Is the consumer always right? When international arbitration meets consumer protection

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In a recent trilogy of decisions, the English courts have considered significant and novel issues arising from the interaction between consumer protection and the support for international arbitration under English law.

Consumer protection clearly assumed primacy in these cases. Beware the party who enters into an international arbitration agreement with an individual domiciled in the UK.

Stay of proceedings

In *Soleymani v Nifty Gateway LLC*,[1] Mr Soleymani, a wealthy UK-based individual, purchased a non-fungible token (NFT) for US$650,000 in an online auction operated by Nifty. The contract was subject to New York arbitration and New York law. After Mr Soleymani failed to pay, Nifty commenced arbitration in New York.

To scuttle the arbitration, Mr Soleymani commenced English proceedings seeking declarations that the arbitration and governing law clauses were unfair under section 62 of the Consumer Rights Act 2015 ("CRA") (and that the contract was illegal under the Gambling Act 2005).

The judge allowed Nifty's application for a stay of the English proceedings pursuant to section 9 of the Arbitration Act 1996 ("AA"). A key reason was her finding that the factual issues going to the unfairness enquiry under the CRA were "*closely linked*" to the substantive issues in the arbitration as to whether Mr Soleymani was bound by the terms of the auction; in the context of a "*fundamentally de-centralised and borderless*" transaction, an English judge could not be said to be significantly better placed than a US judge or arbitrator to decide the questions of fairness.[2]

The Court of Appeal allowed Mr Soleymani's appeal and ordered a trial in England of whether the arbitration agreement was "*null and void*" under section 9(4) of the AA. Notwithstanding the concept of Kompetenz-Kompetenz, a "*powerful*" (and seemingly decisive) factor was that the challenge to the arbitration agreement was premised on a "*vindication of a claimant's arguable consumer rights*" that would be "*best decided by a domestic court*" rather than a "*foreign arbitrator*".[3] A further "*strong*" reason was that "*part of the purpose*" of section 71 of the CRA was that "*decisions on consumer rights are made in public*", in a "*court*" as opposed to in private arbitration.[4]

Enforcement of awards

The default position is that an English court will refuse enforcement of awards under the New York Convention ("NYC") only in very exceptional circumstances. However, two recent cases suggest that where consumer polices are contravened, this pro-enforcement bias is turned on its head: enforcement is the exception, not the norm.

In *Payward Inc v Chechetkin*,[5] Mr Chechetkin (a Russian-qualified lawyer domiciled in the UK) had traded crypto on the Kraken exchange operated by Payward. The contract was subject to San Francisco arbitration and Californian law (clause 23). Mr Chechetkin subsequently lost £608,534 whilst trading and commenced English proceedings to reclaim the same. Meanwhile, Payward had commenced arbitration in San Francisco. Payward obtained an award holding that Payward was not liable to Mr Chechetkin.

Bright J refused to enforce the award under section 103(3) of the AA on the basis that to do so would be contrary to public policies embodied in the CRA, *viz*:

1 [2022] EWCA Civ 1297.
2 *Soleymani v Nifty Gateway LLC* [2022] EWHC 773 (Comm) at [107], [109] per Clare Ambrose sitting as a Deputy Judge of the High Court.
3 *Soleymani* at [142]–[143], [149], [152] per Birss LJ.
4 *Soleymani* at [144]–[145], [151] per Birss LJ.
5 [2023] EWHC 1780 (Comm).

- The policy in section 71 of the CRA (following *Soleymani*) for the English Court to consider consumer rights issues thereunder; Payward's enforcement application was effectively a request for the Court not to consider the fairness of clause 23.[6]
- The policy in section 74 of the CRA that where a consumer contract has a close connection with the UK, consumer rights issues should be dealt with under the CRA rather than any foreign law.[7]
- The policy in section 62 of the CRA that consumer terms should be fair. Bright J held clause 23 to be "*unfair*" since (a) the US federal courts are "*not competent*" to "*supervise disputes that are concerned with English law and UK statutes*"[8]; and (b) the fact that arbitration was seated in California entailed engaging "*US attorneys*", which was "*expensive and inconvenient*", and appointing a "*US arbitrator*" who had "*no experience of English law*".[9]

Eternity Sky Investments Ltd v Mrs Xiaomin Zhang[10] was decided shortly after *Payward*, also by Bright J. Mrs Zhang attempted to resist enforcement of a Hong Kong award relating to a personal guarantee on the basis that the Hong Kong arbitration and governing law clauses were unfair under the CRA. Her attempt failed. The CRA was found inapplicable, because the personal guarantee was not closely connected to the UK. Bright J nonetheless commented that cases where a "*New York Convention award should be enforced notwithstanding a conflict between the award and the rights of the consumer under the [CRA]*", will likely only arise "*infrequently*", for example where there is some "*purely technical breach*" of the CRA.[11]

Takeaways

What clearly emerges is that English law will accord significant weight to consumer protection, even where competing policies in support of international arbitration are at play. It seems unlikely these cases will be the last word on this tension. In particular, the following issues may merit (re)consideration in future:

- It is far from clear that part of the purpose of section 71 of the CRA was for decisions on consumer rights to be made in the English courts wherever possible. On its face, section 71 of the CRA merely sets out the Court's duty to decide the fairness of consumer terms *sua sponte*, where parties have not themselves raised the point.[12] On one view, section 71 of the CRA should only bite where the court already has jurisdiction; it should not negate (or not entirely) the concept of Kompetenz-Kompetenz.
- The analysis in *Payward* focused on showing that the CRA represents the public policy of England. But not every public policy engages section 103(3) of the AA. It requires public policy which also reflects both "*fundamental conceptions of morality and justice*"[13] and "*considerations of international public policy rather than purely domestic public policy*".[14] Arguably contravention of rights under the CRA should be considered as a question of degree, with only serious contraventions qualifying, given that there are competing pro-arbitration policies at play.
- Should it matter that the arbitrations in *Soleymani*, *Payward* and *Eternity Sky* were international, being foreign-seated, and involved high-value claims? Wealthy consumers are still consumers.[15] But consumers who end up facing (and even making) high-value claims in international arbitration are likely to be sophisticated individuals capable of protecting themselves.[16] That again begs the question of whether contravention of rights under the CRA should be decisive in frustrating an arbitration or the enforcement of an award, or whether a multi-factorial balancing of the competing policies is required.

Meanwhile, any party entering into an arbitration agreement with an *individual* domiciled in the UK should carefully consider if the CRA is applicable and, if so, draft their arbitration and governing law clauses appropriately, in order to avoid difficulties in the event of a dispute.

David Lewis KC acted for the defendant in *Soleymani v Nifty Gateway LLC*, [2022] EWCA Civ 1297, and the claimant in *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang*, [2023] EWHC 1964 (Comm). David is very grateful to Yi Jie Ho, senior associate at Wong Partnership LLP, for his assistance with this briefing.

6 *Payward* at [124]–[125].
7 *Payward* at [126].
8 *Payward* at [139]–[141].
9 *Payward* at [144]–[145].
10 [2023] EWHC 1964 (Comm).
11 *Eternity Sky* at [203].
12 See *Océano Grupo Editorial SA v Roció Murciano Quintero* (Joined cases C-240/98 to C-244/98) EU:C:2000:346, [2000] ECR I-4941, [2002] 1 CMLR 1226 (at [28]) relied on by Birss LJ (*Soleymani* at [145]) for a more far-reaching proposition.
13 *Alexander Brothers v Alstom Transport SA* [2020] EWHC 1584 (Comm) at [71] per Cockerill J, as referred to in *Payward* at [101] per Bright J.
14 *RBRG Trading (UK) Limited v Sinocore International Co Ltd* [2018] EWCA Civ 838 at [25(3)] per Hamblen J. This is consistent with the intention of the drafters of the NYC that the public policy exception would not be "*invoked to advance parochial, local interests and would thereby frustrate the Convention's basic objective of facilitating the enforceability of foreign and non-domestic awards*" ('Chapter 26: Recognition and Enforcement of International Arbitral Awards' (updated September 2022), in Gary B. Born, *International Commercial Arbitration* (Third Edition), 3rd edition, (Kluwer Law International 2021) at p.102–105).
15 *Eternity Sky* at [74] per Bright J.
16 Mr Soleymani was described as "*not a typical consumer*" but "*a wealthy individual*" with "*significant cryptocurrency holdings*" who could "*look after himself* (*Soleymani* at [6], [150]); Mrs Zhang as a "*wealthy*" and "*unusual*" consumer with "*familiarity with guarantees and with bond issues*" (*Eternity Sky* at [150]); and Mr Chechetkin a "*qualified … lawyer in Russia*" with an LLM from a US law school (*Payward* at [6]).

Meet the author

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David is a specialist advocate with experience in a wide range of general commercial and private international law disputes, with an emphasis on energy and natural resources (including renewables), shipping and commodities, civil fraud and the conflict of laws. He also has a particular interest in crypto disputes.

David is frequently involved in complex, high-value, multi-jurisdictional disputes either leading a large team or working as co-counsel with foreign lawyers. He also has considerable experience of injunctive relief, in particular anti-suit and freezing injunctions.

A substantial amount of his work is in international arbitration. David has acted as lead counsel in arbitration hearings in London, Singapore (where he was based permanently from 2009 to 2010), Paris, Dubai and Hong Kong. He is regularly instructed on challenges to arbitration awards and disputes relating to their enforcement.

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