matter to the courts or arbitration). Unsurprisingly, the case has been criticised as an attempt to defend the sovereignty of Russian courts from encroachment by foreign jurisdictions. However, whatever view one takes, the net result is that the *RTC* decision presents risks for any contracts with a Russian nexus.

By way of aside, it is notable that the International Swaps and Derivatives Association (ISDA) has not included an optional unilateral arbitration clause in its model arbitration clauses intended for use with the 1992 and 2002 ISDA Master Agreements, published on 9 September 2013. (Previously the ISDA Master Agreements did not include an arbitration clause.) The inclusion of an optional unilateral arbitration clause was raised during the consultation process. Given the controversy surrounding such clauses in a range of jurisdictions (including Russia), this likely influenced the decision not to include such a provision in the published model clause.

**Where does this leave us?**

It is clear under English law that unilateral jurisdiction and unilateral arbitration clauses are valid, notwithstanding the fact that they give one party flexibility and restrict the other. That is the bargain struck by the parties, and often for good reason, particularly when it comes to financial institutions that carry the greater risk under the contract. To rule otherwise makes no commercial sense.

However, there is need for caution as regards unilateral jurisdiction clauses where an agreement has a French nexus. As regards unilateral arbitration clauses, these are perceived to be generally more difficult, as their validity is uncertain in many jurisdictions, and should therefore be avoided in circumstances where the contract has global reach.

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