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A WARNING TO NON-UK B2C BUSINESSES: UK COMMERCIAL COURT REFUSES TO ENFORCE FOREIGN ARBITRATION AWARD ON PUBLIC POLICY GROUNDS

(PAYWARD INC V CHECHETKIN)

The UK Commercial Court has declined to enforce a foreign arbitration award on public policy grounds, ruling that the underlying business-to-consumer ("B2C") contract was subject to UK Consumer legislation, despite its terms providing for foreign law and arbitration. This decision is highly relevant to any non-UK B2C business providing services to UK consumers, especially via online platforms.

In *Payward Inc v Chechetkin*[1], the English Commercial Court declined to enforce a foreign-seated arbitration award on the basis that to do so would be contrary to UK public policy under section 103 of the UK Arbitration Act 1996 (the "**Act**"). The court saw issues with both: (1) consumer protection provided under the Consumer Rights Act 2015 ("**CRA**"); and (2) the regulatory objectives of the Financial Services and Markets Act 2000 ("**FSMA**"). The court also found that where the underlying B2C contract has a close connection to the UK, the CRA would apply regardless of whether the consumer and the company have contractually agreed to non-UK governing law and jurisdiction under the applicable terms.

The case concerned a dispute between: (1) the Payward group (which operates the Kraken global online cryptocurrency exchange); and (2) one of its UK customers, Mr Chechetkin. Payward was in possession of a favourable Californian arbitration award, which it sought to enforce in the UK.

This case is of interest to non-UK companies in general, particularly those running international web-based businesses: (1) with UK-based consumer customers; and (2) using terms which are governed by non-UK law and provide for a dispute resolution forum outside UK. The decision means that claims could potentially be brought against such companies before the English Courts rather than through the dispute resolution forum provided for under the applicable terms. This is regardless of whether a final arbitration award or court judgment has been made in relation to the same dispute in the overseas jurisdiction. It also means that the underlying contract may be subject to the CRA and other applicable English statutes.

Background

The Claimants were UK and US corporate entities within the same group ("**Payward**"). Payward runs the Kraken global digital online cryptocurrency exchange. Payward brought a claim pursuant to section 101 of the Act for enforcement of a Californian arbitration award (the "**Final Award**") against the UK-domiciled Defendant ("**Mr Chechetkin**"). Mr Chechetkin had undertaken various trading activities on Payward's trading exchange and lost more than £600,000. Before trading on the exchange, Mr. Chechetkin had accepted the online terms and conditions containing an arbitration clause referring disputes to arbitration seated in California pursuant to the exclusive jurisdiction of the Judicial Arbitration and Mediation Services ("**JAMS**").

[1] [2023] EWHC 1780 (Comm)

The Final Award confirmed Payward's assertion that the arbitration should be under the JAMS procedure in California and that the laws of California should apply. It further concluded that Payward was under no liability to Mr. Chechetkin.

The FSMA Proceedings

Prior to these proceedings and in parallel to the JAMS arbitration, on 23 February 2022, Mr Chechetkin commenced a claim in the English High Court. Claiming repayment of the sums lost, he alleged that Payward had breached FSMA on the grounds that it did not have the necessary authorisation. Payward contested the jurisdiction of the English court and made an application for a declaration that the court lacked jurisdiction.

The court dismissed Payward's challenge to jurisdiction and found that it was not bound by the decision in the JAMS arbitration such that the Final Award did not deprive the English court of jurisdiction. This was despite: (1) Mr Chechetkin having accepted the online terms and conditions; and (2) the Final Award stating that Payward owed no liability to Mr Chechetkin.

It follows that the FSMA proceedings would continue unless the outcome of the Commercial Court proceedings was in favour of enforcing the Final Award. The court also provided guidance on the definition of 'consumer' for the purposes of section 15B of the Civil Jurisdiction and Judgments Act 1982 ("**CJJA**"), reaching a clear view that Mr Chechetkin was a consumer within the definition contained in the CJJA.

The Commercial Court proceedings

In these proceedings, Payward sought enforcement of the Final Award before the English Commercial Court. Mr Chechetkin contended that the Final Award should not be enforced by the court, relying on the following exceptions provided for in section 103 of the Act:

1. Recognition or enforcement may be refused if it would be contrary to public policy (section 103(3)), based on both the CRA and FSMA.

2. Recognition or enforcement may be refused if the award deals with matters beyond the scope of the submission to arbitration (section 103(2)(d)).

Decision

Was Mr Chechetkin a consumer under the CRA?

The court held that Mr Chechetkin was a consumer under the CRA because his sole profession was as a lawyer and he had made it clear when he applied for his account with Payward that his employment as a lawyer was his source of income. In addition, he was assessed as a customer by Payward on the basis that he did not work in crypto or fintech, and he was acting on this own behalf with no intention to resell.

Should the FSMA proceedings have been brought pursuant to JAMS arbitration?

Payward asserted that Mr Chechetkin should have brought his FSMA claim under the JAMS arbitration and the Final Award prevented him from raising the issue again. However, the court found that as the arbitration was against the application of any law other than the laws of California from the outset, there was no scope for Mr Chechetkin to bring a counterclaim in the JAMS arbitration under the FSMA.

Was the English court bound by the Final Award when applying section 103 of the Arbitration Act?

The court held that it was not bound by any of the tribunal's determinations when applying section 103 of the Act because a tribunal's decision on its own jurisdiction does not bind a different enforcement court.[2] The court further held that an English court should not be obliged to enforce an award that is contrary to UK public policy merely because the arbitrator's decision was said to mean that the Final Award was not contrary to public policy.

Were the CRA and FSMA expressions of UK public policy?

The court held that both the CRA ad FSMA are expressions of UK public policy.

The CRA was in part the UK's enactment of EU Directive 93/13 on unfair terms in consumer contracts, which has been authoritatively established as public policy by several decisions of the Court of Justice of the European Union (the "**CJEU**"). These decisions have the status of retained CJEU case law, which binds the English Court.

[2] Dallah Co v Ministry of Religious Affairs of Pakistan [2011] AC 763

FSMA is a UK statute making provisions regarding the regulation of financial services and appointing the Financial Conduct Authority (the "**FCA**") as the regulatory body for financial services. Accordingly, it too is part of UK public policy.

Would enforcement be contrary to the public policy objectives of the CRA and FSMA?

Public policy objective of section 74 CRA

Section 74 of the CRA provides that where a consumer contract has a close connection with the UK, the CRA applies regardless of whether the parties have chosen a non-UK governing law. The court held that the contract in question had a close connection with the UK as it was:

- between a UK national domiciled in England and a company incorporated in England;
- for services that were paid for in UK currency; and
- paid for under transactions to and from English bank accounts.

The court concluded that the enforcement of the Final Award would be contrary to the public policy objective of section 74 because the JAMS tribunal took no account of the CRA or any other elements of English law. This alone was sufficient to make the Final Award unenforceable. The court's rationale was that questions that should have been answered under the CRA have instead been answered under the laws of California which in itself was contrary to UK public policy.

The public policy objective of section 62 CRA

Under section 62(4), a term in a consumer contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. The issue here was whether the contract was unfair because it required disputes to be resolved by arbitration in California under JAMS Rules.

The judge made reference to Schedule 2 to the CRA, which sets out sample consumer contract terms that may be regarded as unfair (the so-called 'grey list'). Paragraph 20 refers to: "*A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by…(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions…*"

The terms on the grey list are not automatically unfair but may be used to assist a court when considering the application of the fairness test to a case. The court made it clear that the mere fact that a consumer contract provides for disputes to be resolved in arbitration did not make the contract terms unfair. The test was whether a reasonable consumer in the position of Mr Chechetkin would have agreed to the contract. The court concluded that a reasonable consumer would have agreed to arbitration in the UK (subject to the Act) and would not have agreed to arbitration in California (under JAMS rules) and subject to the US Federal Arbitration Act. This reasoning was based on some significant disadvantages for Mr Chechetkin noted by the court:

- there cannot be an appeal on the basis of an error of (English) law;
- the US federal courts are legally not competent to supervise disputes that are concerned with English law and UK statues. The US Federal Arbitration Act is neither an appropriate statutory framework nor one that a reasonable consumer would have selected;
- due to geographical location of the seat of the arbitration in San Francisco, an arbitrator would have difficulty providing for hearings to take place remotely at mutually convenient times;
- Mr Chechetkin had to instruct US attorneys, which was both expensive and inconvenient (by contrast, San Francisco is the headquarters of Payward); and
- a US arbitrator would have no experience of English law and English regulation of financial services markets and would not be receptive to submissions in this area. Therefore, US tribunal would not be appropriate to determine the issues raised in Mr Chechetkin's case.

Public policy and FSMA

The court found that enforcement of the Final Award would have the effect of stopping the FSMA proceedings and leaving that claim undetermined. That in itself was a further reason why the arbitration clause in question was considered unfair within the meaning of the CRA and contrary to public policy considerations of the CRA. Further, the court held that the prevention of Mr Chechetkin's claim under FSMA would be contrary to the public policy considerations under FSMA itself, on the ground that investigation and prosecution of offences is far less likely to occur if customers with grievances are obliged to pursue them in confidential arbitration proceedings overseas and customer complaints are therefore less likely to come to the FCA's attention.

Comment and practical tips

While the English court generally seeks to give effect to arbitration awards as required under the New York Convention, this case is an important example of a situation where the English court refused to enforce a foreign arbitration award on the grounds that to do so would be contrary to UK public policy and consumer legislation.

The decision certainly has wider implications for non-UK companies in general and particularly those running an international web-based business with UK-based consumers, many of which offer standard terms and conditions governed by non-UK laws and providing for a dispute resolution forum outside UK:

- the underlying terms may potentially be considered as having a close connection to the UK and hence UK consumer legislation would apply regardless of whether the parties have contractually agreed a non-UK governing law and a foreign dispute resolution forum;
- UK-based consumers could rely on the protection provided under the CRA and any terms failing the 'fairness' test would not be binding upon consumers;
- provisions in the terms that attempt to bind UK consumers to an arbitration process that puts them at a disadvantage would be vulnerable to challenge as unfair;
- companies could potentially face separate English court claims brought by UK consumers in relation to disputes arising from the services or products offered, regardless of whether a final arbitration award or court judgment has been made in favour of these companies in relation to the same dispute in the overseas jurisdiction specified in the terms; and
- companies engaging in financial services (such as cryptoasset exchange platforms) may find their terms subject to FSMA and therefore regulated by the FCA. This would increase the company's exposure to risks such as facing criminal charges for carrying on regulated activities without authorisation (as in this case if Mr Chechetkin succeeds in the FSMA proceedings).
- The decision is an important reminder of the need for entities servicing customers across the globe to customise their terms. That includes giving careful thought to the dispute resolution provisions in consumer contracts and to the specific circumstances of the entity's type / scope of services, products and potential customer base. In addition to careful drafting and constant review of their terms, detailed consideration of potentially applicable foreign public policies and consumer legislation should be carried out in order to reduce the risk of contravention of the same, as well as mitigating the risk of unfairness in consumer contract terms.

For more information, please contact the authors of this alert

LEANNE FOK
Associate, Hong Kong
T +852 3983 7641
E leanne.fok@hfw.com

KEVIN WARBURTON
Partner, Hong Kong
T +852 3983 7629
E kevin.warburton@hfw.com

hfw.com

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