Crypto Disputes and Public Policy: English Court Refuses to Enforce Arbitral Award

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The Commercial Court has recently handed down a judgment in an arbitration claim brought by a crypto exchange platform provider which sought unsuccessfully to enforce an arbitral award made in San Francisco, California against an individual crypto trader in England ("**Enforcement Proceedings**")[1].

The judge refused to enforce the award on the grounds of public policy under s. 103(3) of the Arbitration Act 1996. Given the rarity of cases where enforcement of an arbitral award is prevented due to public policy considerations, the reasons upon which this decision was arrived at are of particular interest.

Background

The Claimants in the Enforcement Proceedings were three corporate entities that are members of the Payward group headquartered in San Francisco. The group operates the Kraken global crypto asset exchange and trading platform. Two of the Claimants are registered in Delaware and the Third Claimant is a company registered in England, by which the Payward group provides the Kraken platform services to its customers in the UK.

The Defendant was Maxim Chechetkin. While a Russian qualified lawyer, Mr Chechetkin is a British national residing in England.

In March 2017, Mr Chechetkin opened an online trading account via the Kraken website. During the sign-up process, he checked a box to confirm his agreement with the Payward Terms of Service ("**Payward Terms**"), which were set out in a clickwrap agreement accessible through a hyperlink and constituted a contract between Mr Chechetkin and the UK-registered Claimant – Payward Limited. The applicable law and arbitration clause of the Payward Terms provided for disputes to be referred to arbitration in San Francisco, California and to be resolved by a sole arbitrator in accordance with the *"rules of JAMS"*, with the state or federal courts of San Francisco having exclusive jurisdiction over any appeals of an arbitration award and over any suit between the parties not subject to arbitration. This clause further provided for disputes to be governed by the Payward Terms, the laws of the State of California and applicable U.S. law, without giving effect to any conflict of laws principles that might provide for the application of the law of another jurisdiction.

After several years of trading on the platform, Mr Chechetkin ended up losing his investments.

English FSMA Proceedings

In July 2021, Mr Chechetkin sent a letter before claim in which he alleged that Payward had breached the Financial Services and Markets Act 2000 ("**FSMA 2000**") and also stated that the arbitration or jurisdiction clauses in the Payward Terms were unenforceable under the Consumer Rights Act 2015 ("**CRA 2015**") and/or s. 26 of the FSMA 2000. As will be discussed in more detail below, following this correspondence, Payward Limited and others (jointly, "**Payward**") initiated arbitration proceedings against Mr Chechetkin in San Francisco under the Comprehensive Arbitration Rules & Procedures ("**JAMS Rules**").

In February 2022, Mr Chechetkin issued proceedings in the English High Court against Payward asserting breaches of the FSMA 2000 ("**FSMA Proceedings**").

In June 2022, the defendants in the FSMA Proceedings applied to challenge the jurisdiction of English courts. Later, in October 2022 (on the same day that they initiated the Enforcement Proceedings), Payward applied for an injunction prohibiting Mr Chechetkin from taking any further steps within the FSMA Proceedings until a final determination of the arbitration claim in the

[1] *Payward, Inc & Others v Chechetkin* [2023] EWHC 1780 (Comm)

Enforcement Proceedings, alternatively, for an adjournment of the hearing of their challenge to English jurisdiction until after the determination in the Enforcement Proceedings.

The High Court eventually dismissed Payward's challenge to jurisdiction and refused their application for an injunction or adjournment, meaning that the FSMA Proceedings would continue regardless of the ongoing arbitration proceedings unless Payward succeeded in the Enforcement Proceedings.

JAMS Arbitration Proceedings

In January 2022, Payward initiated arbitration proceedings under the JAMS Rules against Mr Chechetkin. Payward alleged that the applicable law for the dispute was the law of California.

In June 2022, Mr Chechetkin submitted a motion challenging the JAMS' jurisdiction and the arbitrability of the dispute. In the same motion, Mr Chechetkin also asserted his rights under the FSMA 2000 and claimed, among other things, that the applicable law and arbitration clause of the Payward Terms was unenforceable under English law.

In July 2022, the sole arbitrator issued her partial final award whereby Mr Chechetkin's jurisdictional challenge and his challenge to the arbitrability of the dispute were denied on the grounds that Mr Chechetkin accepted the Payward Terms when he opened an account on the Kraken platform and, therefore, consented to the jurisdiction in California. The sole arbitrator thus confirmed her jurisdiction and the arbitrability of this dispute.

The final award was handed down in October 2022 ("**Final Award**"). In her award, the sole arbitrator determined, among other things, that (i) Mr Chechetkin was *"enjoined from filing or prosecuting a claim against Payward in court, whether in the U.K. or other jurisdiction"*, (ii) Mr Chechetkin's assertion that Payward should repay the amount he deposited into his account was denied, and (iii) the Final Award was in full and complete settlement and satisfaction of any and all claims submitted in this arbitration.

English Enforcement Proceedings

In October 2022, just a few days after the Final Award was made, Payward issued an arbitration claim in the English Commercial Court to enforce the award. Payward particularly sought to enforce the sole arbitrator's determination that Mr Chechetkin be *"enjoined from filing or prosecuting a claim against Payward in court, whether in the U.K. or other jurisdiction"*.

Mr Chechetkin's primary defence was that enforcement of the award would be contrary to public policy enshrined in the CRA 2015 and the FSMA 2000 and should, therefore, be refused on the grounds set out in s. 103(3) of the Arbitration Act 1996.

Decision

The key issues considered by Mr Justice Bright included:

a) whether Mr Chechetkin was a "consumer" under the CRA 2015;

b) whether the FSMA claim should have been brought in the JAMS arbitration and, accordingly, whether Mr Chechetkin was now estopped from bringing a similar claim before the English Court;

c) the meaning of "public policy" and whether the CRA 2015 and the FSMA 2000 are expressions of English/UK public policy; and

d) if so, whether enforcement would be contrary to public policy expressed in the CRA 2015 and the FSMA 2000.

(a) "Consumer"

In order to determine whether Mr Chechetkin fell under the definition of a "consumer", the judge had to consider his professional background and the nature of his arrangements with the third parties (his parents) who provided Mr Chechetkin with the money which he invested in the crypto trade.

The judge agreed with Mr Chechetkin's counsel that the relevant test had to be applied at the time when the contract was concluded, relying on s. 62(5)(b) CRA 2015, which provides that whether a term is fair is to be determined *"by reference to all the circumstances existing when the term was agreed…"*. In this respect, the judge noted that Mr Chechetkin's sole profession was a lawyer and this was his full-time job. At the time when he applied for his account with Kraken in March 2017, he indicated that the source of his income was his employment as a lawyer and that he had no experience of cryptocurrency trading. No evidence was submitted to suggest that he had any other trade, business, craft or profession. The judge also accepted that the fact that Mr Chechetkin invested money he had received from his parents in his crypto trade was not a business arrangement.

The judge, therefore, concluded that Mr Chechetkin was a consumer for the purposes of the CRA 2015.

(b) Issue estoppel

The judge considered Payward's argument that Mr Chechetkin was estopped from pursuing his claim in England, on the basis that it would be an abuse of process for Mr Chechetkin to do so when it could and should have been pursued in the JAMS arbitration. Payward alleged, in particular, that it was open to Mr Chechetkin to file a counterclaim in the JAMS arbitration which provided him with an opportunity to set out his claim under the FSMA 2000. Not having taken that opportunity, Mr Chechetkin could not now complain that the Final Award was not in his favour. On this point, the judge concluded that there was no scope for Mr Chechetkin to bring a counterclaim in the JAMS arbitration under the FSMA 2000, given that the sole arbitrator was firmly against the application of any law other than the laws of California (and other U.S. laws) throughout the arbitration and her position in this respect was clearly pronounced in her orders and awards.

Payward also argued that, when considering whether to enforce an award, the court should have regard to any points of issue estoppel that arise from the award. The judge held that this was inconsistent with the approach of the House of Lords in *Dallah Co v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763 which held that a tribunal's decision on its own jurisdiction does not bind foreign courts in a jurisdiction where enforcement of an award is sought. On this basis, the judge concluded that he was not bound by the sole arbitrator's determination on her jurisdiction.

(c) Meaning of "public policy" and its expression in CRA 2015 / FSMA 2000

The judge cited the case of *Alexander Bros Ltd (Hong Kong SAR) v Alstom Transport SA* [2020] EWHC 1584 (Comm), where "public policy" was defined in the context of section 103(3) of the Arbitration Act as the public policy of England and Wales (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice.

In answering the question whether the CRA 2015 is an expression of English/UK public policy, the judge relied on the case law of the Court of Justice of the European Union ("**CJEU**") in relation to EU Directive 93/13 on unfair terms in consumer contracts (which was enacted in the UK by CRA

2015), where the CJEU concluded that consumer protection as regards the fairness of contractual terms had *"equal standing to national rules which rank, within the domestic legal system, as rules of public policy"*.

The judge, therefore, concluded that the CRA 2015 is an expression of public policy. He also noted that the fact that CRA 2015 is a UK statute, rather than a mere English statute, means that it expresses the policy of the UK as a whole and arguably underlines its general significance.

In relation to FSMA 2000, the judge noted that it dealt with matters that have been expressly identified by Parliament as matters of public policy. Being a UK statute, the FSMA 2000 was, therefore, an expression of UK national policy.

(d) Enforcement would be contrary to public policy

The judge held that enforcement of the Final Award would be contrary to a number of specific public policy objectives embodied in the CRA 2015 and the FSMA 2000.

Under s. 71 CRA 2015, the court was required to consider the fairness of the Payward Terms, including their applicable law and arbitration clauses. The applicable law clause, which provided for the laws of California and the United States, would have been disapplied by s. 74 CRA 2015, because the latter requires the consumer rights issues that fall under the scope of the CRA 2015 to be dealt with under that UK statute. The sole arbitrator applied the choice of law provided for in Payward Terms and took no account of the CRA 2015 or any other element of the English or UK law. Enforcement of the Final Award, therefore, would be contrary to the public policy objective of s. 74 CRA 2015.

The judge further considered whether the Payward Terms were unfair contrary to the public policy expressed in s. 62 CRA 2015, because they required disputes to be resolved in arbitration in California. Under s. 62(4) CRA 2015, a term 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. In considering whether the arbitration clause of the Payward Terms had caused such significant imbalance, the judge applied an objective test: would a hypothetical reasonable consumer in the position of this consumer have agreed? In his opinion, such a reasonable consumer would not have agreed to arbitration in California, under the JAMS Rules and subject to the Federal Arbitration Act, since arbitration under that system brought with it significant disadvantages in that it prevented the application of English law and UK statutes. This also made it practically necessary for Mr Chechetkin to use U.S. attorneys, which was expensive and inconvenient.

The judge also agreed with Mr Chechetkin's argument that the JAMS arbitration proceedings had been unfair to him, because it was not possible for him to bring his claim under the FSMA 2000 in those proceedings. He further noted that Mr Chechetkin had a *prima facie* claim in the FSMA Proceedings. Enforcement of the Final Award would stop those proceedings in their tracks and Mr Chechetkin's claim would not be determined, contrary to the public policy considerations underlying the FSMA 2000.

Accordingly, the judge held that enforcement of the Final Award would be contrary to UK public policy within the meaning of s. 103(3) of the Arbitration Act 1996, and refused its recognition and enforcement on this basis.

Key takeaways

This case is an illustration of how an otherwise valid and enforceable arbitral award can be rendered unenforceable if it is in conflict with national consumer protection policies, which take precedence

over the country's international obligations and the parties' freedom of contract. It reinforces the need for prospective and existing parties to international B2C contracts to carefully consider the impact which domestic consumer legislation may have on their rights and obligations, despite express provisions of their contract.

The judgment may also help parties and tribunals in arbitral proceedings navigate through complex issues arising from consumer rights and, potentially, prompt them to take relevant public policies into account when resolving their dispute to ensure that they end up with an enforceable award.

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