Is an Asymmetric Disputes Clause Valid and Enforceable?

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Asymmetric clauses are a regular feature of commercial contracts, especially in finance transactions. The apparent unfairness reflected by one party having different, and often 'better', rights than the counterparty has given rise to a number of reactions. In many courts, party autonomy, in agreeing to the asymmetry, is upheld. There are sound policy reasons to do so. Elsewhere, the principle of equal treatment is invoked to challenge the asymmetric clause. Several major decisions upholding the equal treatment challenge have been handed down. Many of these have either been misunderstood, misapplied or have subsequently been clarified in favour of broad party autonomy.

Keywords: public policy, equality, autonomy, asymmetric, unilateral, jurisdiction

1 INTRODUCTION

A 'symmetrical' dispute clause or agreement gives each party equal rights in relation to the resolution of disputes: both parties have the same rights whether they be to proceed through a tiered escalation from management, to senior management, to mediation and then to courts or arbitration; or to proceed in a specific jurisdiction or to arbitrate in a particular forum.

Conversely, an 'asymmetric' jurisdiction clause is one where the parties have different rights. An asymmetric arbitration agreement may grant asymmetric rights to one party as to what type of dispute resolution may be employed (litigation, mediation, etc.), the jurisdiction (for example, having recourse to its home or a wider range of courts or arbitration in a particular seat) or the procedure (for example, a right to appoint an arbitrator).[1]

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[1] Logically, there is no limit as to the asymmetry and there could be asymmetry as between institutional rules. E.g. one party can choose between ICC and LCIA, whereas the other can only initiate proceedings under ICC.

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Such an asymmetric clause is usually reflective of either a stronger bargaining position of one of the parties, or at a purely pragmatic level one party may legitimately need greater flexibility. An example of the latter are finance agreements. Under such agreements a lender will often have greater rights than does the borrower as this is because the lender may wish to commence proceedings in a jurisdiction where assets are located to ease enforcement and the location of assets might not be known until the dispute has arisen. Conversely, a borrower may not have concerns about enforcement and know at the time of the original agreement the jurisdiction and dispute resolution it favours. Equally, the lender may wish to prevent the borrower from forum shopping and creating a court 'first seized' in an inappropriate jurisdiction.

There is no dispute in English law that the relevant principles which apply to the construction of jurisdiction provisions can be derived from *Donohue v. Armco Inc*[2]*; Fiona Trust and Holding Corporation v. Privalov*[3] and *Satyam Computer Services Limited v. Upaid Systems Limited*.[4] It is accepted, that jurisdiction clauses must be construed '*widely and generously*' with a presumption in favour of '*one-stop shopping*' for dispute resolution.

2 BACKGROUND TO THE ISSUE

The bedrock of commercial negotiations in many, perhaps most, jurisdictions is that the parties (especially sophisticated parties with similar bargaining strengths) have the right to strike whatever deal they want and the law will, as far as it is able within certain parameters like public policy, uphold that commercial bargain.

The principle of equal treatment is fundamental to the concept of justice, in international arbitration as in any state court system. Arbitration conventions, rules and national laws unanimously impose a requirement, either express or implied, that the parties be treated equally throughout the arbitral process.[5] Notwithstanding this, the precise extent and limits of procedural equality remain elusive. Defining procedural equality is difficult, in no small part because it is inherently fact sensitive. Nevertheless, difficulties in definition should not prevent a proper attempt at analysis on the role that equal treatment plays, or ought to play, in international arbitration.

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2 [2001] UKHL 64.
3 [2007] EWCA Civ 20, [2007] 2 Ll Rep 267.
4 [2008] EWCA Civ 487, [2008] 2 AllER (Comm) 465.
5 *See* e.g. UNCITRAL Model Law on International Commercial Arbitration ('**UNCITRAL Model Law**'), Art. 18; 2017 CIETAC Investment Arbitration Rules, Art. 20(1); 2013 HKIAC Rules, Art. 13.1; 2017 ICC Rules, Arts 5(2), 22(4), 37(2); 2014 LCIA Rules, Arts 14.4, 14.5; 2017 SCC Rules, Arts 17(4), 17(5), 23(2); 2017 SIAC Investment Arbitration Rules, Rules 7.1, 9.2, 16.1.

The principle of equal treatment has a rich history in modern legal thought that is inextricably linked to the right to a fair trial. The principle traces its roots as far back as the Great Charter of Liberties, the Magna Carta Libertatum, in 1215. Since then, numerous domestic and international legal instruments have enshrined the right to procedural equality as a core ideal of a fair trial. The Fifth and Fourteenth Amendments to the Constitution of the United States, for example, guarantee that no person shall be deprived of '*life, liberty, or property, without due process of law*'.

In the realm of human rights law, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights encapsulate the right to equal treatment within fair trial protections.[6] The term 'equality of arms' – much cited in international arbitration – finds its genesis in jurisprudence of the European Court of Human Rights on the right to a fair trial under Article 6 of the European Convention on Human Rights.[7]

The development of procedural equality in international arbitration reflects these developments. The principle of equal treatment was guaranteed in the New York Convention ('NYC')[8] and its predecessor, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, which set minimum due process protections that secure a party's right to present its case. Although there is no express reference to it, the notion of equality permeates these conventions. It is widely acknowledged that Article V(1)(b) of the NYC, which precludes enforcement of an award when a party was unable to present its case, includes equality of treatment. Others have considered the principle a component of procedural public policy under Article V(2)(b). As stated by Professor van den Berg:

> [*d*]*ue process, which pertains to public policy, implies as a fundamental principle, that the parties have an equal opportunity to be heard*.[9]

The 1985 The United Nations Commission on International Trade Law (UNCITRAL) Model Law guarantees equal treatment in more explicit terms. Article 18 provides that *'[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'*.

Furthermore, the principle of equal treatment has an expansive reach. It guides not only the arbitral tribunal in its conduct of the proceeding, but also the parties in crafting the arbitral procedure. This is most distinctly borne out by

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6 Universal Declaration of Human Rights, Art. 10; ICCPR, Art. 14.

7 *See* e.g. *X v. Sweden*, App No 434/58, Decision of 30 June 1959, *Yearbook of the European Convention on Human Rights*, 2 370 (1958–1959).

8 New York Convention, Art. V(1)(b).

9 A. J. van den Berg, *The New York Convention of 1958: An Overview*, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* 64 (E. Gaillard & D. Di Pietro eds, Cameron May 2008).

the drafting history of Article 18 of the UNCITRAL Model Law, which is described in the passage below:

> *The fundamental precepts of Article 18 were intended to apply both to actions taken by the arbitral tribunal and to procedural agreements reached by the parties. The drafting history is absolutely clear on this point. In some of the early drafts of what became Article 18, the provision was apparently a limitation only on the discretion of the arbitral tribunal and not on the parties. At its fifth and final session on the Model Law, however, the Working Group directed that the text be amended to emphasize that the principle of equality and the right to present one's case 'should be observed not only by the arbitral tribunal but also by the parties when laying down any rules of procedure'.* [10]

Today, numerous national arbitral laws and rules expressly require arbitrators to treat disputing parties equally.[11] National courts have similarly consistently upheld the principle of equal treatment. The requirement for procedural equality applies to all phases of the arbitral reference, which as explained above, sets limits on both the tribunal's and the parties' conduct. A definitive list is, of course, impossible due to the fact sensitive nature of the issue. Indeed, the impossibility of definition is the hallmark of procedural fairness.[12] For instance, one case might necessitate a strict division of hearing time between the parties, another might warrant a more calibrated approach to account for differences between the parties in the number of witnesses and experts to be cross-examined or the burden of proof. The constitution of the tribunal can, however, be used as an example to consider procedural fairness.

The constitution of the arbitral tribunal is one of the most fundamental steps in the arbitral process. While parties have the autonomy to design their own mechanisms for tribunal constitution, unequal procedures which give one party disproportionately greater influence in the appointment process are generally impermissible. Procedural equality in the constitution of the tribunal is of fundamental importance as it gives the parties the same rights and amount of influence in the nomination process.

Some national laws therefore contain express prohibitions on unbalanced appointment procedures.[13] Unequal tribunal constitution mechanisms have been

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[10] Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 550–551, citing UN Doc A/CN.9/246 (6 Mar. 1984), para. 62.

[11] English Arbitration Act 1996, s. 33; German Code of Civil Procedure, s. 1042; Dutch Code of Civil Procedure, Art. 1036(2); Russian Law on International Commercial Arbitration (n. 5338–1), Art. 18; Serbian Arbitration Act (46/2006), Art. 33; Spanish Arbitration Act (60/2003), Arts 15(2), 24(1); 2017 CIETAC Investment Arbitration Rules, Art. 20(1); 2013 HKIAC Rules, Art. 13.1; 2017 ICC Rules, Arts 5(2), 22(4), 37(2); ICSID Arbitration Rules, Art. 20(2); 2014 LCIA Rules, Arts 14.4, 14.5; 2017 SCC Rules, Arts 17(4), 17(5), 23(2); 2017 SIAC Investment Arbitration Rules, Rules 7.1, 9.2, 16.1; 2010 UNCITRAL Arbitration Rules, Art. 17(1).

[12] *See* e.g. *Schweiker v. McClure* (1982) 456 US 188, 200 ('due process is flexible and calls for such procedural protections as the particular situation demands').

[13] Article 1028 of the Dutch Code of Civil Procedure provides that '[i]f by agreement or otherwise one party is given a privileged position with regard to the appointment of the arbitrator or arbitrators,

struck down by both common and civil law courts. Courts in the United States, for instance, have refused to enforce appointment procedures in employment disputes that permit one party (typically the employer) to dictate the list from which the tribunal can be constituted.[14]

In the absence of party agreement, the normal default mechanisms for tribunal constitution are also founded on party equality. Most arbitral rules and national laws provide for a joint appointment by the parties of a sole arbitrator, failing which the appointment is made by the applicable appointing authority (court or institution). For three member panels, each party typically has the right to appoint one arbitrator, and the third arbitrator is appointed by either the two appointed arbitrators jointly, or the applicable appointing authority. These default mechanisms are designed to ensure parity between the parties.

The 1992 French Cour de Cassation case of *Sociétés BKMI et Siemens v. Société Dutco*,[15] demonstrated the importance of procedural fairness. In *Dutco*, the Court set aside an arbitral award rendered in a three-party dispute where each of the two respondents asserted the right to appoint their own arbitrator, rather than make a joint appointment. The arbitration agreement provided for a three-member tribunal where each side appointed one arbitrator and the two appointed arbitrators would appoint the presiding arbitrator. While the respondents eventually made a joint nomination, this was only done under protest. The Court annulled the award on the basis that the appointment procedure violated the respondents' right to equal treatment because it granted the claimant greater influence in the constitution of the Tribunal than each of the respondents. The Court held that the '*principle of equality of the parties in the designation of arbitrators is a matter of public policy …* '

Dutco's practical implications are beyond doubt. Promptly after the decision a number of prominent arbitral institutions, including the International Chamber of Commerce (ICC)[16] and London Court of International

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either party may, in derogation of the agreed method of appointment, require the Provision Relief Judge of the district court to appoint the arbitrator or arbitrators'. German Code of Civil Procedure, s. 1034(2) ('If the arbitration agreement provides for one party to be more strongly represented in the composition of the arbitral tribunal, and this places the other party at a disadvantage, the latter party may file a petition with the court that it appoint the arbitral judge(s) in derogation from the appointment(s) made or the appointment provisions agreed'.) (English translation is, www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html).

14 *See* e.g. *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 303 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

15 *Sociétés BKMI et Siemens v. Société Dutco*, Judgment of 7 Jan. 1992, 10(2) ASA Bulletin 295 (1992).

16 Article 12 now provides:
12.6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Art. 13. … 12.8 In the absence of a joint nomination pursuant to Arts 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal

Arbitration (LCIA),[17] amended their rules. Those rules now provide that claimant(s) and respondent(s) must jointly nominate their respective co-arbitrators; failing the joint appointment by either side, the institution will appoint the entire tribunal, notwithstanding the nomination by either side.

Dutco has also raised the issue of when the principle of equality starts to apply and arguments have been advanced that it applies to agreeing the arbitration agreement itself. The principle of equal treatment does not apply to the arbitration agreement and that is not what *Dutco* decided. To the contrary, *Dutco* concerns the appointment of the tribunal which is plainly part of the arbitral procedure. Equality of treatment is only applicable after arbitral proceedings have been initiated. The principle of equal treatment is a procedural right. Article 18 Model Law lays down the fundamental requirements to achieve procedural justice and requires similar standards to all parties throughout the arbitral process. In this context, '*arbitral process*' means '*from notice of the arbitration […] to making of the award*'.[18] Hence, the expression '*arbitral process*' does not entail the formation of the arbitration agreement. This is also supported by the fact that Article 18 Model Law is contained in chapter five of the Model Law. This chapter provides for the 'Conduct of the Arbitral Proceedings' and provides the legal framework for fair and effective arbitral proceedings, as, for example, the language to be used in the proceedings (Article 22 Model Law) or the conduct of the oral hearings (Article 24 Model Law).

In Germany a strict equality of the parties in the appointment of the arbitral tribunal is part of public policy. Where neither the underlying arbitration clause nor the applicable arbitration rules contained special rules ensuring the strict equality of the parties in the appointment process, section 1034(2) Code of Civil Procedure (ZPO) is used to have the entire tribunal appointed by the courts. It provides:

> *(2) If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the*

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and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Art. 13 when it considers this appropriate.

[17] Article 8 now provides:
8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate 'sides' for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.
8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone.

[18] Born, *International Commercial Arbitration*, 2173 (2nd ed., 2014) para. 3.

court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure. The request must be submitted at the latest within two weeks of the party becoming aware of the constitution of the arbitral tribunal.

In a decision of 16 September 2010, the Higher Regional Court in Frankfurt[19] deviated from that approach. In arbitral proceedings initiated by the insolvency administrator of a project company against two of its shareholders, the Court appointed a joint arbitrator for the two respondents as requested by the claimant. At the same time, it rejected the request by one of the two respondents that the arbitrator appointed by the claimant should be replaced by an arbitrator appointed by the court. Unlike many other arbitration agreements, it explicitly stated that in multiparty situation several parties on one side had to appoint a joint arbitrator.

One of the respondents had not participated in the proceedings at all while the second respondent had replied and had appointed its own arbitrator. The court held the appointment made to be void, as it was not in line with the agreed upon procedure which provided for joint appointment. In making the appointment for both respondents, the Court, however, appointed the same person which had been nominated by the second respondent before. On this basis the court found that there had been no inequality in the appointment process. The second respondent had de facto received the arbitrator it wanted while the first respondent did not care about appointment and was therefore also not negatively affected.

While the result reached may be equitable and the efforts to promote party autonomy may be laudable, the reasoning of the judgment is at least doubtful. It allowed the court to avoid the more general question raised by the case: to what extent are the parties were entitled to deviate from important features of arbitration. Or to put it differently: what are the limits of party autonomy in arbitration.

This question has gained some prominence in connection with the parties' efforts of regulating the finality of awards and their possible review by the courts. There it has received different answers by the US-Supreme Court in *Hall Street v. Mattel*[20] decision. As one of the most controversial decisions in US arbitration law it considered whether grounds for judicial review of arbitration awards provided by the Federal Arbitration Act ('FAA') could be expanded by party agreement. The issue had sharply divided US federal courts. In *Mattel*, the US Supreme Court has held that the statutory grounds for review are not expandable even by express contractual provision. The decision of the Supreme Court in the decision of the majority was based simply on an analysis of the FAA and did not feature policy considerations.

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[19] Docket no. 26 SchH 5/10.
[20] 552 US 576 (2008).

However, the recent decision of the Superior Court of Justice of Brazil in *Santander Brasil v. Paranapanema*[21] has reignited the *Dutco* issues. The Court set aside an award due to irregularities during the formation of the arbitral tribunal in the context of a multi-party dispute. In 2010 claimant, issued arbitration proceedings against two respondents. The relevant institutional arbitration rules, then in force, had no special provisions for multi-party disputes. When the respondents failed to agree on a co-arbitrator, the institution's president made a nomination on their behalf. After the award was rendered, one of the respondents started proceedings to challenge the decision arguing (among other issues) that the proceeding adopted by the institution's president to appoint the members of the arbitral tribunal was irregular and infringed natural justice.

The Court accepted the challenge, ruling that '*unfortunately, there was a failure in the arbitrators' appointment, so the arbitration was tainted irremediably*'.

3 PUBLIC POLICY OBJECTIONS

The particular objections under public policy and procedural fairness can, generally, be broken down into the following categories

3.1 The potestative nature of a clause

The first argument is that an asymmetric clause is *potestative*. The concept of '*caractère potestatif*' is used in French law to describe a situation where performance of a contract is subject to a condition precedent the fulfilment of which falls within the discretion of one of the contracting parties.

In relying on the concept of *potestative*, in the *Rothschild* case (discussed below) the *Cour de Cassation* also used domestic legal principles to interpret the applicable EU provision in violation of the purpose of the Brussels Regulation, which is to provide a uniform and predictable legal framework.

3.2 Lack of mutuality (consideration)

It is a common law doctrine of 'mutuality of obligation' that 'either both must be bound, or neither is bound'. While both parties must manifest assent for a contract to be formed, that manifestation need not be symmetric in time, place, or form. Contract provisions need not give the parties the same positions, and it is not logically sound to

[21] Banco Santander Brasil S/A *v.* Paranapanema S/A and Banco BTG Pactual S/A. Special Appeal 1.639.035-SP, 3rd Panel of the Superior Court of Justice, Judge Rapporteur Paulo de Tarso Sanseverino, decision rendered on 18 Aug. 2018.

require this. It is enough that value be given on both sides – it need not be adequate. If the law required the terms of contracts to be symmetrical such that the parties merely traded the same thing for the other, no exchanges would take place.

The only context in which this argument might work is if the asymmetric clause is severed from the rest of the agreement when assessing consideration but specific consideration for any particular clause in an agreement is not required.

However, courts rejecting the validity of unilateral arbitration agreements based on lack of mutuality seemingly adopt this specific approach. The clause is severed from the agreement and assessed separately. Inevitably, it is found lacking in consideration and, consequently, invalidated. 'Severability' was, however, developed in a different context for a different purpose and it is inapplicable in this respect. It is a rule developed to effectuate the salvation, not the condemnation, of arbitration clauses.

3.3 Violation of EU law

In addition to its reliance on the widely criticized *potestative* doctrine, the court in *Rothschild* held that the clause was in violation of Article 23 of the Brussels I Regulation concerning 'prorogation of jurisdiction' (the equivalent of Article 25 in the Recast Brussels Regulation) as it was contrary to 'the finality of the extension of jurisdiction provided for in Article 23' and its objectives. The asymmetric clause enabled the bank to bring an action before the courts of the domicile of Mrs. X, the courts of Luxembourg or any other court of competent jurisdiction. Despite potentially being numerous, these options are both limited and foreseeable. Article 23 explicitly states that the parties may agree on conferring exclusive jurisdiction unto courts other than those of competent jurisdiction. It is widely considered that the *Cour de Cassation* in *Rothschild*, misinterpreted Article 23.

3.4 Equality of treatment and unconscionability

As its name reveals an asymmetric clause is imbalanced, as it serves the interests of only one party and may reflect an inequality of bargaining power. This gives two possible grounds for invalidity: imbalance between the parties and unconscionability.

With respect to invalidity, it has been suggested that asymmetric clauses violate article 6 of the European Convention on Human Rights and the right to a fair trial. The *Sony Ericsson* case (discussed below) also implied that the 'right to equality of arms' was violated. This amounts to an argument of having an equal opportunity to present one's case before a court. This is to misunderstand the concept in question. The principle of 'a fair trial' means that the parties have equal

procedural rights (due process) within the proceedings – not with regards to the choice of forum.

It can be argued that it is unconscionable for a party to exploit its economically powerful position by insisting upon an asymmetric clause. This argument is not convincing for a number of reasons. First, an agreement may include a number of imbalanced clauses and lack of balance is rarely *per se* ground for invalidity. Secondly, this would lead to the absurd result of invalidating a great number of agreements simply because they contain a clause that is favourable to one party. Finally, a defence of unconscionability requires both procedural and substantive unconscionability. Procedural unconscionability is manifested by unfair surprise. It is difficult to argue that such a condition is satisfied in the context of an asymmetric clause which the parties negotiated and accepted.

4 NATIONAL APPROACHES TO ASYMMETRY

It is against that background that the approach of national courts to asymmetric clauses stands to be considered.

4.1 ENGLAND

English courts have consistently found asymmetric clauses enforceable.

In *Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd*[22] the relevant clause provided that:

> *The courts of England are to have jurisdiction … and accordingly any legal action or proceedings arising out of or in connection with this Agreement ("Proceedings") may be brought in such courts. The Purchaser irrevocably submits to the jurisdiction of such courts … . This submission is made for the benefit of the Seller and shall not limit the right of the Seller to take proceedings in any other court of competent jurisdiction nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not) if and to the extent permitted by applicable law.*

Rix J held

> *The word 'may' reflects the possibility that CS Europe may at its option bring proceedings against MLC outside England. The 'taking of proceedings' in the context of the final sentence can in my judgment only apply to the taking of proceedings by CS Europe. … Although the presence of an exclusive clause binding on MLC in the purchase agreements alone may seem odd, or at any rate incoherent, I do not feel able in the light of Continental Bank v Aeakos and its reasoning, which lays stress on the bank's unilateral option, to hold otherwise than that MLC is bound by its contract to bring proceedings 'arising out of or in connection with' the purchase agreements exclusively in the courts of England.*

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[22] [1999] C.L.C. 579 (1998).

NB Three Shipping v. Harebell Shipping[23] concerned an application to stay arbitration proceedings under an asymmetric clause. The clause provided that the shipowner was entitled to bring arbitration but the charterer was limited to High Court proceedings. Morison J noted the clause gave '"*better" rights*' to the shipowners but refused to stay the arbitration. Moreover, in *Law Debenture Trust Corp v. Elektrim Finance BV & Ors*,[24] Mann J considered an asymmetric clause providing for arbitration but granting an option to one of the parties to litigate. In this case, the application to stay arbitration proceedings was granted as the right to seek arbitration was subject to the agreed option to litigate. These cases demonstrate that English courts will give effect to the parties' chosen dispute resolution method irrespective of whether it is asymmetric.

In *Antec International Limited v. Biosafety USA Inc*[25] in the context of a non-exclusive jurisdiction clause, which had been exercised by one of the parties, Gloster J set out the relevant legal principles. Amongst other things she held that the fact that '*the parties have freely negotiated a contract providing for a non-exclusive jurisdiction of the English courts and English law, creates a strong* prima facie *case that the English jurisdiction is the correct one*' and that '*the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong reasons for departing from this rule*'. She went on to hold that '*such overwhelming or very strong reasons do not inclu*de factor*s of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice)*'.[26]

In *Bank of New York Mellon v. GV Films*[27] Field J held that:

> *The clause has to be construed as a whole, and part of the relevant background are the similar provisions contained in the Dollar Bonds' Terms. In my judgment the words: "The courts of England are to have jurisdiction to settle any dispute which may arise out of or in connection with this Trust Deed … " taken together with the express liberty conferred on the trustee but not conferred on the company, to bring proceedings in any other court of competent jurisdiction, clearly show that the intention of the parties was that the courts of England are to be the exclusive jurisdiction so far as proceedings brought by GV Films are concerned.*

Further, Gloster J in *Lornamead Acquisitions Limited v. Kaupthing Bank HF*[28] held:

> *[An asymmetric clause stated to be for the benefit of one party] does not confer on [that party] an entitlement to "renounce" a jurisdiction clause in its entirety and to dispute the jurisdiction of*

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23 [2004] EWHC 2001 (Comm).
24 [2005] EWHC 1412 (Ch).
25 [2006] EWHC 47 (Comm).
26 At 7.
27 [2009] EWHC 2338 (Comm).
28 [2011] EWHC 2611 (Comm).

> *proceedings properly brought by the other party in accordance with the clause. The article merely provides that the beneficiary of the clause is permitted to elect to bring proceedings arising out of, or in connection with, those agreements in another court of competent jurisdiction, in addition to England. But that provision is clearly, given the wording "in any other court which has jurisdiction by virtue of this Convention" without prejudice to the "first seised" rules … . It does not entitle [the beneficiary] unilaterally to challenge proceedings previously brought by [the other party] against [the beneficiary] in England in accordance with the terms of the English jurisdiction clause and in conformance with [the other party's] contractual obligation thereunder. Nor do the English jurisdiction clauses confer any such right. They make it clear that [the beneficiary] can take concurrent proceedings in other jurisdictions only "to the extent permitted by law." It was not disputed by [the beneficiary], that if the English Court was indeed entitled to maintain jurisdiction, it was the Court first seised, and that accordingly it was no longer open to [the beneficiary] to bring proceedings against [the other party] in relation to the same cause of action in Iceland* [29]

In *Mauritius Commercial Bank Ltd v. Hestia Holdings Ltd* [30] the court held that an asymmetric clause expressed to be '*for the benefit of the Lender only*' in fact only released the lender from the effects of the clause in proceedings brought by the lender. It did not override the lender's agreement to submit to the jurisdiction of the English courts in proceedings brought by the borrower. Popplewell J held:

> *… If, improbably, the true intention of the parties expressed in the clause is that MCB should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect. The public policy to which that was said to be inimical was "equal access to justice" as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum. No forum was identified in which the Defendants' access to justice would be unequal to that of MCB merely because MCB had the option of choosing the forum.*[31]

These principles are reinforced in two further cases on asymmetric court jurisdiction clauses. In *Barclays Bank plc v. Ente Nazionale di Previdenza Ed Assistenza dei Medici e Degli Odontoiatri* [32] the Court upheld a clause allowing one party to sue only in English courts but giving the other party a free choice, noting there were '*good practical reasons*' for the clause. Equally, in *Commerzbank AG v. Pauline Shipping Limited Liquimar Tankers Management Inc*[33] the court held that asymmetric jurisdiction clauses are exclusive jurisdiction clauses for the purposes of Article 31 (2) the Brussels 1 Recast Regulations. This is important as Article 31(2) provides that where there is an exclusive jurisdiction agreement, an EU Member State court is required to stay proceedings brought before it, until the court given jurisdiction under the parties' jurisdiction agreement declares that it has no jurisdiction over the dispute. The court noted that it would undermine the parties' agreement and

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29 At 112.
30 [2013] EWHC 1328 (Comm).
31 At 43.
32 [2015] EWHC 2857 (Comm).
33 [2017] EWHC 161 (Comm).

foster abusive tactics if asymmetric jurisdiction clauses were treated as nonexclusive.

These recent cases provide further comfort to those relying on asymmetric arbitration clauses. Even though they deal with a choice between courts rather than between arbitration and courts, the principle relied upon is the same – parties should be free to choose how to resolve their disputes and courts should respect that choice.

4.2 Singapore

The Singapore Court of Appeal recently confirmed the validity of an asymmetric clause in *Dyna-Jet Pte Ltd v. Wilson Taylor Asia Pacific Pte Ltd.*[34] The clause provided that at the election of one party (Dyna-Jet), a dispute may be referred to and settled by arbitration. Therefore, not only was the clause asymmetric and 'lacking mutuality' but it was optional in that it depended on an election being made by Dyna-Jet. This is the first time that the Court of Appeal has ruled on the validity of an asymmetric and optional arbitration clause under Singapore law.

Upholding the High Court's decision, the Court of Appeal held that the dispute resolution clause was a valid arbitration agreement. The court held that, in establishing the validity of the arbitration agreement, it is 'immaterial' that the arbitration clause is asymmetric and that arbitration of a future dispute entirely optional instead of imposing on parties an immediate obligation to arbitrate their disputes.

4.3 Hong kong

Asymmetric clauses have been held to be valid and enforceable in *China Merchants Heavy Industry Co Ltd v. JGC Group*,[35] referring to and applying the English case of *Pittalis v. Sherefetin*.[36]

4.4 Us

Some US courts have upheld asymmetrical agreements, but others have not. Those upholding have included: *Harris v. Green Tree Fin. Corp.,*[37] reasoning that: *'[T]he*

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34 [2017] SGCA 32.
35 [2001] HKLRD (Yrbk) 21.
36 [1986] 1 QB 868.
37 183 F.3d 173, 183 (3d Cir. 1999). *See also Salley v. Option One Mortg. Corp*, 246 F. App'x 87, 91 (3d Cir. 2007), confirming Harris *v.* Green Tree as an accurate statement of Pennsylvania law, after conflicting lower court decisions caused the question to be certified to the Pennsylvania Supreme Court.

mere fact that [one party] retains the option to litigate some issues in court, while the [other party] must arbitrate all claims does not make the arbitration agreement unenforceable' and *Doctor's Assocs., Inc. v. Distajo,*[38] holding that under Connecticut law, an arbitration clause allowing only one party to seek judicial recourse for certain claims is not void for lack of mutuality, because *'the consideration for the contract as a whole covers the arbitration clause as well'*.

However, some courts have found that one-sided arbitration clauses may be unconscionable and oppressive, and therefore unenforceable. Cases to this effect include, for example: *Bragg v. Linden Research, Inc.,*[39] applying California law, holding that an arbitration clause was procedurally unconscionable as a take-it-or-leave-it contract of adhesion, and substantively unconscionable for forcing the weaker party to arbitrate claims but allowing the stronger party a choice of forums, imposing high costs for arbitration, designating an inconvenient forum for arbitration and imposing confidentiality on the arbitration proceedings. Similarly, *US ex rel. Birckhead Elec., Inc. v. James W. Ancel, Inc.,*[40] applying Maryland law, the court refused to enforce an arbitration clause in a construction subcontract that provided *'All disputes … at the Contractor's sole option, be resolved by arbitration'*. The court held that arbitration agreement is not supported by mutual consideration. In New York, mutuality of remedy is not required in arbitration contracts: *Sablosky v. Edward S. Gordon Co.,*[41] but lack of mutuality may be considered as a factor in determining whether the agreement to arbitrate is unconscionable: *Deutsch v. Long Island Carpet Cleaning Co.*[42]

4.5 India

The status of asymmetric clauses in India is also unclear, in light of inconsistent decisions by the Indian courts[43] but there appears to be pro-validity approach emerging. The Supreme Court of India in *TRF Ltd v. Energy Engineering Projects Ltd* [44] held that a clause entitling one party to appoint an arbitrator alone and without the input of the other, was valid. The High Court of Judicature in Bombay[45] also dealt with a clause whereby one party was solely entitled to appoint

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38 66 F.3d 438, 451–453 (2d Cir. 1995).
39 487 F. Supp. 2d 593, 605–611 (E.D. Pa. 2007).
40 2014 WL 2574529 (D. Md. 5 June 2014). *See also Noohi v. Toll Bros.*, 708 F.3d 599, 609 (4th Cir. 2013).
41 538 N.Y.S.2d 513, 516 (1989).
42 158 N.Y.S. 2d 876 (1956).
43 Contrast *Union of India v. Bharat Engineering Corporation* ILR 1977 Delhi 57 and (*New India Assurance Co Ltd v. Central Bank of India & Ors AIR* 1985 Cal 76).
44 3 July 2017, Civil Appeal No. 5306 of 2017.
45 26 May 2017, Arbitration Application No. 65 of 2016.

the arbitrator and did not consider it necessary to consider whether that aspect of the clause was valid.

4.6 France

In *Sicaly*[46] the Cour de cassation upheld an asymmetric clause giving one party only the right to choose between a court or an arbitral tribunal.

However, since then, the Cour de cassation has issued some controversial decisions where it refused to enforce asymmetric clauses. Those cases arguably had no real bearing on asymmetric arbitration clauses since the option offered was between national courts. For instance, in the highly criticized *Rothschild case*,[47] the Cour de cassation held that an agreement providing an option to one party to choose between an indefinite choice of jurisdictions is void. The bank's customer, Mme X, brought a claim against the bank in Paris alleging negligent management of her investments. The bank relied on a jurisdiction clause which provided for exclusive Luxembourg jurisdiction subject to the bank's right to sue the customer elsewhere. The Cour de cassation held that the jurisdiction clause did not fulfil the requirements of Article 23 of the Judgment Regulation and refused a stay. In its very brief reasons for doing so it described the clause as '*potestativite'*, a concept of French *droit commun* based on provisions of the Civil Code, provisions which have an equivalent in the Civil Code in Mauritius.

But in the recent *Apple case*,[48] the Cour de cassation clarified its position. The court gave effect to a clause that offered a rather limited choice to the beneficiary of the option, i.e. between the Irish courts, the court of the reseller's corporate seat (France), or '*any jurisdiction where harm to [the reseller] is occurring*'. The court reached its conclusion on the basis that such a clause was foreseeable as the option permitted the identification of the jurisdictions before which the action could be brought.

In light of this latest decision, most scholars and practitioners are of the view that asymmetric clauses are valid under French law, provided that the choice offered to the beneficiary of the option is objectively limited and predictable.

4.7 Russia

In the Russian Federation, courts have held an optional clause is not valid when the choice is conferred to only one party of the dispute. In the *Sony Ericsson case*,[49]

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[46] Cass. 1st civ., (15 May 1974).
[47] Cass. 1st civ., (26 Sept. 2012), No. 11–26.022.
[48] Cass. 1st civ., (7 Oct. 2015), No. 14–16.898.
[49] Case No. No. A40-49223/11-112-401.

the Russian Supreme Commercial Court found unilateral hybrid dispute resolution clauses invalid. Sony Ericsson could file a claim in any court of competent jurisdiction for recovery of debt for delivered products. The other party had no such right. The court stated that a '*dispute settlement clause cannot confer only one party (Seller) of the contract the right to file a claim to the competent national court and deprive the other party (Buyer) of such rights. Such clauses breach the balance of the rights of the parties*'.

However, in a subsequent case, the Supreme Court held that a clause which conferred an option on '*the claimant*' (rather than on a named party) was valid and enforceable. The court found that the equality of the parties was not violated because either party to a dispute could become the claimant by initiating a dispute.[50] Further, in May 2015, the Supreme Court emphasized that hybrid dispute resolution clauses *per se* do not contradict Russian Law and therefore, optional clauses are valid and enforceable in Russia, provided that they do not violate the equity of parties.[51]

4.8 Other Jurisdictions

It is understood that the courts in Poland and Bulgaria, as well as France, have refused to recognize asymmetric jurisdiction clauses, whereas courts in Spain, Italy, Luxembourg and Greece have all adopted the same approach as the English courts.

The Financial Markets Law Committee published a paper on asymmetric clauses in July 2016[52] in which they highlighted the starkly different approaches that have been taken in some European courts and recommended that clarification was required.

5 BREXIT

When the UK leaves the EU, the 'recast' Brussels Regulation will no longer apply automatically to it. It is unclear what, if any, reciprocal arrangements on jurisdiction and recognition of judgments will apply instead between the UK and the EU27, but if no replacement agreement is reached:

- The English courts may no longer be bound by decisions of the CJEU, removing the current (low) risk that asymmetric clauses might become ineffective in England on account of an unfavourable CJEU judgment in the future.

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50 Case No. A62-1635/2014.
51 Case No. A56-56934/2014.
52 http://fmlc.org/report-asymmetric-jurisdiction-clauses-29-july-2016/.

– The UK's simplest option for ensuring that English (and other UK) judgments continue to be recognized and enforced throughout the EU27 may be to accede to the Hague Convention. The UK will be able to accede in its own right to the Hague Convention unilaterally, without needing the agreement of the EU27. The EU has already ratified the Convention. However, the mutual recognition of judgments between Convention contracting states only applies to judgments made under an exclusive jurisdiction agreement (unless contracting states agree otherwise). The Explanatory Note to the Convention states that asymmetric clauses do not count as exclusive for this purpose (although interestingly, Cranston J commented in his *Commerzbank* judgment that there are '*good arguments*' for the opposite view).

Given the number of variables and unknowns, it is hard to say definitively whether Brexit increases or decreases the risk of using asymmetric jurisdiction clauses in transactions involving EU27 parties. However, as the UK has the Hague Convention as a 'fallback' option, it is difficult to see a plausible outcome in which an English court judgment made under a mutual exclusive jurisdiction agreement would not be recognized and enforced throughout the EU27 after Brexit. Slightly greater uncertainty might exist under an English judgment made under an asymmetric jurisdiction clause.

6 CONCLUSION

Despite the variety of decisions from around the globe there does appear to be a consensus in favour of upholding asymmetric disputes clauses arguments, at least in common law jurisdiction. Of the various arguments raised, including public policy at its highest level of abstraction and procedural fairness none constitutes an acceptable ground to invalidate asymmetric clauses. As Professor Fentiman has observed:

> *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 … .*[53]

Arbitral tribunals and courts deciding on their validity should accept the party autonomy reflected in the clause absent powerful grounds to do so.

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[53] *Universal Jurisdiction Agreements in Europe,* 72 (1) CLJ 24–27 (2013).