# CONSUMER RIGHTS CAN RENDER AN OTHERWISE VALID ARBITRATION AWARD UNENFORCEABLE

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**UK International Arbitration Alert**

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A warning to all consumer-facing businesses...

The UK's Court of Appeal has upheld the enforcement of a US$64 million Hong Kong-seated arbitration award against a Mrs Zhang, rejecting her argument that she was protected by the UK Consumer Rights Act 2015 (CRA).[1]

So far, so unremarkable. But, apart from convoluted underlying facts which Lord Justice Stephen Males (Males LJ) likened to “the facts of a students' moot,” the case is notable for more substantive comments made by Males LJ in the leading judgment. He made clear that, if the CRA applied and was infringed, consumer rights would prevail over an arbitration award on UK public policy grounds, and the court would have to refuse enforcement of the award.

This decision follows on from Payward v Chechetkin[2], a rare decision in 2023 in which the Commercial Court refused to recognise a US arbitration award on public policy grounds, partly on the basis of the CRA. See our alert on that decision here.

## BACKGROUND

- Mrs Zhang, a Chinese businessman's widow, was found liable under a personal guarantee, which the Commercial Court said she signed “predominantly out of love.”
- Mrs Zhang argued that under the CRA, the personal guarantee she signed was non-transparent and unfair, thus making the arbitration award unenforceable on public policy grounds.
- The court concluded that, on the facts, the CRA did not apply.
- However, the claimant, Eternity Sky claimed that even if Mrs. Zhang succeeded on all of the issues, the court should still not refuse enforcement on public policy grounds under s.103(3) of the Arbitration Act 1996.
- Eternity Sky argued that s.103(3) afforded the court discretion, and in exercising that discretion, the court would need to balance two competing public policies, the policy of enforcing arbitration awards on the one hand and the policy of effective consumer protection on the other.
- Mrs Zhang countered, insisting that the CRA created a special rule which should prevail over the general rule of enforcement of awards.

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- In obiter commentary, Males LJ rejected Eternity Sky's 'balancing exercise' argument. Males LJ acknowledged that there is a competing public policy in favour of enforcing arbitral awards, but said that had the CRA applied and been infringed, the arbitration award would not be enforceable. Males LJ stated that the CRA provided unequivocally that “an unfair term of a consumer contract is not binding on the consumer” and that this was a public policy principle found in primary legislation.
- The decision was unanimous (Lord Justice James Dingemans and Lady Justice Sarah Falk agreed with Males LJ).

## WHAT ARE THE PRACTICAL TAKEAWAYS?

These judgments should make businesses that deal directly with consumers stop and think about the following:

- Assess the connections of contracts (e.g., consumers' jurisdictions) and what local laws apply, particularly in multijurisdictional situations and where cross-border contracts are involved;
- Consider the choice of dispute resolution clauses and, when arbitration is chosen, the seat of arbitration. Wherever you are in the world, consumer rights may be relevant;
- Take account of where you may want to enforce; and
- Seek to navigate relevant consumer protection legislation, and other public policy considerations, in relevant jurisdictions.

Our lawyers in our over 45 offices around the globe can assist with the formulation of consumer contracts, including appropriate dispute resolution provisions, taking account of multijurisdictional factors and, in the event that claims arise, provide representation on matters involving conflicts of laws, jurisdictional challenges, and parallel proceedings.

# FOOTNOTES

[1] *Eternity Sky Investments Ltd v Xiaomin Zhang* [2024] EWCA Civ 630

[2] [2023] EWHC 1780 (Comm)

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