CONSUMER RIGHTS AND PUBLIC POLICY PREVENT RECOGNITION OF CRYPTO US ARBITRATION AWARD IN ENGLAND

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Litigation and Dispute Resolution Alert

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If an online business thinks it is insulated from court proceedings by an arbitration clause in standard terms, the English Commercial Court decision in *Payward Inc. v Chechetkin*[1] will give pause for thought, particularly where consumer rights are engaged. The English Court has refused to recognise a US arbitration award on public policy grounds, permitting a consumer to continue with English court claims against a US-headquartered crypto exchange, despite terms and conditions providing for Californian law and arbitration.

BACKGROUND

In 2017 Mr. Chechetkin, a British citizen residing in England, opened an online trading account with the Kraken crypto exchange, headquartered in San Francisco, California. In doing so, he contracted with Payward Limited (Payward), an English company providing the services of the Kraken exchange to UK customers. The Payward Terms of Service provided for any disputes to be decided by arbitration in San Francisco under the Judicial Arbitration and Mediations Services (JAMS) rules and governed by the laws of the State of California.

During the first few months of the COVID-19 UK lockdown, Mr. Chechetkin's trading activities on his account increased, and he ended up losing over £600,000 between March and June 2020. Mr. Chechetkin subsequently asserted that Payward was in breach of the “general prohibition” in the United Kingdom's Financial Services and Markets Act 2000 (FSMA), on the basis that its services in the United Kingdom amounted to carrying on regulated activities without the requisite regulatory authorisation.

Payward commenced a JAMS arbitration in San Francisco, and Mr. Chechetkin commenced English High Court proceedings, asserting that Payward was in breach of FSMA. Payward contested the English court's jurisdiction, and. Mr. Chechetkin contested the jurisdiction of the JAMS arbitration, albeit each side's jurisdictional challenges were ultimately dismissed.

In the JAMS arbitration, Payward obtained an award including findings that: (1) Mr. Chechetkin was bound to arbitrate his disputes with Payward and enjoined from filing or prosecuting a claim against Payward in the UK courts; (2) Payward's Terms of Service adequately disclosed the risks of trading; and (3) Mr. Chechetkin engaged in risky margin trading, assumed the risks of doing so, caused the loss of money in his account, and so was not entitled to repayment.

Payward issued an arbitration claim in the English Commercial Court seeking to enforce its JAMS arbitration award as an order of the English court. Mr. Chechetkin contended that the arbitration award should not be

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recognised or enforced by the English courts, since to do so would be contrary to public policy under S.103(3) Arbitration Act 1996.

DECISION

The English Court (Mr. Justice Bright) held that:

- The Consumer Rights Act 2015 and FSMA are expressions of UK public policy, and it would not be consistent with the fair and orderly administration of justice if consumer protections could be outflanked merely by choice of a different system of law.
- Mr. Chechetkin was a consumer for the purposes of the Consumer Rights Act, and his contract with Payward (between an English national and an English company for services paid for in UK sterling under transactions to and from English bank accounts) was one with a close connection to the United Kingdom.
- A US arbitrator with no experience of English law or English regulation of financial services and marketing is not the ideal tribunal for Mr. Chechetkin's FSMA claim, the JAMS award had applied Californian law only, and there was no basis to suggest that Mr. Chechetkin's FSMA claim could or should have been brought in the JAMS arbitration.
- Enforcement of the arbitration award in England would be contrary to public policy, because:
  - The UK Parliament has decided that the protection of consumers domiciled in the United Kingdom should be governed by the Consumer Rights Act 2015, not by foreign laws or standards.
  - The award took no account of any aspects of English law, including the Consumer Rights Act 2015.
  - Whilst a reasonable English consumer might agree to terms requiring disputes to be arbitrated in the United Kingdom (where an appeal may be available if, for example, the Consumer Rights Act or FSMA has not been applied correctly by the arbitral tribunal), they would not have agreed to arbitrate in California, under JAMS rules, subject to US law alone.
  - It would have the effect of stifling Mr. Chechetkin's FSMA claim, contrary to the public policy considerations of the Consumer Rights Act and FSMA, and the investigation and prosecution of offences is far less likely to occur if customers with grievances are obliged to pursue them in confidential arbitration proceedings in California, rather than through the UK Courts, or at least in arbitration proceedings in the United Kingdom.

COMMENT

A number of crypto exchanges and NFT marketplaces providing services online select local laws and arbitration institutions for their governing law and jurisdiction terms, and some may consider themselves to be insulated from claims issued in other jurisdictions or awkward targets for potential claimants located in other jurisdictions. This decision illustrates that customers in other jurisdictions (in this case, the United Kingdom, but the approach may have wider applications) may rely on their domestic consumer protection laws to issue claims in their home jurisdiction, which may result in inconsistent decisions or prevent the enforcement of an arbitration award.

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The English Court of Appeal reached a similar conclusion last year in the case of *Soleymani v Nifty Gateway LLC*[2] (albeit a case about jurisdiction, rather than enforcement) involving a UK resident participating in an online auction, the terms of which provided for New York governing law and New York JAMS arbitration to determine disputes. In circumstances in which one party commenced an arbitration in New York and the other commenced English High Court proceedings relying on consumer protection rights, the Court of Appeal refused to stay the English proceedings in favour of the New York arbitration. The Court of Appeal considered that: (1) where it is properly arguable that there is a consumer contract with a close connection to the United Kingdom and a consumer is seeking to rely on domestic consumer rights, the domestic court is better placed than a foreign arbitrator to determine whether an arbitration agreement is invalidated by consumer protections; (2) it is important that consumer rights decisions are ruled upon in a public court; and (3) arbitration overseas would place a significant burden on an English consumer.

These cases do not mean that arbitration clauses in consumer contracts are necessarily unfair or invalid. Each case will depend on the circumstances. When implementing standard terms for consumers, consideration may need to be given to prospective customers' jurisdictions and consumer protection laws. It cannot be assumed that choices of law and jurisdiction will necessarily be able to prevent or enjoin claims based on consumer protections in a consumer's local courts.

Our lawyers can assist with the formulation of appropriate dispute resolution provisions, and in the event that claims, conflicts of laws, jurisdictional challenges, or parallel proceedings arise.

FOOTNOTES

[1] [2023] EWHC 1780 (Comm)

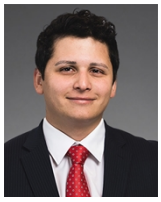
[2] [2022] EWCA Civ 1297

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