

UNILATERAL DISPUTE RESOLUTION CLAUSES IN FINANCING AGREEMENTS: STRUCTURE & ENFORCEMENT

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Introduction

- Ordinarily, dispute resolution clauses are balanced in their approach, i.e. the parties agree that any future dispute arising from their contract will be heard at, or by a particular forum.
- Unilateral dispute resolution clauses adopt a different approach.
- These are bespoke clauses which allows one party (the Lender) to choose a convenient forum/jurisdiction for the resolution of the parties dispute, after the dispute has arisen; while other party is restricted to a particular forum.

Variant (1): Jurisdiction Clause

- Unilateral jurisdiction (litigation) clause refers all disputes to the court, but gives the lender the sole option of recourse to arbitration. For instance:
 - *“Any dispute arising out of this agreement shall be governed by, and construed in accordance with Nigerian law. The parties agree that the High Court of Lagos State shall have exclusive jurisdiction to resolve any such dispute, and the decision of the court shall be final and binding*
 - *The above clause notwithstanding, [**Lender**] shall, at its sole option, be entitled to refer any such dispute to arbitration, as provided below :
[details of the arbitral rules, number of arbitrators, seat of arbitration].*

Variant (2): Arbitration Clause

- Unilateral arbitration clause refers all disputes to arbitration, but gives the lender the sole option of recourse to the court. Such clause may read:
 - *“Any dispute arising out of this agreement shall be referred to arbitration by a sole arbitrator in accordance with the Nigerian Arbitration and Conciliation Act. The seat of the arbitration shall be Lagos, Nigeria.*
 - *Notwithstanding the above clause, the Parties hereby agree that [Lender] shall have the exclusive right, at its option, to submit any such dispute to the High Court of Lagos State. [Borrower] hereby waive objection to the jurisdiction of the High Court of Lagos State, and agree that a judgment or order of the Court in connection with this agreement is conclusive and binding on it, and may be enforced against it in the courts of any other jurisdiction.*

Variant (3): Multi-Jurisdiction Clause

- Unilateral pure jurisdiction clauses gives one party a choice between the courts of multiple legal jurisdictions.

The Parties hereby agree that the Federal High Court of Nigeria shall have jurisdiction to settle any dispute or proceedings which may arise in connection with this agreement (the “Proceedings”) and that any judgment or order of the Federal High Court shall be conclusive and binding on them.

However, this clause binds [Borrower] only, and shall not limit the right of [Lender] to bring Proceedings against [Borrower] in connection with this agreement in any other court of competent jurisdiction in Nigeria, or concurrently in more than one legal jurisdiction.

Utility

- Lenders in international financing contracts, particularly derivatives and loan transactions. The clause may be operated (particularly where Lender holds court option) to restrict debtor from obtaining ex-parte injunctions, or commencing tactical dilatory proceedings at an inconvenient forum.
- Shipowners to prevent arbitrary arrest of vessels at hostile jurisdictions.
- Any party in a commercial transaction who will be exposed in the event of dilatory legal proceedings, and wishes to optimize its position in anticipation of legal disputes.

Underlying Strategy

- **Forum convenience control**
- *Three Shipping Ltd v. Harebell Shipping Ltd* [2004] All ER 152; a shipping charterparty contained an arbitration clause which required the charterers refer any dispute between the parties to litigation, but gave the ship owner the sole option of arbitration. A dispute arose between the parties and the charterers filed a claim in court. Subsequently, the owners exercised their option to refer the dispute to arbitration, and applied to the court for stay of further proceedings. Held: unilateral option clauses are intended to operate on the basis that the party without the option will, if it wishes to bring a claim, be wise to consult the party with the option before commencing proceedings. Accordingly, the proceedings were stayed.

Underlying Strategy

- **Flexibility**
- Unilateral option clause affords an exposed party the ability to pursue the form of dispute resolution that best suit the specific dispute that has arisen.
 - If the matter is a simple recovery of an undisputed debt, Lender may wish to reserve the right to go to the Court where the matter can be expeditiously determined by way of summary judgment.
 - If, however, the dispute raises knotty issues which required expert adjudication, or the debtor's assets have been moved abroad and the enforcement of a local court judgment may become an issue, the lender can activate the option of international arbitration.

Enforcement – Common Law Jurisdictions

- unilateral option clauses is an exercise of the parties' freedom to determine the terms of their contract.

England - *Law Debenture Trust Co v Elektrim* [2005] 2 All ER (Comm) 476, a multiparty finance trust deed which contained an arbitration clause, but also conferred a litigation option on certain parties was challenged on grounds of unfairness. Held, the two clauses running together makes “perfect sense”, and that a party holding the unilateral option to litigate, was entitled to commence court proceedings and thereby prevent the opposing party from pursuing a parallel arbitration. The unilateral litigation option was subject only to the limitation that the party exercising it would not be able to invoke this option if it had waived its right by starting arbitration or participating sufficiently in the arbitration.

Australia - *PMT Partners Pty v. Australian National Parks & Wildlife* [1995] 184 CLR 302
United States of America: *AT&T Mobility v. Concepcion*, 563 U.S. 131 S.Ct. 1740 (2011)

Enforcement – Civil Law Jurisdictions

- unilateral option clauses are liable to be struck down...
- France - the *Cour de Cassation* declared in *Rothchild* case that a unilateral jurisdiction clause in a banking contract which provided for the jurisdiction of the Luxembourg courts but allowed the bank to sue wherever it wished (it sued in France), was void for being “potestatif” (one-sided). This decision was anchored on French Civil Code (articles 1170 and 1174) which voids obligations that are conditional upon an event that one party entirely controls.
- Bulgaria – In case 1193/2010, the Bulgarian Supreme Court struck down a unilateral arbitration clause in a loan agreement for being a potestativite right.
- Germany and Italy - the courts have reportedly upheld unilateral option clauses in some cases, but upturned them where they visibly violate *boni mores* (good morals) and are significantly imbalanced, or give manifest advantage to one party only.

Russian Hybrid...

- In *RTK v. Sony Ericsson* (Case No. VAS-1831/12) the dispute resolution clause in the parties' contract stipulated ICC arbitration. Sony Ericsson however held a litigation option. RTK filed a claim against Sony Ericsson at the Commercial Court of Moscow. Sony Ericsson, invoking the unilateral option clause applied to strike out RTK's claim.
- Supreme *Arbitrazh* Court - one of the guarantees of fair dispute resolution is that the parties should have equal procedural rights to present their position to the courts or other adjudicatory authorities, and that the principles of procedural equality means that the parties should have equal opportunities.
- Held - a party affected by a unilateral option on dispute resolution should be able to exercise its right to judicial protection on equal terms as the party holding the option. Accordingly, Sony Ericsson's unilateral option of litigation was converted into a bilateral option for both parties.

Nigeria

- *United World Ltd v. MTS Ltd* [1998]10 NWLR (Pt. 568) 106; the dispute resolution clause in a newspaper advertisement contract provided that any dispute should be referred to ICC arbitration, but reserved a unilateral right for the newspaper company (Publisher) to initiate court proceedings.
- An advertiser failed to pay the balance of agreed rate after the advert was published.
- The publisher filed a suit for summary judgment at the Lagos State High Court. In response, the advertiser argued that the dispute ought to have been referred to arbitration. The High Court upheld this argument, and stayed further proceedings to await arbitration. The publisher challenged this decision on appeal, contending that if the High Court had given a proper attention to the litigation option as enshrined in the dispute resolution clause, it would not have referred the matter to arbitration

Nigeria (2)

- The Court of Appeal (Lagos) allowed the appeal:

“When a party to an agreement with reference to arbitration compromised his position by being signatory to the agreement the contents of which give numerous alternatives remedies to the other party, other than resort to arbitration, and by evincing an intention to compromise to an act of the party which he is complaining about, he has robbed himself of competence or premise of referring the subject matter of complaint to an arbitration.”

- Under Nigerian law, unilateral option clauses are, in principle, valid and enforceable. Restriction on the basis of perceived unequal terms would be an unacceptable interference with the principle of sanctity of contract.

Abuse of the unilateral option clause?

- *Deutsche Bank AG v. Tongkah Harbour Public Ltd* [2011] EWHC 2251; a bank issued civil proceedings seeking payment of sums due under a facility agreement, and simultaneously commenced arbitration proceedings under the underlying export contract. The English Court held that although the bank had different claims, due under different agreements, they arose out of the breach of the same transaction arrangements. As such, they were aspects of the same “matter”. Having exercised the option to arbitrate in respect of the matter under the export agreement, it was held that the bank was not entitled to proceed with the litigation under the facility agreement.

Infraction of fair hearing?

Infraction of fair hearing under Section 36 of the 1999 Constitution?

- Unilateral option clause merely confers a procedural advantage for a party to optimize its position in anticipation of legal disputes.
- The parties have equal substantive rights under law. While procedural rights regulate where and how a dispute may be resolved, the dispute would ultimately be determined in accordance with the parties' substantive legal rights.
- Section 14 of the Arbitration and Conciliation Act, Chapter A18, LFN 2004: *“the arbitral tribunal shall ensure that parties are accorded equal treatment and that each party is given full opportunity of presenting his case.”*
- The same standard of equal treatment is entrenched in litigation proceedings: *Stabilini Visiononi v Mallison* [2014] 12 NWLR (Pt 1420) 134

Protection from abuse of the unilateral option

The party without the option could be protected in instances whereby:

- the party with the option had taken steps, without formal protest, to defend proceedings commenced by the counter-party in an inconvenient forum. In such circumstance, the party holding the option will be taken to have waived the option and submitted to the jurisdiction of the inconvenient forum.
- The party holding the options engages in multi-forum litigation. See *Deutsche Bank AG v Tonghah* case.
- The lender refuses to consult with the debtor where the debtor has indicated an intention to file a claim, or an unreasonable delaying of such discussions, or failing to indicate which forum the claim should be brought in,

Overall Lessons

- **Principle of party autonomy** - Provided that it is reasonably clear that the parties intended that a dispute-resolution clause to operate unilaterally, the common law courts would be reluctant to interfere with the parties' contract.
- **Caution** - Where the multi-jurisdiction option is to be exercised in Nigeria, the jurisdiction limits of each court in the 1999 Constitution must be carefully considered. Furthermore, where it would have to be exercised abroad, the judicial attitude at the forum of enforcement must be considered.
- **Clarity** - Parties should avoid ambiguous clauses which do not define the extent of procedural control, and whether arbitration or litigation was agreed by the parties as the primary forum of dispute resolution, or where the unilateral option interferes with the exercise of parties' substantive rights.



Q & A

THANK YOU FOR LISTENING!

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