

# Dispute Resolution Hotline

November 20, 2023

## TESTAMENTS ON ARBITRABILITY OF CONSUMER DISPUTES: PART II - UK

- In *Payward, Inc. and Ors. v. Maxim Chechetkin*, the England and Wales High Court refused to enforce a foreign-seated arbitration award in the UK for being against public policy because: (i) the arbitration agreement was unfair to the consumer, and (ii) the arbitrator failed to consider English consumer protection laws in its decision despite the contract having a close connection to the UK.
- English law finds that the mere fact that a consumer contract provides for disputes to be resolved through arbitration does not make the contract unfair for the consumer.
- Businesses must be cautious when crafting arbitration clauses in standard-form contracts to comply with varying jurisdictional requirements, especially in the context of international commerce. At the same time, consumers should understand agreements to avoid being locked into potentially disadvantageous arbitration processes in foreign jurisdictions.

## SYNOPSIS

In *Payward, Inc., Payward Ventures, Inc., and Payward Limited v. Maxim Chechetkin* (“**Payward**”),<sup>1</sup> the England and Wales High Court (“**EWHC**”) refused to enforce a foreign-seated arbitration award stemming from a dispute concerning a clickwrap agreement between a consumer and the operator of a cryptoasset exchange. The court refused to enforce this award in the UK on public policy grounds by finding that: (i) the arbitration agreement was unfair; and (ii) the arbitrator failed to consider English consumer protection laws in the decision even though the contract had a close connection to the UK.

The EWHC’s position varies from that taken by the Indian Supreme Court in *Hemalatha Devi & Ors. v. B. Udayasri I* (“**Hemalatha**”), which was previously discussed [here](#). In *Hemalatha*, the Indian Supreme Court found that a consumer has an option to approach consumer courts after a dispute arises, despite any pre-existing arbitration agreement. On the other hand, the court in *Payward* found that a consumer may be required to arbitrate their dispute if the arbitration agreement itself is not unfair, and provisions of the English consumer protection laws are considered by the tribunal in the decision.

Amid the rapid expansion in global e-commerce, this divergence between legal jurisdictions could introduce complexities and uncertainties in cross-border consumer transactions.

## FACTUAL BACKGROUND

The dispute arose from a clickwrap agreement entered between a consumer and an operator of a cryptoasset exchange. The consumer had to agree to this contract to open an online trading account on the exchange. This contract included a link to the “Payward Terms”. Notably, these terms featured an arbitration clause mandating resolution of disputes by arbitration seated in San Francisco, conducted by a single arbitrator, and in accordance with the JAMS Rules. Additionally, the terms specified that any dispute would be governed by Californian and U.S. law (as applicable), and that San Francisco courts would have exclusive jurisdiction over any appeals of the award or non-arbitrable litigation between the parties.

After incurring a loss of J608,534 in trades on the platform, the consumer filed a lawsuit against the exchange before the EWHC for allegedly violating the Financial Services and Markets Act, 2000 (“**FSMA Act**”) by carrying on regulated activities without required authorization (“**FSMA Proceedings**”). The exchange challenged the jurisdiction of the EWHC in the FSMA Proceedings. It also sought an injunction against the FSMA proceedings, in light of the arbitration clause in the Payward Terms. The EWHC rejected this challenge and refused to grant an injunction by finding that the consumer was entitled to initiate the FSMA proceedings as the arbitration agreement was entered between the parties before the present dispute arose.<sup>2</sup>

Meanwhile, the exchange initiated arbitration under the JAMS Rules. The consumer disputed the validity and enforceability of the arbitration agreement and requested an injunction to pause the arbitration pending the outcome of the jurisdictional challenge in the FSMA Proceedings. The arbitrator denied the consumer’s injunction request and upheld the arbitration agreement. In the final award, the arbitrator concluded that the consumer had: (a) assumed the risks of trading on the exchange; and (b) breached the clickwrap agreement by threatening legal action in the UK. However, the arbitrator declined to award attorney fees and costs to the exchange noting that such costs cannot be awarded under the consumer minimum standards in the JAMS Rules (applicable to consumer arbitrations).<sup>3</sup>

The exchange applied to recognize the final award in the UK and sought a court order preventing the consumer from continuing with the FSMA proceedings. The consumer resisted the enforcement of the final award on the grounds

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that: (i) enforcement of such award would be contrary to public policy; (ii) the award dealt with a matter not capable of settlement by arbitration, and (iii) the award dealt with a difference beyond the scope of submission to arbitration.

## JUDGMENT

The EWHC found that the consumer was a 'consumer' as defined under the Consumer Rights Act, 2015 ("CRA"). It also held that the consumer cannot be prohibited from continuing the FSMA Proceedings. This is especially because the arbitrator neither considered, nor was experienced to, consider issues under the FSMA. The court further recognized that the CRA, particularly its provisions on unfair terms, and the FSMA's general prohibition against unauthorized financial activities, are integral to English public policy.

The EWHC found that the final award was not enforceable in the UK for being in violation of UK public policy under Section 103(3) of the UK Arbitration Act, 1996.<sup>4</sup> The court cited two main reasons for this:

(i) Considering the contract's close connection to the UK, English law should have been the governing law for issues of consumer protection, as stipulated under Section 74 of the CRA.<sup>5</sup> The arbitrator's failure to apply English law rendered the final award unenforceable. The EWHC found that the present contract had a close connection to the UK for several key reasons: the consumer involved was a British citizen residing in the UK, the company operating the exchange was UK-based, payments for the service were made in British sterling, and all banking transactions were conducted through English bank accounts.

(ii) Applying Sections 62 and 71 and Schedule 2 of the CRA, the arbitration clause in the clickwrap agreement was unfair and, thus, unenforceable. The mere fact that a consumer contract provides for arbitration of disputes does not make it unfair. However, the arbitration clause in the present case was unfair since no reasonable consumer in the same position (i.e. a UK citizen domiciled in the UK) would have agreed to such clause which provides for arbitration in California, under the JAMS Rules and subject to the US laws. Further, the court held that the arbitration clause is also unfair since enforcement of any final award rendered pursuant to such clause would effectively stall the FSMA proceedings.

The court also observed that stifling of the FSMA proceedings would independently violate English public policy, thereby rendering the final award unenforceable in the UK. Additionally, forcing resolution through confidential arbitration in California could hinder the Financial Conduct Authority's ability to regulate the UK financial services industry.

However, the EWHC dismissed the other two grounds the consumer had raised against the final award's enforcement. It held that issues under the CRA or the FSMA could have been settled by arbitration if the arbitrator had not explicitly excluded the application of any non-US laws in the arbitration. Further, the EWHC held that the final award did not decide on issues which were not submitted to arbitration.

## ANALYSIS

The criteria for arbitrating consumer disputes vary across legal jurisdictions. In *Hemalatha*, the Indian Supreme Court ruled that consumers have the choice to pursue litigation in consumer courts rather than arbitration, if they make that decision post-dispute. Conversely, in *Payward*, the EWHC finds that arbitration is permissible for consumer disputes as long as the arbitration agreement is not unfair, and the English consumer protection laws are applied by the arbitrator. Unlike the Indian Supreme Court, the EWHC did not place much weight on the fact that the consumer did not elect to arbitrate the dispute subsequently when deciding on the enforceability of the final award in the UK. However, both courts concur on upholding the consumer protections afforded by their respective domestic laws.

In another recent judgment of *Eternity Sky Investment Ltd v. Mrs Xiaomin Zhang*,<sup>6</sup> the EWHC rejected a challenge to the enforcement of an award on grounds of unfairness under English consumer protection law. The court held that English consumer protection laws did not apply when the underlying contract did not have a close connection with the UK. The mere fact that the consumer was a resident in the UK was not sufficient to establish a close connection between the underlying contract and the UK. Instead, the court found that the underlying contract had a closer connection to Hong Kong, and thus laws of Hong Kong were applicable.

The approach taken in India and the UK stands in contrast to less protectionist legal systems like the United States, Germany, or Austria.<sup>7</sup> In these jurisdictions, arbitration of current or future consumer disputes is generally accepted as long as two conditions are met: the consumer was aware of the arbitration agreement, and the arbitration agreement is not unconscionable. German and Austrian law further require that a consumer enter into a separate arbitration agreement for any future consumer disputes to be subject to arbitration.<sup>8</sup>

In this context, arbitration clauses in standard-form contracts are likely to come under increased scrutiny. Businesses, particularly those operating across international borders, must exercise caution in crafting arbitration clauses to ensure they comply with varying jurisdictional requirements. Failure to do so could result in the nullification of such clauses in certain jurisdictions. Further, as demonstrated in *Payward*, merely selecting a foreign governing law may not necessarily insulate a contract from the influence of other jurisdictional laws. Businesses must exercise ongoing caution, adapting to the legal frameworks specific to each jurisdiction where their consumer base is located.

Concurrently, the rise of global e-commerce places the onus on consumers to be equally vigilant. Failing to thoroughly understand agreements with international businesses could inadvertently lock them into binding arbitration processes in foreign jurisdictions, potentially complicating dispute resolution.

– Ritika Bansal, Shweta Sahu and Sahil Kanuga

You can direct your queries or comments to the authors.

*We acknowledge and thank Aryan Sharma (Student, Institute of Law, Nirma University) for his assistance on this hotline.*

<sup>1</sup> [2023] EWHC 1780 (Comm).

<sup>2</sup> The default position under Section 15B of the UK Civil Jurisdiction and Judgments Act 1982 is that a consumer may initiate proceedings in English courts against the other party. However, Section 15B(6) provides that this default position may be departed from by an agreement entered between the parties after the dispute arose. Here, since the arbitration agreement was entered before the dispute arose, the consumer was allowed to approach the English courts.

<sup>3</sup> *"In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail."* Standard 8, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (effective from 2009).

<sup>4</sup> *"Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award."* Section 103(3), UK Arbitration Act, 1996.

<sup>5</sup> *"If—(a) the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a consumer contract, but (b) the consumer contract has a close connection with the United Kingdom, this Part applies despite that choice."* Section 74(1), CRA.

<sup>6</sup> [2023] EWHC 1964.

<sup>7</sup> G. Born, *Chapter 6: Nonarbitrability and International Arbitration Agreements*, International Commercial Arbitration, (3<sup>rd</sup> Edition, 2022).

<sup>8</sup> German Code of Civil Procedure, §1031(5); Austrian Civil Procedure Code, §617.

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