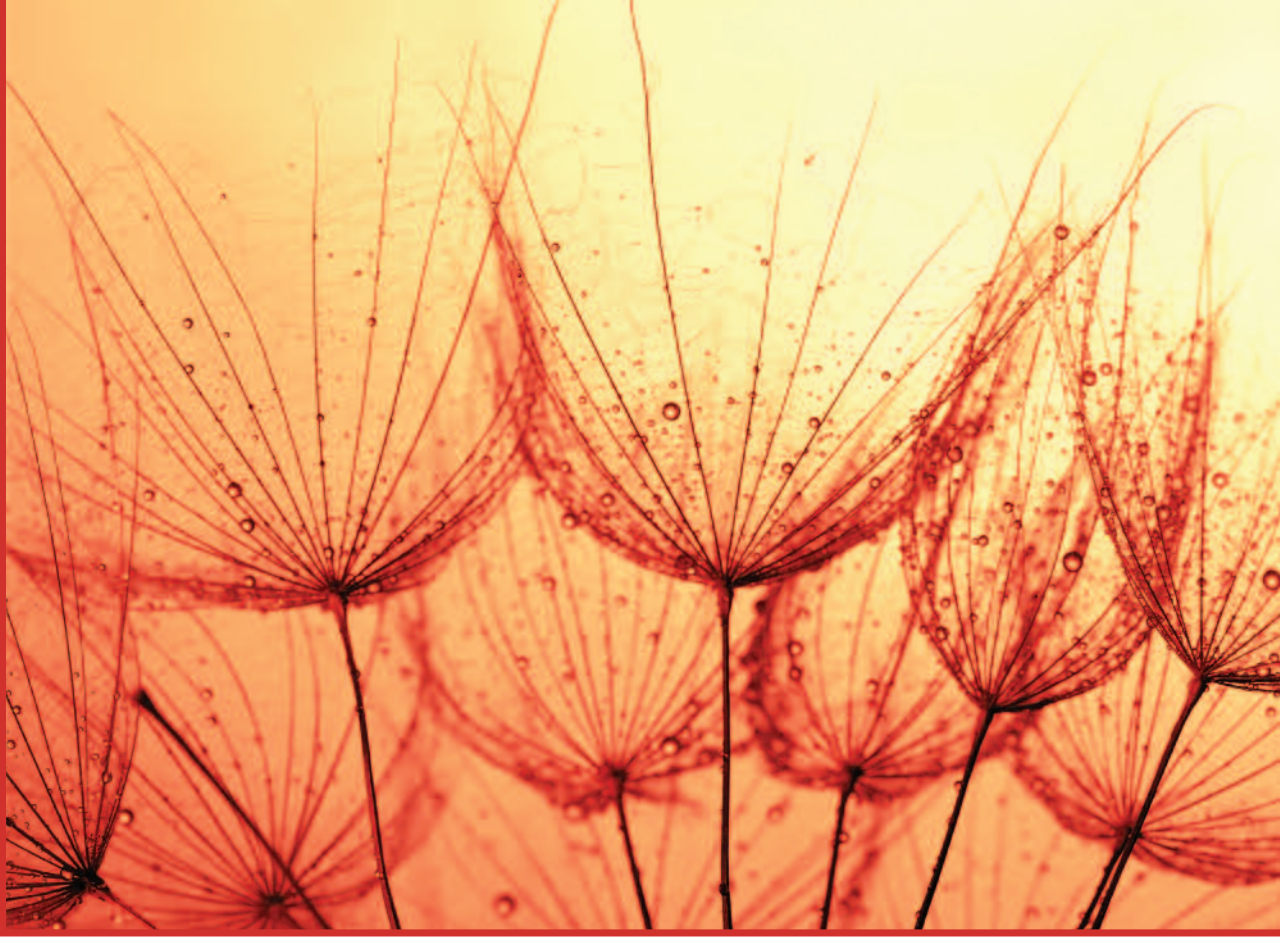

Dispute Resolution Guide **2015**

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Asymmetric dispute resolution clauses

Ilya Komarevski and **Eleonora Mateina** of **Tsvetkova Bebov Komarevski** examine the Bulgarian approach towards unilateral dispute resolution clauses and compare it to other European courts

The first time a Bulgarian court had the chance to adjudicate on the validity and admissibility of unilateral jurisdictional clauses in Bulgaria was on September 2 2011. It appears that at that time, this was one of the first decisions in Europe dealing with the validity and admissibility of the so-called one-sided or asymmetric dispute resolution clauses. These are clauses that allow both of the parties to a contract to refer their disputes to a court or to an arbitral tribunal, but only one of the parties with the right to choose to refer disputes, arising from or in connection with this contract to a specific jurisdiction (such as a particular state court or arbitral institution). Now, four years on, this remains the only decision in this respect rendered by a Bulgarian court. However, several decisions have been rendered in other countries and this topic is subject to intense discussion among scholars and practitioners. Some of these decisions may be relevant for Bulgaria too.

Bulgarian Supreme Court of Cassation's decision

The disputable clause was implemented in a loan agreement. The dispute resolution clause was drafted in a way that entitled only the lender to refer its claims to one specific or any other arbitral institution in the Republic of Bulgaria. By contrast, the borrower could refer its disputes to the competent state courts, which in this case was the Sofia regional court. The law governing the loan agreement and the arbitration clause was Bulgarian law.

> **Unilateral dispute resolution clauses enable the fundamental contractual principles of party autonomy and freedom of contract**

In its reasoning, the Bulgarian Supreme Court of Cassation stated that unilateral dispute resolution clauses are generally not permitted under Bulgarian law, since they establish rights of a potestative nature. Under Bulgarian law, a right is potestative when it allows only one of the parties of a defined legal relationship to influence the legal sphere of the other party. Examples of potestative rights under Bulgarian law include the right to divorce, the right of cancellation and recession of a contract, and the right to request the transformation of a preliminary contract to a final one.

Under Bulgarian law, potestative rights can be established only *ex lege* (by law), but not contractually, by virtue of a parties' agreement. Bearing this rule in mind, it is understandable why the Bulgarian Supreme Court of Cassation, having concluded that the potestative right was at the core of the dispute, considered the unilateral arbitration clause, contained in the loan agreement, as null and void. The Supreme Court of Cassation presented an example of the restriction of the principles of party autonomy and freedom of contract, based on general civil law considerations. Although the Supreme Court of Cassation of Bulgaria rendered the decision, it is not binding on other Bulgarian courts.

The Court did not analyse whether unilateral dispute resolution clauses provide potestative rights. The court simply accepted this, without presenting any legal or even theoretical test for determining the potestative nature of the rights. Additionally, the court did not comment on the wording of the clause, the position of the parties, the type of the clause (for example, unilateral litigation or arbitration or mixed, one-step or multi-stage) and did not present any other arguments that could ground the nullity of the unilateral jurisdictional clauses.

Validity of the unilateral dispute resolution clauses

In our view, the validity and enforceability of unilateral dispute resolution clauses is far from being established under Bulgarian law. It will probably be subject to more detailed analysis by the courts and doctrine and by more subtle approaches. We believe that most of the arguments raised by case law and doctrine in other countries could be relevant also under Bulgarian law.

Pros

Unilateral dispute resolution clauses enable the fundamental contractual principles of party autonomy and freedom of contract. This is the argument usually used by English courts for the recognition and enforcement of unilateral dispute resolution clauses in England (for example, in *Three Shipping v Harebell Shipping 2004; Pittalis v Sherefettin* 1986). The argument of the courts is usually based on the idea that parties have autonomy to decide how potential future disputes between them may be resolved. In Bulgaria, the principles of party autonomy and freedom of contract are explicitly established in the Bulgarian Obligation and Contracts Act. This principle is also recognised by legal doctrine as one of the cornerstones of private law. Therefore, this argument could be used when arguing that unilateral dispute resolution clauses are valid under Bulgarian law.

The bargaining power of each party should also be taken into consideration when evaluating the validity and the admissibility of the unilateral dispute resolution clauses. Usually, US courts consider the unilateral litigation or arbitration clauses invalid only when one of the parties had stronger bargaining power during the negotiations of the respective contract and as a result, was able to impose clauses in its favour (*California Supreme Court, Armendariz v Foundation Health Psychcare Service.; Arkansas Supreme Court, E-Z Cash Advance v Harris; Montana Supreme Court, Iwen v US West Direct*). In Bulgaria, the better bargaining position of parties to a contract is taken into account in limited occasions (for example in consumer contracts or as a ground for cancellation of a contract in some extreme circumstances). Nevertheless, this argument could be presented when defending the position for validity and enforceability of the unilateral jurisdictional clause. One could argue that when the parties, at the time of concluding the agreement containing the unilateral dispute resolution clause, are at equal bargaining position, the clause should not be considered null and void.

It is important to assess the validity and enforceability of the respective unilateral dispute resolution clause from the perspective of the law applicable to it. In *Mauritius Commercial Bank v Hestia Holdings*, the High Court (England and Wales) decided that the contested unilateral dispute resolution clause is valid since under the applicable law (English law), such clauses are valid and enforceable. Therefore, if a Bulgarian court is seized to resolve a dispute, dealing with the validity and enforceability of a unilateral dispute resolution clause, if the law applicable to such clause does not consider it illegal, the clause may be valid and enforceable as it does not contradict public policy or override mandatory rules.

Contract drafting is never to be underestimated

The character of the respective contract and the party in favour of whom the clause is agreed should also be taken into account. Unilateral dispute resolution clauses, for example, are widely used in the Loan Market Association (LMA) finance contracts. These clauses are usually agreed in favour of the lender. The presence of a unilateral dispute resolution clause in the LMA contract and in the loan agreement in general are understandable, since creditors want to ensure their ability to litigate or arbitrate in their debtor's national court or where the latter has assets. This approach protects the lender, as the debtor's obligations are enforceable and provide the finance party with predictability in the outcome of the dispute. This argument could also be used before Bulgarian courts. Bulgarian law appears to recognise the importance of banks for the economy and provides several preferential regimes (such as in relation to the enforcement of debts and evidence of loans).

In the light of the predictability of future litigation or arbitration proceedings, clarity as to who can sue whom and where is important. Clauses containing wording similar to 'X can refer all disputes arising from or in connection with the present agreement before the Y court/arbitration or any other competent court' are too broad and might lead to uncertainty and unpredictability in the litigation or arbitration proceedings. Therefore, the formal approach towards such clauses should be avoided and the evaluation should be made on a case-by-case basis, depending on the specific wording of the clause.

Last but not least, under article 23 of both Council Regulation (EC) 44/2001 (Brussels I) and as of January 2015 Council Regulation (EC) 1215/2012 (Brussels I Recast), the parties to a contractual or non-contractual relationship have the right to refer any dispute which has arisen or which may arise between them to the state courts of a member state. In this case, the chosen court is deemed to have exclusive jurisdiction over the respective dispute, unless the parties have agreed otherwise. Even if these regulations do not comment on unilateral dispute resolution clauses explicitly, both of them, in compliance with the principle of party autonomy and freedom of contract, provide that the parties can choose the court, which would be competent to resolve their disputes. For unilateral clauses, parties can have a choice of forum by allowing their current or future disputes to be resolved by a specific court or arbitral tribunal. Consequently, it could be concluded that under Regulation Brussels 1 and Regulation Brussels 1 Recast, unilateral dispute resolution clauses are admissible. Bulgaria, as a member state, also applied Brussels 1 and now applies Brussels 1 Recast; therefore, this argument could be used before the Bulgarian courts.

Cons

There are also strong arguments against the validity and enforceability of unilateral dispute resolution clauses.

First, the potestative character of the right given under unilateral dispute resolution clauses [*Mme X v Banque Privée Edmond de Rorthschild, French Cour de Cassation; Bulgarian Supreme Court of Cassation's decision 71 of September 2 2011, Cour de cassation, civile, Chambre civile 1, March 25 2015, 13-27.264*]. may be seen from two perspectives

In the case of a one-sided litigation clause with applicable law that prohibits contractual establishment of potestative rights (such as France, Bulgaria, and Russia) the dispute resolution clause may be considered null and void as it violates applicable law and attempts to create potestative rights.

In the case of a unilateral arbitration clause, the latter may not be enforced under article II of the New York Convention for Recognition and Enforcement of foreign arbitral awards (New York Convention), in states where the establishment of potestative rights (such as France, Bulgaria, and Russia). The argument for refusing to recognise and enforce such clauses would be in contradiction with the public policy of the state in question.

Both the refusal for recognition and enforcement and the set aside of a rendered arbitral award, grounded on a unilateral arbitration clause, are more likely to be equated to violation of the public policy of the state where recognition and enforcement is requested and where the setting aside is sought (usually before the courts of the seat of arbitration). The ground for refusal of recognition and enforcement and setting aside, based on contradiction with the respective state's public policy, may be found in article V of the New York Convention, article 34 of the Uncitral Model law and the arbitration acts of the respective state.

In Bulgaria, the contractual establishment of potestative rights is not permitted. Therefore, seen from both perspectives, the argument is more likely to be seen as a ground for nullity and invalidity of the respective asymmetric clause (if the latter is considered as clause) attempting to create rights of a potestative nature.

Second, the argument for predictability of jurisdiction, marked by the French *Cour de Cassation*'s latest decision of March 15 2015 should also be taken into account. Generally, the main purpose when implementing choice of forum clauses is the predictability of the competent jurisdiction that would resolve future disputes between the parties. This is also one of the main purposes of the provisions allowing jurisdictional clauses. Otherwise, the determination of the competent jurisdiction could turn out to be very difficult task; in particular, if in order to determine it, one should apply the conflict of law rules. Actually, this was the *Cour de Cassation's* second argument for invalidation of the unilateral arbitration clause that it dealt with. The first one was for the potestative character of the unilateral dispute resolution clause. Regarding the lack of predictability, the French court based its argumentation on article 23 of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as was applicable to the case. The court considered that the unilateral arbitration clause, as drafted, was too broad and led to unpredictability in terms of the jurisdiction competent to resolve disputes arising between the parties. This argument from the French *Cour de Cassation* could also be taken into account by Bulgarian courts.

Third, the Russian Federation Supreme Court of Arbitration (VAS – 1831/2012) considered that unilateral dispute resolution clauses are null and void, since they violate the principle of equal access to jurisdiction, as established in the European Convention for Human Rights and in the Russian Civil Procedure Code. Despite being too general, this argument could be used in to support the argument of jurisdictional predictability.

Mitigating risks

Unilateral dispute resolution clauses, governed by Bulgarian law or intended to be enforced in Bulgaria, that aim to establish potestative rights, imply a certain level of risk in the light of the 2011 judgment by the Bulgarian Supreme Court of Cassation that such clauses be regarded as null and void in Bulgaria. However, this judgement is not mandatory for other Bulgarian

courts or other panels of the Supreme Court of Cassation. Other Bulgarian courts and court panels may find that such clauses do not establish potestative rights, or are valid for other reasons.

The case for the validity and enforceability of one-sided dispute resolution clauses is not closed

If the law intended by the parties to govern a unilateral dispute resolution clause is of a jurisdiction which accepts their validity (for example England), the clause's proper structuring and drafting may help further mitigate the risk of the judgment or award rendered by the forum chosen under the clause being refused recognition or enforcement in Bulgaria. Contract drafting is never to be underestimated, regardless of a number of solid arguments that one-sided clauses cannot be invalid in and of themselves.

The case for the validity and enforceability of one-sided dispute resolution clauses is not closed. Bulgarian courts should take a case-by-case approach to these clauses and consider the majority of them as valid, depending on the wording and bargaining power of the parties.

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Eleonora Mateina is a Bulgarian qualified lawyer and member of Tsvetkova Bebov Komarevski's dispute resolution team. She specialises in commercial arbitration, litigation, private international law and competition law. She has experience in commercial and civil disputes, as well as in advising on a wide range of competition law and regulatory issues.

Mateina has authored several articles dedicated to hot topics in international arbitration and litigation (such as unilateral dispute resolution clauses, heightened judicial review over arbitral awards, and admissibility of the anti-suit injunctions outside UK). She has also been actively involved as competitor, coach and arbitrator in international moot court competitions.