

# International Arbitration

ALERT | 21 January 2025



## In this issue

SOUTH AFRICA

Opt in or out: Unilateral option clauses in international arbitration



For more insight into our expertise and services

## Opt in or out: Unilateral option clauses in international arbitration

The 2024 edition of the Clifford Chance Unilateral Option Clauses Survey considers the validity of unilateral option clauses in 120 jurisdictions around the world, including 28 countries in Africa. The full survey, including CDH's contribution for South Africa, is available [here](#).

### What are option clauses?

Unilateral option clauses allow one party, at its discretion, the exclusive right to choose whether to resolve any future dispute by litigation before the courts or arbitration before an arbitral tribunal.

This is beneficial because arbitration and litigation can offer different processes and procedures in areas such as disclosure, fees, interim relief, summary judgment and international enforcement. Option clauses preserve the ability to benefit from the differing processes by allowing a party to choose the most appropriate forum once a dispute has arisen and once the circumstances, value and complexity of the dispute are known.

The clauses are generally included in favour of parties that have stronger bargaining power in negotiations, who are more likely to be a claimant than a defendant in any future proceedings. For example, a financial institution that is making a loan facility available and wants to preserve different options for securing quick default or summary judgment may request the benefit of such a clause.

### Option clauses around the world

The 2024 survey confirms that unilateral option clauses are not necessarily valid and enforceable in every country. While the position is clear in some countries, in others it can be inconsistent or uncertain.

Some courts (like those in France, Mauritius and the United Arab Emirates (UAE)) may determine unilateral option clauses to be wholly or partially invalid or decline to enforce arbitration awards that derive from them. This is generally on the basis that their laws consider the inherently imbalanced and one-sided nature of option clauses to be contrary to principles of public policy, fairness and equality of treatment, or that such clauses lack the requisite unambiguous expression of certainty to constitute a valid arbitration agreement. This could have significant adverse consequences for a party seeking to rely on or enforce a clause in that country. For example, in October 2024, the Dubai Court of Cassation held that a unilateral option clause did not constitute a valid agreement to arbitrate according to UAE law. The Dubai courts assumed jurisdiction over the dispute, despite the party with the benefit of the option electing for arbitration.

**INTERNATIONAL ARBITRATION  
ALERT**

## Opt in or out: Unilateral option clauses in international arbitration

CONTINUED

In contrast, many jurisdictions have a demonstrated track record of recognising and upholding such clauses. For example, in England and Wales the courts have consistently upheld the validity of option clauses and have taken steps to protect a party's option by staying proceedings if necessary. Moreover, in other countries (such as South Africa and Kenya), although the courts have not directly examined unilateral option clauses, it is anticipated that they would uphold them as they generally uphold contractual terms freely entered into, provided that they are not illegal, immoral or contrary to public interest or policy.

The survey emphasises the diversity of approaches to unilateral option clauses globally. Consequently, before considering entering into an option clause, advice should be taken as to the position under the applicable laws and in any countries where the parties are located or enforcement of a judgment or award may be sought.

**Veronica Connolly and Luke Kleinsmidt**

The logo for 'The Legal 500 EMEA 2024' is displayed in white text on a dark blue background. The word 'The' is in a small font above 'LEGAL', which is in a large, bold, serif font. Below 'LEGAL' is the number '500' in a large, bold, sans-serif font. The text 'EMEA' and '2024' are in a smaller, bold, sans-serif font below the '500'.

The  
**LEGAL**  
**500**

EMEA  
**2024**

**TIER 1**  
Dispute Resolution



## OUR TEAM

For more information about our International Arbitration sector and services in South Africa and Kenya, please contact:



### Rishaban Moodley

Practice Head & Director:  
Dispute Resolution  
Sector Head:  
Gambling & Regulatory Compliance  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com



### Tim Fletcher

Chairperson  
Director: Dispute Resolution  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



### Timothy Baker

Director:  
Dispute Resolution  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com



### Denise Durand

Director:  
Dispute Resolution  
T +27 (0)11 562 1835  
E denise.durand@cdhlegal.com



### Jackwell Feris

Sector Head: Industrials,  
Manufacturing & Trade  
Director: Dispute Resolution  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com



### Khaya Mantengu

Director:  
Dispute Resolution  
T +27 (0)11 562 1312  
E khaya.mantengu@cdhlegal.com



### Richard Marcus

Director:  
Dispute Resolution  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com



### Burton Meyer

Director:  
Dispute Resolution  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com



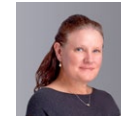
### Lucinde Rhoodie

Director:  
Dispute Resolution  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com



### Clive Rumsey

Sector Head:  
Construction & Engineering  
Director: Dispute Resolution  
T +27 (0)11 562 1924  
E clive.rumsey@cdhlegal.com



### Belinda Scriba

Director:  
Dispute Resolution  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com



### Tim Smit

Sector Head:  
Consumer Goods, Services & Retail  
Director: Dispute Resolution  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com



### Veronica Connolly

Senior Associate:  
Dispute Resolution  
T +27 (0)21 481 6376  
E veronica.connolly@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.  
Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114  
E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**NAMIBIA**

1<sup>st</sup> Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia  
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020  
T +264 833 730 100 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2025 14256/JAN

