

LONDON CALLING

Written by ALEXANDER LYALL



What makes a consumer contract English?

Two recent decisions in the English Commercial Court have highlighted the importance of understanding who is at the end of your arbitration agreement. Arbitration is an attractive option to solve disputes, but as these two decisions show, the ability to enforce any resulting awards may depend on who, and where, they signed up.

The rights of a consumer

Both cases concerned parties who sought the safety of the Consumer Guarantees Act 2015 (the **CRA**). If successful, the parties could have the dispute heard in the United Kingdom rather than in a foreign jurisdiction. On a practical level, the goal of the parties was to have an arbitration award set aside.

To use the legislation to their advantage, the parties had to prove three matters related to the commercial activity. The party needed to show a) they were a consumer, b) their contract had a close connection to the United Kingdom, and c) it would be unfair to have the matter of the dispute heard in a foreign jurisdiction. As

shown by the different outcome of the cases, this will be determined by a number of very circumstantial factors.

Payward v Chechetkin

In *Payward v Chechetkin*,¹ the party to an arbitration agreement in the context of a cryptoasset trading platform was found to be a consumer. The case developed after the respondent, Mr Chechetkin, incurred losses of over £600,000 trading on the cryptocurrency trading website Payward. Mr Chechetkin believed himself to be a consumer and so sought to pursue an action under the Financial Services and Markets Act 2000. Payward replied by focusing on the fact that an arbitration agreement had been signed by Mr Chechetkin as part of the terms and service of use. The Court looked at section 74 of the CRA and found that an arbitration award stemming from this agreement could not hold. The matters raised by the crypto dispute had to be dealt with by the UK rather than a foreign jurisdiction.

Eternity Sky Investments Ltd v Mrs Xiaomin Zhang

Meanwhile, the decision in *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang*² saw the Commercial Court reject the public policy challenge to an arbitration award. The commercial activity concerned

Mrs Zhang's relationship with her late husband's fintech company. Mrs Zhang had signed a personal guarantee supporting the company and also held its shares. The business operated from and in Hong Kong but Mrs Zhang lived in London. Although deemed to be a consumer, Mrs Zhang was not able to have the award set aside.

Is the party a consumer?

One of the points the Courts reinforced was that *being a person of substantial means* does not mean that somebody cannot be a consumer.³ That the individuals in both *Payward* and *Eternity Sky Investments* were of this description did not impact this assessment. Nor did it matter that Mr Chechetkin had a history of substantial involvement with crypto trading.⁴

In *Eternity Sky Investments*, the applicants argued that Mrs Zhang had a real business interest in her late husband's company. Mr Justice Bright applied a "functional link" test to see whether involvement with the company was for the sake of the company, or for the sake of Mrs Zhang. In Mr Justice Bright's view, the decision to sign the personal guarantee was an act motivated by love for her husband.⁵

However, the assessment for the shareholdings was more technical. The significance of the possession

of these shares could not be excused by the marriage motivation, as it was for the personal guarantee. Rather, the possession had to be "non-negligible" for Mrs Zhang to have a functional link with the company.⁶ Mr Justice Bright considered that the significance of the shareholdings lay in the percentage of the company's capital rather than market value. Mrs Zhang's holdings constituted 0.4% of the company. This could not give rise to a functional link.

Did the agreement have a close connection to the UK?

The decision to classify the party a consumer only becomes relevant if the binding contract has a close connection to the UK. Under the CRA, the protections afforded to consumers by the legislation are to apply even when the contract directs the governing law to be that of a foreign jurisdiction.⁷

In both cases, Mr Justice Bright assessed the origins of the term "close connection". Section 74, which contains the term, was enacted in part to reflect aspects of the Unfair Contract Terms Act (UK) and the European Community Directive on unfair terms in consumer contracts (the **Directive**). As a result of the CRA's furtherment of the Directive, Mr Justice Bright assessed the Court of Justice of

1 *Payward v Chechetkin* [2023] EWHC 1780 (Comm).

2 *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm).

3 *Payward*, above n 1, at [71].

4 *Payward*, above n 1, at [71] and [76].

5 *Eternity Sky Investments*, above n 2, at [78].

6 *Eternity Sky Investments*, above n 2, at [75].

7 Section 74(1)(b).

the European Union's (CJEU) view on the definition. In *Commission v Kingdom of Spain (C-70/03)*, the CJEU described the term as *deliberately vague* for the purpose of taking into account *various ties depending on the circumstances of the case*.

That the consumer themselves lives, works, or is a citizen of the UK cannot *automatically satisfy the test of close connection*.⁸ A court looks further at the circumstances of that agreement.

It was at this stage of the test that Mr Justice Bright found the circumstances in Payward and Eternity Sky Investments to be

different. In Payward, Mr Justice Bright found the facts to point clearly to the contract as being one with a close connection to the UK:

- Mr Chechetkin was a UK citizen living in England.
- Payward Ltd was a company incorporated in England.
- The services were paid for in UK sterling, paid for under transactions between English banks.

Eternity Sky Investments

As the residency status of the consumer is of a lower importance, Mr Justice Bright looked at the

relationship between Mrs Zhang's personal guarantee and Hong Kong. The connection between the two was *so great as to be overwhelming* because:

- The personal guarantee originated in Hong Kong. Its bond issue was held under the Stock Exchange of Hong Kong and subject to its GEM Listing Rules.
- Eternity Sky was not based in the UK. It did not do business there, nor did it seek UK customers.

Would dealing with a foreign jurisdiction be unfair?

Similarly, an assessment of fairness will depend on the circumstance.

⁸ *Eternity Sky Investments*, above n 2, at [102].

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Consumer contracts

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The main concern for the court is whether dealing in that jurisdiction would result in a significant imbalance for the consumer. Judge Bright adopted an objective test, asking whether a “reasonable customer” would have agreed to have the UK law heard in a different jurisdiction.⁹ In *Payward*, Mr Justice Bright considered it likely that Mr Chechetkin would have selected arbitration to deal with the matters in contention but not in California.

Mr Justice Bright also considered the fairness question in *Eternity Sky Investments*, despite the findings about the connection of the contract making this exercise unnecessary. The assessment related back to Mrs Zhang’s close relationship to Hong Kong. As the central question concerned

fairness in overseas proceedings, it was relevant that Mrs Zhang could access lawyers.

Arbitration equipped for crypto

Although in *Payward* the enforcement of the award was held to be unfair, Mr Justice Bright highlighted that this did not mean the California-based arbitrator could not have dealt with the matter.¹⁰ The question was specifically whether it would be fair on the consumer to engage in that jurisdiction. Furthermore, although the award could not be enforced, Mr Justice Bright stressed the arbitrator was nevertheless entitled to make the finding that they did.

Conclusion

The preference of the courts in England is to enforce arbitration.

However, there will be occasions where public policy considerations will not make this possible. Once satisfied that the individual is a consumer, the courts will assess the context of the agreement. In these decisions, the outcome went both ways. The outcomes show the extent to which the courts will take a view of all the circumstances related to the arbitration agreement.

Crucially, the focus in these cases was the practical disadvantages of their legal processes being conducted outside of home. The decisions make it clear that arbitration itself offers a lot, including competent expertise in specialised areas like crypto disputes. As these increase, we may see arbitration continue to play a large role in this space.

⁹ *Payward*, above n 1, at [136].

¹⁰ *Payward*, above n 1, at [159].