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I INTRODUCTION

In the wake of the global financial crisis in 2008, market participants have focused on dispute resolution provisions in their financial transactions to ensure better enforcements of their contractual rights against defaulting debtors.¹ As a result, hybrid arbitration clauses (‘HAC’) became more frequent in such transactions, especially in loan agreements.² These clauses are especially designed to ensure enforcement of creditors’ claims, in a cross-border context, against the assets of the debtors when such assets are disbursed in several countries.³ Hybrid arbitration clauses can also be found, although not very frequently, in other types of agreements such as in charter parties, tenancy, employment and other types of agreements.⁴ This study will discuss the challenges and suggested solutions in relation to hybrid arbitration clauses in the context of financial transactions. Even though some court decisions illustrated in the course of the study delivered judgments in relation to clauses that were not stipulated in financial agreements, it remains of crucial importance to discuss these cases as they provide general guidance rules in relation to the treatment of such clauses in all types of agreements, including financial transactions.

The 2013 ISDA Arbitration Guide defined a hybrid arbitration clause as a clause giving ‘one (or more) parties the ability to make a choice after a dispute has arisen whether to arbitrate or litigate that dispute.’⁵ Hybrid arbitration clauses that will be discussed in the course of this study should be differentiated from (i) traditional jurisdictional clauses, (ii) hybrid jurisdictional clauses, and (iii) hybrid clauses in arbitration agreements.

First, the difference between hybrid arbitration clauses and traditional jurisdictional clauses is that under the latter clause, the parties make their choice at the time when the agreement is entered into, whereas the choice is deferred, under the former clause, until the time when the dispute arises.⁶ Second, hybrid arbitration clauses are not hybrid jurisdictional clauses limiting the right of one party to refer disputes to one particular jurisdiction while giving the counterparty a right to elect other jurisdictions to resolve the dispute.⁷ Finally, the clauses discussed in this study should be differentiated from hybrid clauses that the parties can stipulate in their arbitration agreement, whether the latter is related to a dispute arising from financial, commercial or any other type of transactions. A Hybrid clause in an arbitration agreement is a clause by virtue of which the parties agree that the arbitration proceedings will be administered by one arbitration institution using the rules of another institution.⁸ Although these clauses present some issues on the level of

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⁴ Ibid 21.
their recognition by the courts and their enforceability, they do not serve the purpose of the present study that will be focusing on hybrid arbitration clauses used in financial transactions.

Hybrid Arbitration Clauses are usually drafted under two scenarios: the first would be a clause submitting disputes to a specific jurisdiction while giving one party an option to arbitrate. The second scenario however would have contractual disputes submitted to arbitration while giving one party an option to litigate. The first part of this study will discuss how English courts have treated each of the two drafting scenarios.

Whether drafted under the first or the second scenario, hybrid arbitration clauses are advantageous for finance parties. Indeed, such clauses increase the certainty of enforceability of the said parties’ contractual rights. Moreover, they allow the party benefiting from the option to make an informed choice when the dispute arises. Hence, in some cases the parties having the benefit of the option will opt for litigation while in others they would litigate. An illustration of the advantages of each choice will be discussed in the second part of this study.

Despite the advantages presented by hybrid arbitration clauses, they ‘ab initio create an unequal position of the parties to a dispute’. The option given to one of the parties and the unbalanced contractual relationship that it might create have not been similarly treated by all the jurisdictions of the world. Indeed, most jurisdictions are friendly to these clauses and positively recognize them. Other jurisdictions, however, are hostile to such clauses or have a less certain position in relation thereto. These jurisdictions can either nullify the whole clause (e.g. France) or extend the option’s scope so both parties can exercise it (e.g. Russia). The third part of this study will reproduce some cases decided in some jurisdictions where hybrid arbitration clauses have valid effect. The fourth part however, will list the challenges faced by these clauses with special emphasize on jurisdictions where their invalidation was based on the principle of equal access to justice (e.g. in Russia) and under the civil law concept of

9 Ibid.
10 Draguiiev, above n 3, 24-25.
11 Ibid 19.
12 Peacock, Greenaway and Kennedy, above n 6.
13 Draguiiev, above n 3, 20.
15 Draguiiev, above n 3, 20.
16 see, eg, Ms X v Banque Privee de Rotschild, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:CI00983 <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/983_26_24187.html> (‘Ms. X’).
18 Ibid.
potestativité (e.g. in France). This study will argue that the invalidation of the clauses pursuant to the principle of equal access to justice was erroneous and that the concept of potestativité should not be interpreted and extended in a way to cover hybrid arbitration clauses sui generis.

Given the challenges faced by hybrid clauses on the international level, the last part of this study will attempt to provide some practical solutions that financial markets participants can follow with a view to mitigate the risks of invalidation of these clauses. The proposed solutions start with the careful choice of the governing law of the agreement and the arbitral seat, the careful drafting of the clause to end with the avoidance of hybrid arbitration clauses where the agreement has a nexus with a hostile jurisdiction. Finally, in the cases where hybrid arbitration clauses should be avoided, this author opines for the choice of arbitration as an alternative dispute resolution for financial transactions.

II DRAFTING OPTIONS: AN OPTION TO ARBITRATE OR AN OPTION TO LITIGATE

As defined above, a hybrid jurisdictional clause gives a party a choice to submit disputes, as of the day in which they arise, either to arbitration or to court litigation. These clauses ‘enhanced by’ arbitration, can be drafted under two different scenarios:

1- The first scenario allows one party (say the finance party) to elect between court jurisdictions and arbitration and limits the right of the other party (say the borrower) to exclusively refer disputes to court jurisdiction.

2- The second scenario on the other hand allows the finance party to choose, like in the first scenario, between arbitration and court jurisdiction and limits the right of the borrower to refer any dispute to arbitration only.

It is noteworthy that a clause drafted under the first scenario might face higher enforcement and recognition challenges as it confers, when compared to clauses drafted under the second scenario, to one party the right ‘to bypass the moment of crystallization [of the dispute] and still make... a discretionary election’.

A Option to Arbitrate

Under the first scenario, if the finance party is claiming remedy, the borrower will then be obliged to follow the choice made by the finance party. However, when the borrower institutes proceedings in the agreed forum, it has been suggested, in the UK for instance, that the finance party in this case can initiate arbitration procedures and force the borrower to have its claims heard by the arbitral tribunal. This was the case in *NB Three Shipping Ltd v Harebell Shipping Ltd*, a milestone decision in the field of recognition of HAC with

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19 Ms. X, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983.
20 Dragiuev, above n 3, 24-25.
21 Ibid.
22 Ibid 25.
23 Dragiuev, above n 3, 24.
arbitration option, where the English court stayed its proceedings upon the request of the party having the arbitration option in the agreement to initiate arbitration procedures.\textsuperscript{25} The court based its conclusion on the grounds of s 9 of the \textit{Arbitration Act}.\textsuperscript{26} Section 9(1) provides that a party to an arbitration agreement can apply to a court to stay the proceedings that were brought against it in breach of the arbitration agreement.\textsuperscript{27} The court had to decide whether the arbitration option, which lacked mutuality, fell within the scope of section 9(1). The decision in \textit{NB Three Shipping} confirmed that the said section applied to HAC with arbitration option even though (i) only one of the parties had the option to arbitrate, and (ii) the party having no option to arbitrate could only institute court proceedings.\textsuperscript{28}

Some argue that this decision had extended the scope of application of section 9(1) and that such an extension may confer abusive powers to the party benefiting from the arbitration option.\textsuperscript{29} Indeed section 9(1) only applies to a party who, despite being obliged to arbitrate, breaches the arbitration agreement and decides to institute court proceedings.\textsuperscript{30} Only then would the court stay proceedings. However, this was not the case in \textit{NB Three Shipping}. In this author’s view, section 9 should not apply to the court proceedings instituted by a party who, not only is not bound to arbitrate, but is rather prohibited from arbitration. If the party having the option to arbitrate initiates arbitration procedures, then the other party would have to abide by the choice. However, if the party with no option files a lawsuit prior to the initiation of the arbitration procedures by the other party, the rights of the former should not be diminished unless (i) such a party expressly waives his rights with respect thereto or (ii) the clause stipulates that the option to arbitrate in favor of one party ‘released the [other] party from the obligation to appear in a state court if the... party [benefiting from the option] requested it’.\textsuperscript{31}

Some scholars have argued, and this author concurs with their views, that \textit{NB Three Shipping} gave abusive power to the party benefiting from the option to undercut any court proceedings instituted by the party having no option but to litigate.\textsuperscript{32} Indeed ‘there is a thin line between having advantage in general, or prior to commencement of action, and having advantage after an action is brought, as the second does not seem to have been provided by the clause at hand’.\textsuperscript{33}

\textbf{B Option to Litigate}

Under the second scenario, the finance party can elect between court jurisdiction and arbitration. The borrower on the other hand is obliged to submit any dispute to arbitration only. Hence, the borrower would be forced to follow the choice of the finance party and to appear in whatever forum the latter has chosen.\textsuperscript{34} The borrower however, is only entitled to initiate arbitration procedures and any attempt by it to institute court proceedings would

\begin{itemize}
  \item \textsuperscript{25}Ibid.
  \item \textsuperscript{26}\textit{Arbitration Act 1996} (UK) Part I, s9.
  \item \textsuperscript{27}Ibid s9(1).
  \item \textsuperscript{28}\textit{NB Three Shipping Ltd v Harebell Shipping Ltd}, [2005] 1 Lloyds Rep. 509.
  \item \textsuperscript{29}Draguiev, above n 3, 24.
  \item \textsuperscript{30}Ibid.
  \item \textsuperscript{31}Ibid 24 n 12.
  \item \textsuperscript{32}Ibid.
  \item \textsuperscript{33}Ibid.
  \item \textsuperscript{34}Ibid 25.
\end{itemize}
amount to a breach of the hybrid arbitration clause. It is not uncommon though for parties not benefiting from the option under this scenario to turn to court litigation despite the contractual prohibition to challenge the validity of the hybrid clause itself. Some jurisdictions of the world have positively answered these challenges and ruled against the recognition of hybrid clauses. These hostile jurisdictions will be considered in more details under the part V of this study.

A good illustration of the operation of this clause with an option to litigate and its recognition by the English courts would be the court decision in *Law Debenture Trust Corp Plc v Elektrim Finance BV* (‘Law Debenture Trust’). Unlike *NB Three Shipping*, *Law Debenture Trust* considered the scenario where one party was benefiting from an option to litigate while the other could only arbitrate. In this case, a trust deed stipulating a HAC had been executed between the parties. Indeed, clause 29.2 of the Trust Deed provided that any dispute arising therefrom may be submitted to arbitration under the UNCITRAL Arbitration Rules. On the other hand, clause 29.7 provided that notwithstanding clause 29.2, the trustee (i.e. Law Debenture) had the ‘exclusive’ right to submit any dispute arising out of or in connection with the agreement to the courts of England.

In construing the validity of the clause, Mann J stated that the trustee is entitled under the agreement to commence court proceedings and cannot be obliged to arbitrate even if both litigation and arbitration proceedings cover the same subject matter.

The only limitation to this right is that the beneficiary of the option ‘cannot blow hot and cold’. In other words, the court established that if the beneficiary of the option initiates arbitration then this would be deemed as a waiver of its option to litigate. In the same perspective, if the beneficiary had ‘sufficiently’ participates in the arbitration triggered by the other party having no such option, the former may well be deemed to have waived its right to use the option.

Mann J went on to support his decision, by referring to *NB Three Shipping Ltd*. Indeed, although the facts of the latter were, as noted above, different from *Law Debenture Trust*, Man J nonetheless drew support from the ruling of Morison J who clearly stated the English law recognizes the validity of clauses giving one party more rights than the other.

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35 Ibid.
36 See, eg, Ms. X, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983; Sony-Ericsson, Presidium of the Supreme Arbitrazh Court of the Russian Federation, No 1831/12, June 19, 2012.
38 Ibid.
39 Ibid 43[3].
40 Ibid.
41 Ibid 60[42].
42 Ibid.
43 Ibid.
44 Ibid.
46 Ibid 32-33 [7].
III MAIN ADVANTAGES OF HYBRID ARBITRATION CLAUSES

A Offering the Best Option: When to Litigate or Arbitrate?

Whether drafted with an option to arbitrate or with an option to litigate, hybrid arbitration clauses are considered advantageous for they allow the party benefiting from the option to make an informed decision as to which option is more appropriate for the resolution of a dispute once the dispute arises rather than when the agreement is first executed.47 For example, a lender might prefer to litigate a dispute, rather than opting for a more costly arbitration procedures, when the claim represents a small debt48 and/or a low level of technicality.49

In other instances, arbitration choice primes over litigation. This is particularly the case where proceedings are brought in different European Union member states and in relation to the same cause of action.50 Pursuant to articles 27 and 28 of the EC Regulation 44/2001 (the ‘Brussels Regulation’), the court of an EU member state that was seized should stay its proceedings with respect to a case having the same cause of action as another case previously filed before the court of another member state until the latter delivers its decision. This rule applies regardless of whether or not the jurisdiction clause in the agreement clearly and expressly provides for the exclusive jurisdiction of the later EU member state’s courts.51 Defaulting parties to financial transactions have used this procedural particularity to delay cases by instituting proceedings in an EU jurisdiction that is different from the one having express exclusive jurisdiction under the agreement. One illustration is the English court decision in JP Morgan Europe Ltd v Primacom AG and Others52 in which a loan was made under a facility agreement by JP Morgan to a German company. The company defaulted and, in breach of the exclusive English jurisdiction clause, commenced proceedings in Germany alleging that no interest payment was due by it to the lenders.53 JP Morgan on the other hand issued a notice of default, accelerated the loan and requested immediate reimbursement. It also sought declaration before the English courts that the agreement was valid and enforceable, and that the notice of default was also valid.54

The English High Court of Justice found that the cause of action instituted before it was the same as the cause of the action that was before the German courts and that pursuant to article 27.1 of the Brussels Regulation, it had to stay its proceedings until the German courts decide upon their jurisdictions.55

Thus, the application of Brussels Regulation can diminish or limit, to say the least, the autonomy of the parties to have their syndicated lending agreement subject to the exclusive jurisdiction stipulated in the said agreement. This risk is of detrimental consequences on the

47 Peacock, Greenaway and Kennedy, above n 6.
48 Nesbitt and Quinlan, above n 14.
50 Peacock, Greenaway and Kennedy, above n 6.
51 Ibid.
53 Ibid.
54 Ibid.
55 [2005] EWHC 508, [49]-[50].
finance parties who, in negotiating such sophisticated agreements, carefully choose the governing law and the jurisdiction clauses that best serves their interests.  

Hybrid arbitration clauses, by allowing finance parties to submit their dispute to arbitration, may provide a solution to this issue. In fact, an arbitration tribunal is not subject to the provisions of Article 27 of the Brussels Regulation, and therefore is not forced, unlike the EU domestic courts, to stay its proceedings until the first court seized decides upon its jurisdiction. Indeed, the first article of the Brussels Regulation provides that the latter shall not apply to arbitration. In that perspective, the English court of Appeal expressly held that when court proceedings are instituted in breach of a jurisdiction clause referring disputes to arbitration, the English court could allow the arbitration to proceed in parallel to the foreign court proceedings. Absence arbitration, such a continuation of the proceedings would not have been possible. Thus, hybrid arbitration clauses can provide an efficient gateway for the party benefiting from the arbitration option when different proceedings are brought in different EU member states and in relation to the same cause of action.

B Higher Enforcement Chances

When the transaction presents an international aspect, in the sense that it involves parties domiciled in different jurisdictions, an enforcement problem against the assets of the debtors may arise when the decision delivered by the court having exclusive jurisdiction pursuant to a traditional jurisdictional clause cannot be enforced in the jurisdiction where the debtor is domiciled or has its assets.

A particular illustration of this concern can be drawn from the laws governing securities in Argentina. Enforcement of a security interest is of crucial importance for finance parties and a determinant factor in their decision-making process as to whether or not they should finance the debtor to a financial transaction. In Argentina, when a security interest is created abroad over assets located in Argentina, the enforcement of such a security is subject to the exclusive jurisdiction of the Argentinian courts and in application of the country’s local laws. Hence, any decision delivered by a non-Argentinian court in this context would not be enforceable in Argentina. Here, a hybrid arbitration clause can offer a solution to this problem; for instance, while having the dispute submitted say to arbitration in England, the finance parties may still reserve the power to opt for the choice

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59 Ibid.

60 Exclusive Jurisdiction Clauses: Handle With Care, above n 56.

61 Nesbitt and Quinlan, above n 14.


64 Ibid.
of the Argentinian courts with respect to the enforcement of their security over assets located in Argentina.

Finally and most importantly, the enforcement of arbitration awards is more widely accepted and recognized on the international level than courts’ judgments. This is an established legal truth in light of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (the ‘NY Convention’).\(^{65}\) NY Convention has created a presumption of enforceability of arbitration awards\(^{66}\) and became one of the main reasons why arbitration has flourished on the international level. Thus, the enforcement of arbitral awards obtained pursuant to HAC is a pillar advantage allowing finance parties to ensure a better enforcement option (obtained through arbitration) when the traditional court judgments present enforceability difficulties.

IV FRIENDLY INTERNATIONAL TREATMENT

Due to the advantages that hybrid arbitration clauses present to finance parties, such clauses have become increasingly used in financial transactions.\(^{67}\) Moreover, there is a growing trend of recognizing such clauses on the international level. It has been said that there are few objections to the validity and recognition of HAC on the international level.\(^{68}\) Indeed, these clauses are business friendly and courts across the world should uphold the contractual parties’ autonomy and accept the validity of these clauses.\(^{69}\)

A England and Wales

English law seems to be the most favorable to the recognition and enforcement of hybrid clauses. As discussed under paragraphs II(A) and (II)(B) above, English courts recognize and enforce HAC whether they provide for an option to litigate or to arbitrate.

The underlying rationale of the UK position is the tendency of the English courts to uphold and assist the interests of businesses through giving full and undisputed effect to the principle of parties’ autonomy.\(^{70}\) This has been recently confirmed in Mauritius Commercial Bank Limited v Hestia Holdings Limited & Another\(^{71}\) (‘Hestia Holdings’) where the court insisted on giving effect to a hybrid clause regardless of how one-sided the clause might be or how wide its scope of application is.\(^{72}\)

B Australia

The High Court of Australia considered the validity of hybrid clauses in its decision in PMT Partners Pty Ltd v. Australian National Parks & Wildlife Service\(^{73}\) (‘PMT Partners’). The

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\(^{65}\) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature on 10 June 1958 (entered into force 7 June 1959) (‘NY Convention’).

\(^{66}\) Ibid art III.

\(^{67}\) Draguiev, above n 3, 45.

\(^{68}\) Nesbitt and Quinlan, above n 14, 148.

\(^{69}\) Ibid.

\(^{70}\) Draguiev, above n 3, 26.

\(^{71}\) [2013] EWHC 1328 (Comm); [2013] 2 Lloyd’s Rep. 121.


\(^{73}\) (1995) 184 CLR 301.
agreement before the court was not a financial agreement but rather a contracting agreement by virtue of which the appellant engaged to carry out some contracting works for the account of the respondent.\textsuperscript{74}

Clause 45 of the agreement stipulated that the appellant (contractor) must submit any dispute arising from the agreement to the Superintendent and to the Principal. If not satisfied with the outcome, the contractor will then have 28 days, as from the date in which the latter decision is delivered, to refer the issue to arbitration.\textsuperscript{75}

In this case, the respondent advanced, \textit{inter alia}, that until the date in which the contractor exercises the option, there is no arbitration agreement between the parties\textsuperscript{76} in the sense provided for under the Australian law.\textsuperscript{77} The High Court disagreed with this reasoning and stated as follows in \textit{obiter}:

\begin{quote}
[I]n our view, the terms of the definition of "arbitration agreement"... in s 4 of the Act\textsuperscript{78} extend to an agreement whereby the parties are obliged if an election is made, particular event occurs, step is taken or condition is satisfied to have their dispute referred to arbitration.\textsuperscript{79}
\end{quote}

The validity of hybrid clauses was also confirmed by later cases in Australia on the grounds of respect of parties’ autonomy to give one of the parties a power to choose to refer a dispute to arbitration.\textsuperscript{80}

\section*{C Other Jurisdictions}

As a wide generalization, common law countries are considered friendly to hybrid arbitration clauses. In the USA, hybrid clauses are generally valid\textsuperscript{81} except in some imbalanced situations in which the clauses were broad and stipulated in employment agreements or contracts of adhesion.\textsuperscript{82} The validity of such clauses also extends to civil law countries such as Luxembourg,\textsuperscript{83} Spain, Greece\textsuperscript{84} and Italy.\textsuperscript{85} In some other civil law countries, the general validity of hybrid arbitration clauses \textit{per se}, was recognized. These countries include Argentina, Austria, Belgium, Germany, Croatia, Morocco, Switzerland and many others.\textsuperscript{86}

\begin{footnotesize}
\textsuperscript{74} Ibid 314.
\textsuperscript{75} Ibid 314-315.
\textsuperscript{76} Ibid 323.
\textsuperscript{77} \textit{Commercial Arbitration Act 1985} (NT), s 4.
\textsuperscript{78} Ibid.
\textsuperscript{79} \textit{PMT Partners Pty Ltd v. Australian National Parks & Wildlife Service} (1995) 184 CLR 301, 323 (emphasis added).
\textsuperscript{80} See Nesbitt and Quinlan, above n 14, 148; see also \textit{Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd} [2002] 2 QD R 514.
\textsuperscript{81} Draguev, above n 3, 26.
\textsuperscript{82} See, eg, \textit{Armendariz v Foundation Health Psychcare Servs Inc}, 99 Cal. Rptr. 2d 745; 6 P.3d 669 (2000); \textit{Bragg v Linden Research Inc.} (487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007)).
\textsuperscript{83} \textit{Tribunal d’Arrondissement de et à Luxembourg, No 127/14 and No 128/14, 29 January 2014.}
\textsuperscript{86} Berard and Dingley, above n 84.
\end{footnotesize}
However, even where a hybrid arbitration clause is considered to be valid, some challenges might face such clauses in friendly jurisdictions, like the USA or Germany, when the clauses present some particularities making them vulnerable against invalidity.

V CHALLENGES FACED BY HYBRID ARBITRATION CLAUSES ON THE INTERNATIONAL LEVEL

The enforceability of hybrid clauses is not tackled equally across the jurisdictions of the world. The main caveat with respect to these clauses remains on the level of their invalidation or non-recognition by certain jurisdictions. Indeed, many jurisdictions provide little or no assistance as to their position in relation to the recognition of hybrid clauses. Those include but are not limited to Hungary, Brazil, Japan, China and India. Other countries may invalidate such clauses on different grounds ranging from unconscionability, uncertainty, unfairness and protection of the local citizens of the state, to the principle of equal access to justice and the legal concept of potestativité. This part will discuss some challenges to the validity of hybrid clauses by illustrating and analyzing the positions adopted by different jurisdictions of the world.

A Unconscionability

The courts of the USA have invalidated hybrid arbitration clauses in some specific situations. In 2000, the Supreme Court of California invalidated such a clause when stipulated in an employment agreement for being ‘unconscionable’. Seven years later, another court in California invalidated a hybrid arbitration clause with an option to litigate stipulated in a contract of adhesion as it was considered to be abusively one-sided.

However, one should not rush to conclude that the US law precludes hybrid clauses in general. The above cases are exceptional due to the type of transactions they involved. The situation would not be the same if the parties to the agreement were sophisticated and having almost the same bargaining power, as is the case in financial transactions. In this perspective, it is noteworthy that other common law states in the USA have duly recognized such hybrid clauses.

B Uncertainty

A recent decision of the Turkish courts was interpreted as invalidating hybrid arbitration clause under the Turkish law as this type of clauses lacks ‘clear and definitive intent to

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87 Peacock, Greenaway and Kennedy, above n 6.
88 Ibid.
89 Berard and Dingley, above n 84.
90 Magee and Mulholland, above n 72, 6.
92 Bragg v Linden Research Inc. (487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007)).
93 Magee and Mulholland, above n 72, 6.
94 Ibid.
95 Ibid.
arbitrate’ which contravenes the international arbitration law of Turkey.  

**C Unfairness**

In some jurisdictions, hybrid clauses were not recognized on the basis of unfairness. This was the case in Germany where an abusively imbalanced unilateral clause giving an unreasonable advantage to one of the parties was considered to be contrary to section 138 of the German Civil Code.  

Pursuant to the said section, ‘A legal transaction which is contrary to public policy is void’. The public policy considerations to which the clause in the case matter was contrary were the principles of fairness in the contractual relationship between the parties.

**D Protection of Local Citizens**

Some states are considered to be hostile to arbitration in general. It has been argued that the United Arab Emirates (‘UAE’) places great importance on its citizens’ right to appear before the local courts, as opposed to arbitration tribunals, for protection and justice. Although there are no reported cases as to date elucidating the position of the UAE courts with respect to the validity of hybrid arbitration clauses, some legal practitioners opined that the latter may not be valid in the UAE. This is due, *inter alia*, to the UAE law’s policy to protect the local party to any type of transactions, including financial transactions.

However, it should be noted that the laws of Dubai International Financial Centre (‘DIFC’) usually govern financial transactions in the UAE and the position under the DIFC rules should be distinguished from the position of the UAE law. The DIFC rules reflect the English law principles and hybrid arbitration clauses are widely accepted as being valid and enforceable under the said DIFC rules.

**E Principle of Equal Access to Justice**

1 **Application by the Russian Courts**

Before 2012, Russian courts used to uphold hybrid clause in financial transactions executed between Foreign and Russian parties. However, in 2012 the Presidium Supreme Arbitrazh Court of the Russian Federation (SAC) delivered a decision decree invalidating a hybrid arbitration clause in *Sony-Ericsson Mobile Comms LLC v Russkaya Telefonnaia Kompania CJSC* (*Sony-Ericsson*). The relevant clause in that case provided one party with an option to commence proceedings before the English courts and limited the right of the other party

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97 Ibid.  
98 Draguiev, above n 3, 27.  
99 German Civil Code, s 138.  
100 Ashmore, above n 96.  
101 Ibid.  
102 Ibid.  
103 Ibid.  
104 Ibid; see also Berard and Dingley, above n 84.  
to arbitration.\textsuperscript{107} The court based its rejection of the clause on the principle of equal access to justice. It stated:

Principles of adversarial nature and equality of the parties imply that the parties participating in the court hearing will be granted equal procedural opportunities to defend their rights and lawful interests\textsuperscript{108}

It was not clear whether or not the court invalidated the entire hybrid clause as a matter of Russian law.\textsuperscript{109} Subsequently, the SAC clarified that the Russian law does not fully invalidate the clause and the court only extended the option so both parties can benefit therefrom.\textsuperscript{110} In other words, the effect of the decision was the conversion of the clause into an arbitration agreement with an option for both parties to litigate.\textsuperscript{111}

\textbf{2 A Wrongful Interpretation of the Principle?}

As mentioned above, the basis on which the SAC relied to reject the clause was the principle of equal access to justice. It should be noted that the court did not rely on the domestic Russian norms to reach its conclusion but it rather relied, \textit{inter alia}, on the European Convention on Human Rights (‘ECHR’).\textsuperscript{112} However, the court failed to explain how a hybrid clause goes against the principle of equal access of justice.\textsuperscript{113} In other words, the decisions lacked clarity when it failed to describe how the right of one party to exclusively arbitrate had disadvantaged it when compared to the other party having an option to litigate.\textsuperscript{114} Would the latter benefit from a \textit{higher amount of justice} than the former?

The answer to this question was delivered in 2013 by the UK High Court of Justice in \textit{Hestia Holdings}.\textsuperscript{115} The court solemnly reinterpreted the provisions of the ECHR as they apply to the principle of equal access to justice. The court ruled in \textit{obiter} that hybrid arbitration clauses do not contravene the said principle as provided for in Article 6 of ECHR.\textsuperscript{116} Popplewell J made it clear that access to justice should be equal within the forum chosen by the parties. It does not however extend to cover the choice of the forum itself.\textsuperscript{117}

This author concurs with the interpretation made by the UK court of the principle. Indeed, granting one party an option pursuant to a hybrid clause does not ‘unequalize’ the parties’ rights to access justice. First, the party who does not benefit from such an option will nonetheless still have access to justice within the forum stipulated for in the agreement. Second, if the parties agreed to this type of clauses, the result of their bargain and their autonomy should be upheld especially when the financial transactions in which such hybrid

\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid, 6.
\textsuperscript{109} Linklaters, above n 105.
\textsuperscript{110} Garvey, above n 1.
\textsuperscript{111} Ibid.
\textsuperscript{112} Natalia Belomestnova, \textit{Russian Supreme Commercial Court Finds Unilateral Hybrid Dispute Resolution Clauses Invalid} (06 September 2012) Practical Law Thomson Reuters Practical Solution \url{<http://uk.practicallaw.com/6-521-2664>}. 
\textsuperscript{113} Ibid.
\textsuperscript{114} Ibid.
\textsuperscript{115} [2013] EWHC 1328 (Comm).
\textsuperscript{116} Ibid [43].
\textsuperscript{117} Ibid [43].
arbitration clauses are stipulated involve sophisticated parties and heavy and lengthy negotiations. The principle of equal access to justice should be respected once the choice of the forum is made - only then, both parties should be treated equally in their right to access justice within the said forum. Indeed, if one party is in a beneficial position, this does not automatically imply that the other party is in worse position.\(^\text{118}\)

\textbf{F Potestativité and the Unruly French Position}

The position of the French law with respect to the validity of hybrid clauses has become controversial after the recent French high court’s decision in \textit{Ms X v Banque Privée de Rotschild}\(^\text{119}\) (‘\textit{Ms X}’). The \textit{Cour de Cassation} confirmed a judgment delivered by the Paris Court of Appeal and held that a hybrid clause should be nullified because of its \textit{potestatif(ve)} character.\(^\text{120}\)

This case had to interpret the European law provisions\(^\text{121}\) that apply throughout the EU member states and its nullification of hybrid clauses imposed a heavy burden on the viability of these clauses in relation to agreements having a nexus with an EU member state. Therefore, special and extensive emphasize should be put to scrutinize this decision and its implication on hybrid arbitration clauses and, more generally, the future of hybrid clauses in the European Union.

\textbf{1 The Earlier Position of the French Courts}

Before analysing the court’s decision in \textit{Ms. X}, it is of crucial importance to note a previous case delivered by the same \textit{Cour de Cassation} in which a hybrid arbitration clause was recognized and enforced. In that case, \textit{Société Sicaly v. Société Grasso Stacon NV}\(^\text{122}\) (‘\textit{Société Sicaly}’) an arbitration agreement was executed between a French company and a Dutch company. The agreement gave the French company a right to elect between litigation or arbitration, while it limited the right of the Dutch company to arbitration only. The Dutch company however instituted proceedings before a French commercial court in breach of the said clause. The claimant referred to article 14 of the French Civil Court which provides that a foreigner can be cited before the French courts to enforce engagements entered into by him with a French person.\(^\text{123}\) The first instance court, the Court of Appeal and the French High Court all declined jurisdiction of the French court over the dispute and ruled that the clause clearly stated that disputes arising from the agreement can be subject to arbitration and by agreeing to such clause the Dutch company had implicitly waived its right to rely on article 14 of the French Civil Court.\(^\text{124}\) In addition, this case had made it clear that such hybrid clauses should be recognized under the French law as they do not contravene the French public policy.\(^\text{125}\)

\(^{118}\) Draguiev, above n 3, 34.

\(^{119}\) \textit{Ms. X}, \textit{Cour de Cassation} [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983.

\(^{120}\) Ibid.

\(^{121}\) Chong and Carter, above n 7.

\(^{122}\) \textit{Cour de Cassation} [French Court of Cassation], Bull. 1974 I No 143, p. 122 Cass. Civ. (1ère); see also Nesbitt and Quinlan, above n 14, 144-145.

\(^{123}\) French Civil Code, Art 14.

\(^{124}\) \textit{Cour de Cassation} [French Court of Cassation], Bull. 1974 I No 143, p. 122 Cass. Civ. (1ère); see also Nesbitt and Quinlan, above n 14, 144-145.

\(^{125}\) Ibid.
French commentators had widely accepted the position taken by the court in Société Sicaly and argued that ‘there is no reason why, under the French law, such clauses should not be upheld’. 126

2 A Turning Point: Ms X v Banque Privée de Rotschild

(a) Facts

Almost forty years after the validity of hybrid clauses has been recognized by the French High court, the position of the French law in relation thereto has been put to question in 2012 by the same court in Ms X v Banque Privée de Rotschild. 127 In this case the plaintiff, Ms. X, a French natural person had opened a bank account with A Bank (defendant) in Luxembourg through its French sister company. The relevant jurisdiction clause stipulated that any potential dispute between the parties had to be submitted to the exclusive jurisdiction of the courts of Luxembourg. However, one of the parties (the bank) reserved the right to bring claims before the courts of the domicile of the other party (the client) or before any other competent court if it decided not to use the courts of Luxembourg. 128 Thus, unlike the clause in dispute in Société Sicaly, the clause in Ms. X did not extend to arbitration but only granted one party a choice between different jurisdictions.

A dispute had arisen between the parties and Ms. X instituted proceedings before the French courts notwithstanding the express provisions of the jurisdictional clause which limited her power to bring claims to the exclusive jurisdiction of the courts of Luxembourg. The bank challenged the allegations of Ms. X relying on the express terms of the jurisdiction clause and argued for the validity of the clause based on Article 23(1) of the Brussels Regulation. Article 23(1) of the Brussels Regulation provides that the choice of a jurisdiction would be ‘exclusive unless the parties [to an agreement] agree otherwise’. 129

(b) Proceedings

The Paris Court of Appeal recognized that a contractual clause can confer an option to one party to choose between different jurisdictions. However it invalidated the clause in the case matter, as it was too broad and extensive since it gave the bank a ‘discretion to select whatever jurisdiction it wishes’. 130 However, the Cour de Cassation, although it reached the same result, shifted the basis of clause’s invalidation by expressly mentioning the legal principle of potestativité and ruling that the clause was for the sole benefit of the bank and hence ‘was contrary to the objectives and finality of the prorogation of jurisdiction provided for in Article 23 of the Brussels Regulation’. 131

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126 Nesbitt and Quinlan, above n 14, 144-145.

127 Ms. X, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983.

128 Ibid.


131 Ms. X, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983 (emphasis added).
Although the clause did not involve a hybrid arbitration clause but rather a hybrid jurisdictional clause providing one party with an option between different jurisdictions, the basis on which the court invalidated the clause was that it conferred to one party, and to the detriment of the other, a unilateral and extended power in the exercise of a contractual provision.\(^{132}\) Thus, one can be led to think that the decision of the Cour de Cassation invalidated the option itself regardless of whether it was related to a choice between different jurisdictions or between litigation and arbitration.\(^{133}\) Indeed, it was argued that the present case departed from the previous position taken by the French Cour de Cassation by virtue of which a clause should not be invalidated if the express agreement of the parties gave one of the parties a unilateral option to litigate or to arbitrate.\(^{134}\)

(c) On the Consistency with the French Law Provisions

(i) Interpretation of Agreements

In fact, the pre-Ms. X position of the French court was more in line with the provisions of sections 1156-1164 of the French Civil Code titled ‘Interpretation of Agreements’.\(^{135}\) The said articles imply that the respect of the parties’ autonomy is mandatory when interpreting an agreement\(^{136}\) and that when a clause or certain provisions of an agreement can be interpreted in two different ways, the said clauses and provisions should be understood according to the interpretation that would give them a legal effect rather than the interpretation that would give them none.\(^{137}\)

The decision in Ms. X departed from the above principles of the French law.\(^{138}\) Although the court underlined the importance of the parties’ jurisdictional choice (Luxembourg), it nonetheless went to invalidate the entire jurisdiction clause and submitted the dispute, against the express choice of the parties, to the jurisdiction of the French courts.\(^{139}\)

(ii) Potestativité

Potestativité is a legal concept that nullifies any clauses the execution of which is subject to the sole control of the debtor - since such power would allow the debtor to avoid its obligations.\(^{140}\)

Articles 1170 and 1174 of the French Civil Code discuss ‘postestatives’ obligations. These articles fall under the Section entitled ‘Conditional Obligations’.\(^{141}\) Article 1170 provides that a potestative condition is one that makes the performance of the agreement

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\(^{132}\) Ibid.

\(^{133}\) Magee and Mulholland, above n 72, 4.

\(^{134}\) Nesbitt and Quinlan, above n 14, 144-145.

\(^{135}\) French Civil Code, Art 1156-1164.

\(^{136}\) French Civil Code, Art 1156.

\(^{137}\) French Civil Code, Art 1157-1158.

\(^{138}\) Chong and Carter, above n 7.

\(^{139}\) Ibid.

\(^{140}\) Draguiev, above n 3, 35-36.

\(^{141}\) Chong and Carter, above n 7.

\(^{141}\) French Civil Code, Book III, Title III, Chapter IV, Section 1: Conditional Obligations.
dependent on an event that is in the power of one party to enforce or prevent.\textsuperscript{142} As for article 1174, it provides that an obligation is void when contracted under a \textit{potestative condition} to be performed by the party who is obliged.\textsuperscript{143}

The \textit{potestativité} theory thus requires the existence of a conditional obligation as a prerequisite for it to apply. Hybrid clauses however contain no conditional obligations but rather confer an option to one of the parties. Therefore, the reasoning of the court on this level is flawed. Moreover, potestativité is also a concept the basis of which is to prevent a creditor from engaging in discretionary and abusive behavior.\textsuperscript{144} However, it would not be precise to state that hybrid clauses involve a relationship between a debtor and a creditor \textit{per se}. Such clauses are jurisdictional and procedural clauses pertaining to dispute resolution mechanisms rather than to the substantial right under the contract \textit{stictu sensu}.\textsuperscript{145}

Therefore, the theory of \textit{potestativité} in the case matter does not seem to have been well applied.

\textit{(d) On the consistency with the Brussels Regulation}

In \textit{Ms. X} the court had to interpret the European law provisions, more specifically article 23 of the Brussels Regulation.\textsuperscript{146} The French court, by applying the \textit{potestativité} concept, relied on the French \textit{lex fori} (\textit{i.e.} its substantial law)\textsuperscript{147} to strip the autonomy of the parties of its effect. Such application of the French substantive law when dealing with Brussels Regulation was wrong.

Indeed, in \textit{Francesco Benincasa v Dentalkit Srl}\textsuperscript{148} the Court of Justice of the European Union ruled that the principle established by the European case-law requires that Article 17 of the \textit{Brussels Convention} (Now Article 23 of the Brussels Regulation) should be interpreted according to the system and objectives of the latter and independently from the substantial law of the contracting states.\textsuperscript{149} Based on foregoing, the court in \textit{Ms. X} have misinterpreted the Brussels Regulation and wrongfully applied the French substantial law to invalidate the clause.

On another level, Article 23(1) of the \textit{Brussels Regulation} provides that when the parties (one of them should be domiciled in a member state) agree to submit their disputes to the jurisdiction of a member state, ‘such jurisdiction will be exclusive unless the parties have agreed otherwise’.\textsuperscript{150}

The text of Article 23 expressly provides that jurisdictional exclusivity can be subject to

\begin{flushleft}
\textsuperscript{142} French Civil Code, art 1170. \\
\textsuperscript{143} French Civil Code, art 1174. \\
\textsuperscript{145} Draguiev, above n 3, 36. \\
\textsuperscript{146} Chong and Carter, above n 7. \\
\textsuperscript{148} (Case C-269/95). \\
\textsuperscript{149} (Case C-269/95), [12]; see also Draguiev, above n 3, 38. \\
\end{flushleft}
exceptions. In other words, the parties can choose more than one jurisdiction to resolve any potential contractual disputes. The text of the relevant clause in Ms. X was in line with such interpretation as the bank had the power to refer disputes to ‘any other court of competent jurisdiction’. As long as the court is competent, the parties should be free to refer their disputes to it regardless of how wide the array of competent jurisdictions may be. The Cour de Cassation has failed to take these considerations into account and its decision on this level was considered to be ‘more than peculiar’ and ‘absurd’. Moreover, recital (14) of the Brussels Regulation provides for the necessity of respect of the autonomy of the parties. There are no provisions in the Brussels Regulations that would invalidate the clause as drafted in the agreement and therefore the autonomy of the parties in relation thereto should have been upheld.

For these reasons, and for many others, the decision in Ms. X was subject to many critics and was considered to be ‘ill-founded’ and based on ‘perverse reasoning’. Thus, it is thought that this decision is not likely to be followed in the future by the French courts.

Finally, it is important to note that the Brussels Regulation have now been amended by Regulation (EU) No. 1215/2012. The said regulation have amended Article 23 (now Article 25) to provide that the courts of the jurisdiction designated by the parties to settle disputes can invalidate the clause in accordance with their local laws. This amendment will make the situation more complicated when the courts of France are seized to resolve a certain dispute especially in light of the decision in Ms. X.

(e) Extension to Arbitration?

Although the Brussels Regulation does not extend to cover arbitration, it would be difficult to imagine how a hybrid arbitration clause would be upheld in France where ‘a choice as between jurisdiction of competent courts is not’. This author does not fully agree with this argument. It is true that the position of the court in Ms. X has made the validity of hybrid arbitration clauses doubtful in France, but it would be excessive to treat such position as evidently prohibiting a choice between arbitration and litigation. Such choice, although questionable, can still be possible notwithstanding the said decision and HAC can still survive Ms. X’s implications for the following reasons:

151 Ms. X, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983.
152 Dragueiev, above n 3, p 37.
153 Ibid.
154 See Magee and Mulholland, above n 72, 4.
155 See generally Scherer, above n 130.
156 Ibid.
157 Chong and Carter, above n 7.
158 Ibid.
160 Ibid, art 25.
161 Dragueiev, above n 3, 39.
162 Magee and Mulholland, above n 72, 4.
First, it is notable that the Paris Court of Appeal recognized that a contractual clause can confer an option to one party to choose between different jurisdictions but invalidated the clause in the case matter because of its alleged broad scope. The Cour de Cassation, although it shifted the basis of the invalidation by invoking potestativité, did not contradict or disagree at all with the said recognition of option clauses made by the Court of Appeal. Therefore, it is arguable that the French courts do not ipso facto invalidate hybrid clauses - including hybrid arbitration clauses.

Second, the decision in Ms. X involved parties who do not stand on equal footing. Indeed, the parties to the agreement in question before the French court were a bank and a natural person. Some authors have argued that such imbalanced power between the parties might have led the court to seek to protect the weaker party. In the French civil law, such protection is usually referred to as l’ordre public de protection or the public order of protection - a concept designating the body of rules governing the private contractual relations the specific aim of which is the protection of a weaker party to an agreement. Thus some commentators have argued that the outcome of the case would have been different if the relevant parties were on equal bargaining footing. Therefore, it is highly sustainable that, even in light of the decision in Ms. X, a hybrid clause would not be inherently invalid under the French law. Hence, a carefully drafted hybrid clause, whether it involves an option between different jurisdictions or between litigation and arbitration, can still escape invalidation by the French courts if such clause was carefully and narrowly drafted.

Third, the decision in Ms. X involved and was confined to an interpretation of the Brussels Regulation. The said regulation expressly excludes arbitration from its scope of application. Consequently, the option to arbitrate should be excluded from the scope of application of the decision in Ms. X.

Finally, the decision of the court in Ms. X did not refer to or overrule the decision in Société Sicaly. Consequently, the latter remains the only authority related to hybrid arbitration clauses. Hence, there is a good argument that such clauses remain valid in France.

(f) Conclusive Comments

Based on the above, hybrid arbitration clauses might be safe from the hostility bestowed by Ms. X. The latter decision was highly criticized and ill-founded. Its authority is questionable with respect to hybrid clauses conferring to one party a power to elect different jurisdictions and a fortiori such authority should not be extended to hybrid clauses.
However, it would be frivolous to ascertain that Ms. X have no implication whatsoever on hybrid arbitration clauses with a French nexus and that the latter are totally safe from nullification by the French courts. Therefore, until the time when a further decision is rendered either by the Cour de Cassation and/or the Court of Justice of the European Union on this matter, the validity of hybrid clauses under the French and European Law would remain a hybrid validity in France and across the EU.

VI RECENT DEVELOPMENTS: RIPOSTES TO SONY-ERICSSON & MS. X

Pursuant to the uncertainties triggered by Sony-Ericsson and Ms. X, the courts of several jurisdictions have rendered decisions reconfirming the validity of hybrid clauses.

A Hestia Holdings: Reconfirming the Validity of Hybrid Clauses in the UK

The validity of hybrid clauses has always been recognized in the UK. However, in the wake of Ms. X decision, some concerns arose as per the validity of hybrid clauses in Europe (including the UK). A recent case of the English courts was delivered in 2013 to reconfirm the validity of these clauses in England. The importance of the case lies in the fact that it had to interpret whether or not a hybrid clause would be effective under the Mauritian law. The Mauritius legal system is a hybrid one which partially follows the French legal system example. Hence, the English court had to assess whether or not Ms. X decision would impact the validity of the relevant hybrid clause having a nexus with Mauritius.

In the case matter, the facility agreement in dispute was first governed by the Mauritian law. However, following certain developments in the contractual relationship between the parties, a new agreement was executed. The latter was governed by the English law and the jurisdictional clause submitted disputes to the exclusive jurisdiction of English Courts with an option to one party to litigate ‘in any other courts in any jurisdiction’.

The defendants challenged both the change of the governing law and the jurisdiction clause. On the governing law issue, Popplewell J ruled that (i) the parties can amend the governing law, whether retroactively or prospectively, and (ii) pursuant to the amendment, the agreement was governed by the English law. As for the jurisdiction clause, when addressing the argument advanced by the defendants who relied on Ms. X decision to invalidate it under Mauritian law, Popplewell J ruled that such clause is valid as a matter of
English law (the law of the agreement). He also stated that even if the Mauritius law was presumably the governing law of the agreement, the jurisdiction clause would still be enforceable and valid notwithstanding the decision in Ms. X.

### B Spain: Coping with the International Trend

In Spain, the position of the courts has recently shifted towards the recognition of hybrid arbitration clauses in line with the English law position in *Hestia*. In 2013, the Court of Appeal of Madrid declared the validity of hybrid clauses in *Camimalaga S.A.U. v DAF Vehículos Industriales S.A. and DAF Truck N.V.* Both, the Court of First Instance and the Court of Appeal solemnly held that such hybrid clauses are valid under Spanish law and that such validity reflects the international trend towards the recognition of hybrid clauses. Moreover, the court confirmed that the option to arbitrate in such hybrid clauses constitutes a ‘valid and binding agreement to arbitrate in the unilateral option clause.’

This decision was the first to expressly confirm and state the recognition and enforceability of such clauses under the Spanish law.

### C Luxembourg: A Strong Riposte to Ms. X

In January 2014, the Luxembourg District court delivered a re-assuring decision by virtue of which it recognized that hybrid clauses giving one party the option to submit disputes ‘before any competent court’ was valid. The text of the jurisdiction clause in the case matter was somehow similar to the one in Ms. X.

The court considered that the parties in the case had equal bargaining power and therefore effect should be given to their Agreement. The court also underlined criticism to the decision in Ms. X and solemnly stated that the Brussels Regulation allowed such clauses.

The position of the court is reassuring as its interpretation of the Brussels Regulation was not based on the local laws of the Luxembourg. It had also brought hope to financial parties having a hybrid arbitration clause in their agreement by declaring validity of one-way jurisdictional clauses under the EU law.

However, as mentioned above, the validity of such clauses will remain uncertain in the EU absence any decision of the Court of Justice of the European Union to that effect.

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184 Ibid [41-42].
185 Ibid [36].
186 Berard and Dingley, above n 84.
187 Audiencia de Madrid (Court of Appeal of Madrid), Sección 28, 18 Oct. 2013.
188 Ibid.
189 Berard and Dingley, above n 84.
190 Ibid.
191 Tribunal d'Arrondissement de et à Luxembourg [the Luxembourg District Court], No 127/14 and No 128/14, 29 January 2014; see also Garvey, above n 1.
192 Tribunal d'Arrondissement de et à Luxembourg [the Luxembourg District Court], No 127/14 and No 128/14, 29 January 2014.
193 Ibid.
VII WHERE TO GO FROM HERE? - PRACTICAL SOLUTIONS

The hostility and uncertainty that hybrid arbitration clauses have faced in different jurisdictions and their impact on the predictability and certainty of agreements is cause for concern.194 That concern is particularly high where the clause faces the risk of being struck invalid in its entirety. Hence, market participants in financial transactions should attempt to strike a balance between the control that such clause provides for the party who has the option and the risk of invalidation that it might face in certain jurisdictions or circumstances.195

Hence, an attempt to provide practical solutions to the uncertainty caused by such clauses is necessary for the purposes of mitigating the risks and reach better enforcement outcomes of the hybrid arbitration clauses themselves or of the arbitral awards resulting from their use.

There are also other scenarios where it is recommended not to use hybrid clauses. Here the parties should opt either for court jurisdiction only or for arbitration only.

A Careful Choice of the Governing Law and of the Arbitral Seat Pursuant to Articles V(1)(a) and V(2)(b) of the New York Convention

It is true that the *NY Convention* created a presumption of enforceability of arbitration awards196 as discussed under paragraph III(B) above. However, it is also true that such enforceability is subject to some exceptions the most relevant of which for the purposes of this paragraph are Articles V(1)(a) and V(2)(b) of the said convention.

Pursuant to Article V(1)(a), an award may be unenforceable if ‘the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law where the award was made.’197 This means that an award based on a hybrid arbitration clause stipulated in an agreement governed by a law that does not recognize such a clause might not be enforced by the enforcing court even if the law of the latter recognizes these clauses.198 By way of example, an English court might not enforce an award based on a hybrid clause stipulated in an agreement governed by the Russian law.199 If the agreement does not stipulate for a governing law, the enforcing court may also refuse to enforce the award if the law of the arbitral seat does not recognize hybrid clauses.

Moreover, Article V(2)(b) denies enforcement to an award if such enforcement would be contrary to the public policy of the jurisdiction where the latter is sought.200 Hence, where hybrid clauses are contrary to the public policy of a given jurisdiction (e.g. Russia), the court of said jurisdiction would refuse the enforcement of any award the basis of which was a hybrid clause.201

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194 Chong and Carter, above n 7.
195 Ibid.
196 *NY Convention*, art III.
197 Ibid art V(1)(a).
198 See generally Magee and Mulholland, above n 72.
199 Ibid, 6.
200 *NY Convention*, art V(2)(b).
201 Magee and Mulholland, above n 72, 2.
When dealing with Article V(1)(a), finance parties should be advised to carefully choose the governing law of the agreement as well as the seat of the arbitration in such a way to avoid the non-enforcement of the arbitral awards resulting from hybrid arbitration clauses in their agreements.

However, when Article V(2)(b) is concerned, a more draconian solution should be adopted. Indeed, in such case, finance parties are invited to avoid hybrid clauses in their agreements. In other words, finance parties should avoid said clauses in the situation where they are aware at the time when the financial transaction is entered into that the enforcement of any future arbitral award resulting from the application of such clauses will most likely take place in a country where such clauses are considered to be against public policy.

B Careful Drafting

1 Limiting the Scope of the Clause

It has been argued that in some jurisdictions where hybrid clauses were invalidated, such invalidation was not against the clause per se but rather against the way in which the clause was drafted - giving the stronger party an abusive advantage to the detriment of the other party.202 Indeed, the Paris Court of Appeal in Ms. X stated that the clause gave the bank the power and discretion to ‘select whatever jurisdiction it wishes’.203 A closer look at the decision reveals that it was implicit to the reasoning of the Cour de Cassation in this case that the potestativité was invoked against the lack of specificity in the clause. Indeed, it has been argued that Ms. X decision should be understood as only prohibiting such non-specified clauses, rather than the option itself.204 In other words, a hybrid clause would have remained valid if the option was limited to some precise jurisdictions – such solution has been already upheld by previous French case-law.205

Similarly, in 2011 the Bulgarian Supreme Court of Cassation had also invalidated a hybrid arbitration clause for being against the principles of equality and good morals.206 The clause in the case matter was also very broadly and extensively drafted as it gave the lender to a facility agreement the option to refer disputes to the arbitration court at BCCI, any other arbitration court or before a state court.207

Hence, finance parties are advised to limit the scope of their hybrid jurisdictional clauses. Thus, where the clause stipulates for an option to litigate, terms as wide as ‘any other court’ should be avoided. Indeed, the finance parties will most likely be aware of the jurisdiction to which the dispute may be referred and therefore should limit their option, when possible, to such specified jurisdictions. In this same perspective, an option to arbitrate should not extend to refer disputes to ‘any other arbitration court’.

202 See, eg, Scherer, above n 130; See also Draguiev, above n 3, 31.
203 Ms. X, Cour de Cassation [French Court of Cassation], No 983/12, 26 September 2012, ECLI:FR:CCASS:2012:C100983.
204 Scherer, above n 130.
205 See, eg, Société de Ruiter’s new Roses International BV et alia v Société STAR 2000 SHA, Cour d’Appel d’Aix en Provence [Court of Appeal of Aix en Provence], No 07/13465.
206 Second Commercial Chamber of the Bulgarian Supreme Court of Cassation, Decision No. 71, Commercial Case No. 1193/2010, 02 September 2011.
207 Draguiev, above n 3, 31.
It has been argued that ‘a clause allowing a lender, for example, to seek interim relief to protect and preserve their position anywhere in the world, but which restricts claims to a single jurisdiction... may not be objectionable.’\textsuperscript{208} However, this situation is still untested\textsuperscript{209} and until then, limitation of the scope of hybrid clauses remains a necessary drafting technique.

### 2 Other Drafting Tips

In some cases, especially in HAC with an option to arbitrate (as opposed to a HAC with an option to litigate), it is advisable for the clause to provide for a notice to be served to the counterparty before the forum’s election.\textsuperscript{210} Indeed, it would be abusive for instance to allow the party with an option to arbitrate to exercise its option after the other party had commenced court proceedings.\textsuperscript{211} This would undermine the court proceedings that had already started and give excessive powers to one party to the detriment of the other.\textsuperscript{212} Such practice has been considered permissible in the UK, but poses serious doubts as to its admissibility in other jurisdictions.\textsuperscript{213}

For the purposes of mitigating the risk, the parties can stipulate that at the moment when the dispute arises and before the option is crystallized or exercised, the party intending to commence court proceedings or arbitration procedures should serve a notice to its counterparty informing it of its intention. Here, the party with arbitration option will be able to exercise its option before the other party commences court proceedings. On the other hand, the party with no option will refrain from commencing court proceedings when it receives a notice from counterparty having the option to arbitrate. Adding a notice provision in the agreement is, to this author’s opinion, an effective measure that re-introduces balance into HAC with an option to arbitrate and consequently reduces their nullification risks.

Other drafting measures may include (i) a specification of the types of disputes that the clause covers (all disputes or certain types thereof), and/or (ii) subjecting the exercise of the option to the occurrence of a specific event, and/or (iii) specifying which party should, in the absence of notice if any, bear the costs of any aborted court proceedings or arbitration procedures.\textsuperscript{214}

All the above tips contribute to limit the risk of having hybrid arbitration clauses precluded by some jurisdictions based on the invalidation grounds discussed under part V above.

### C Avoidance of Hybrid Arbitration Clauses Where Necessary: Adopting Arbitration Only

Another solution would be to avoid hybrid arbitration clauses where the financial agreements in which such clauses are stipulated have a nexus with a hostile jurisdiction

\textsuperscript{208} Chong and Carter, above n 7.
\textsuperscript{209} Ibid.
\textsuperscript{210} Berard and Dingley, above n 84.
\textsuperscript{211} Draguiev, above n 3, 24.
\textsuperscript{212} Ibid.
\textsuperscript{213} Ibid, 36.
\textsuperscript{214} Berard and Dingley, above n 84.
(such as in Russia and Turkey). Moreover, avoidance of hybrid clauses can also be argued where one of the parties to the financial agreement is a natural person or a consumer (e.g. retail loan agreements) and such agreement has a nexus with a jurisdiction having an uncertain position with respect to these clauses.

In these cases, the parties can either choose to exclusively submit their disputes to arbitration or to the courts jurisdiction.\(^{215}\)

1 **Litigating Only**

Referring disputes to court litigation by parties who had intended to include arbitration in their contractual jurisdiction clause is, to this author’s view, not advisable. Indeed, as an extremely broad generalization, the courts of the countries that are hostile to hybrid clauses, especially those of emerging jurisdictions, are usually unattractive.\(^{216}\)

Moreover, the main caveat with respect to court jurisdiction is the enforcement problem of judgments on the cross-border level.\(^{217}\) Indeed, as far as financial transactions are concerned, the traditional jurisdiction of the UK or New York courts is usually chosen to govern such agreements. However, the enforcement of judgments delivered by the said courts is problematic in other jurisdictions where enforcement of foreign judgments is difficult.\(^{218}\) By way of example, if an agreement is subject to the jurisdiction of the UK courts and has a nexus with Russia, the decision of the English court might face enforcement problems in Russia as no treaty of mutual recognition of court judgments exists between the two countries.\(^{219}\)

2 **Arbitrating Only**

Arbitration is a dispute resolution mechanism by virtue of which a privately constituted tribunal, commonly made of one or three arbitrators, renders a *binding* arbitral award.\(^{220}\) This binding feature of the arbitral award differentiates arbitration from the other alternative dispute resolution mechanisms such as mediation or negotiation.\(^{221}\) It is true that arbitration is regarded as the common or preferred dispute resolution mechanism for commercial disputes, whether such disputes arise from local or international transactions.\(^{222}\) However, financial markets participants have been traditionally reluctant to use arbitration in their financial transactions.\(^{223}\) This perception appears to have taken a step back and the said markets participants recently became more accustomed to arbitration, as an alternative dispute resolution mechanism, in their transactions.\(^{224}\)

\(^{215}\) Linklaters, above n 105.

\(^{216}\) ISDA, *Memorandum on arbitration under an ISDA Master Agreement*, 19 January 2011, [4].

\(^{217}\) Ibid.

\(^{218}\) Peacock, Greenaway and Kennedy, above n 6.

\(^{219}\) Linklaters, above n 105.


\(^{221}\) Ibid.


In perspective, the International Swaps and Derivatives Association, Inc (‘ISDA’) had published the *2013 ISDA Arbitration Guide* (the ‘Guide’) to provide guidance in relation to the use of arbitration clauses within the ISDA 2002 Master Agreement and/or the ISDA 1992 Master Agreement. The ISDA stated that the guide was published ‘in response to a growing trend in derivatives trading over recent years to make use of arbitration as an alternative way of dispute resolution compared to the traditional choice of court litigation’. The *Guide* noted the enforceability problems faced by optional arbitration clauses in some jurisdictions. Hence, optional arbitration clauses were not expressly precluded from the Master Agreement, but one can safely state that the terms in which such clauses were addressed in the *Guide* were definitely not intended to encourage market participants to use them under the ISDA Master Agreement.

Moreover, arbitration had become more prevalent in the context of financial transactions due to the rise of certain arbitration bodies both on the international and domestic levels in some jurisdictions. On the international level for instance, the Panel of Recognized International Market Experts in Finance (‘Prime Finance’) had started its operations in January 2012. *Prime Finance* aims to resolve complex financial disputes by way of arbitration. The main advantage of *Prime Finance* lies in its introduction of the expedited arbitration proceedings and urgent provisional measures. These procedures respond to the lack of summary proceedings in arbitration procedures by ensuring celerity in rendering arbitral awards.

On a more domestic level, new arbitration bodies have emerged in several countries where hybrid clauses were held unenforceable, such as in China. Chinese courts have been described as being corrupted and neither independent nor impartial. Hence, parties can be advised to submit their disputes to arbitration in China, as long as the Chinese law is hostile to hybrid clauses. The most recognized arbitration body in China is CIETAC which adopted in 2003 the Financial Dispute Arbitration Rules especially enacted to deal with disputes arising from financial transactions. Finally, arbitration (as opposed to litigation) is more in line with the Chinese Confucian tradition according to which: ‘It is better to die from starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit.’

Most importantly, the main advantage of arbitration over litigation, in the scenario where the stipulation of hybrid clauses is not recommended, remains on the level of the relatively
quick and easy enforcement of international arbitral awards pursuant to the *NY Convention*. Indeed Article III of the latter establishes the principle of enforceability by providing that the recognition and enforcement of awards by the contracting states is mandatory.\textsuperscript{237} Moreover, almost 75% of the world’s jurisdictions are contracting parties to the *NY Convention* (including Russia, China, Turkey, UAE and all the countries of continental Europe).\textsuperscript{238} Such wide array of signatories assures that an arbitration award given based on an arbitration agreement in the context of a cross-border financial transaction will be enforceable in a country the laws of which are hostile to hybrid clauses.\textsuperscript{239}

Finally, it is noteworthy that arbitration has some drawbacks in the world of financial transactions as the former lacks summary proceedings and default judgments mechanism\textsuperscript{240} and can be costly when compared to court jurisdictions.\textsuperscript{241} However, on a balance of interests this author believes that the rise of new arbitration bodies with expedited procedures, the general unreliability of courts in the jurisdictions that are hostile to HAC and the ease of enforcement of arbitral awards pursuant to the *NY Convention*, all argue for the more advantageous character of arbitration over court litigation in, or when there is a nexus with, the countries that are hostile to hybrid clauses.

**VIII CONCLUSION**

The ongoing growth in the financial markets, the increasing numbers of financial transactions and the huge amounts of money involved in such transactions dictate a need for the courts to uphold agreements and refrain from interfering with the parties’ autonomy\textsuperscript{242} to better ensure predictability and certainty of outcome. Given the advantages and flexibility that hybrid arbitration clauses provide for finance parties, their future in the cross-border world of financial transactions will most likely be secured.\textsuperscript{243} It has been said that ‘[t]here can be few objections to the general validity of unilateral arbitration clauses’.\textsuperscript{244} This is generally true in common law jurisdictions,\textsuperscript{245} where the law and its interpretation are creditors’ friendly\textsuperscript{246} and tuned to encourage the market economy,\textsuperscript{247} and ensure the respect of the parties’ autonomy.

However, hybrid arbitration clauses have faced some challenges during the recent years. Some jurisdictions struggle to recognize and enforce hybrid clauses. These challenges peaked in 2012 with the decisions of the Russian Presidium Supreme Arbitrazh Court in *Sony-Ericsson* and the French *Cour de Cassation* in Ms. X. Although this study have argued against the outcomes of these two decisions and suggested arguments in favor of the necessity of upholding hybrid arbitration clauses, the uncertainty that has emerged

\textsuperscript{237} *NY Convention*, art III.

\textsuperscript{238} *NY Convention*, Contracting States <http://www.newyorkconvention.org/countries>.

\textsuperscript{239} See generally Magee and Mulholland, above n 72, 2.

\textsuperscript{240} Peacock, Greenaway and Kennedy, above n 6.

\textsuperscript{241} See, eg, Ali and Huang, above n 233, 99.

\textsuperscript{242} Nesbitt and Quinlan, above n 14, 148.

\textsuperscript{243} Chong and Carter, above n 7.

\textsuperscript{244} Nesbitt and Quinlan, above n 14, 148.

\textsuperscript{245} Scherer, above n 130.


\textsuperscript{247} Ibid 3-05 and 3-09.
pursuant to these decisions should put finance parties on notice.\textsuperscript{248} Hybrid arbitration clauses are not risk-free.\textsuperscript{249}

It is true that most of the world’s jurisdictions do not invalidate hybrid arbitration clauses \textit{per se}\textsuperscript{250} but it is also true that the interference of some jurisdictions with the parties’ autonomy would impeach the desired effect of such clauses, or the arbitral awards emanating therefrom, when enforcement is sought.

Hence, financial market participants ought to put special focus on the choice of the governing law of their agreement and the seat of arbitration in order to enhance the enforcement chances of such clauses. Moreover, the drafting of these clauses requires special attention from legal practitioners. Standard boilerplate clauses do not always serve the purpose of enforceability and should be avoided.\textsuperscript{251} When the agreement has a nexus with a jurisdiction in which the validity of hybrid arbitration clauses is uncertain, the standard drafting of the clause should be modified in such a way to ensure or enhance, to the say the least, its enforcement.

If however, a given jurisdiction is clearly hostile to hybrid arbitration clauses, finance parties should assess whether or not the desire for the advantageous regime of these clauses overweighs the risk of their non-enforcement.\textsuperscript{252} If not, arbitration, as an alternative dispute resolution mechanism, should be favoured in these cases over court litigation.

In sum, the challenges faced in the recent years cannot imply, as some have argued, ‘\textit{[t]he end of the road}’ for hybrid arbitration clauses.\textsuperscript{253} The road is still long despite some bumps and turns that might appear along the way. On this long road, drivers of financial vehicles should nonetheless drive with caution and take the right turns so they reach safe and carefully chosen ends.

\textsuperscript{248} Scherer, above n 130.
\textsuperscript{249} Peacock, Greenaway and Kennedy, above n 6.
\textsuperscript{250} Draguiev, above n 3, 44.
\textsuperscript{251} Ibid 45.
\textsuperscript{252} Magee and Mulholland, above n 72, 6.
\textsuperscript{253} Garvey, above n 1.
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