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DISPUTES & INVESTIGATIONS

Further developments in crypto-asset compliance: *arbitration clauses in terms and conditions of cryptocurrency exchanges*

The case of *Chechetkin v Payward Ltd and others*[1] *[2022] EWHC 3057 (Ch)* (**Chechetkin**) is one of a number of recent judgments handed down by the English High Court concerning cryptocurrency exchanges or Non-Fungible Token (**NFT**) exchanges.

We recently analysed the finding of the English High Court that a crypto-wallet provider was a constructive trustee of stolen funds. The Chechetkin decision is of note as it looks at the role of arbitration clauses in the standard terms and conditions of exchanges and puts the term "consumer" in the crypto-asset sphere, firmly under the spotlight.

[1] *Chechetkin v Payward Ltd and others [2022] EWHC 3057 (Ch)*

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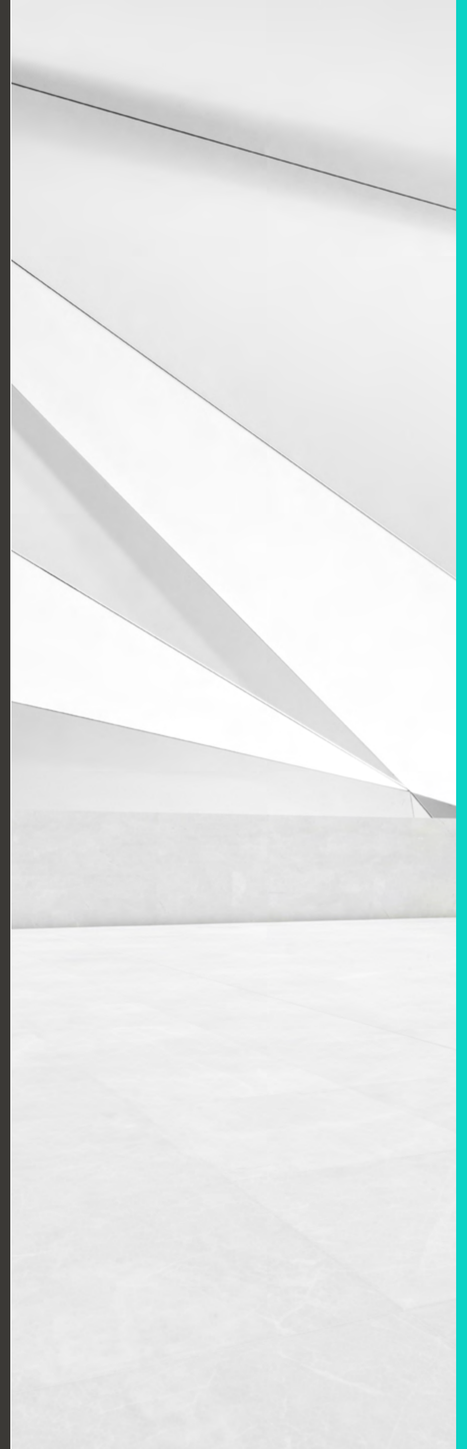


In the present case, the English High Court dismissed an application by Payward Ltd (**Payward**), a provider of cryptocurrency trading services, who sought a declaration that the Court lacked jurisdiction to hear a claim brought before it by a user of Payward's cryptocurrency exchange. Significantly, the Court rejected this application notwithstanding:

- the existence of a binding arbitration clause in Payward's terms and conditions designating California as the seat of arbitration
- the fact that Payward had commenced an arbitration under the JAMS Rules[2] in California, and
- the fact that a final arbitration award had already been granted in favour of Payward.

The Court also found it had jurisdiction to hear the claim on the basis that Chechetkin was a "consumer" and therefore had standing under the UK's Civil Jurisdiction and Judgments Act 1982[3] (**CJJA**) to have his claim heard by an English court.

[2] *These are the terms of arbitration established by Judicial Arbitration and Mediation Services, Inc (**JAMS**), an organisation providing alternative dispute resolution services.*

[3] *Civil Jurisdictions and Judgments Act 1982*

Background

The underlying claim

The basis of the dispute between Chechetkin and Payward was that Chechetkin, a UK based banking lawyer and user of Payward's cryptocurrency trading platform, claims that he incurred significant losses (over stg£600,000) having engaged in various trading activities on Payward's trading platform.

The arbitration clause

The terms and conditions of service governing the use of the trading platform contained an arbitration clause, which provided for disputes regarding the use of Payward's platform to be resolved by arbitration in San Francisco. Payward's position was that this clause was binding on both parties. The parties were prohibited from commencing legal proceedings in court in any other jurisdiction because both parties had agreed to arbitrate disputes under the JAMS Rules in California on agreeing to the terms and conditions. If the parties wished to appeal an arbitration award, the clause provided for the exclusive jurisdiction of the courts of San Francisco, California. The governing law of the contract was designated as the laws of the state of California.

Payward relied on the arbitration clause and commenced arbitration proceedings in San Francisco under the JAMS Rules in accordance with the arbitration clause. The arbitration concluded with a final award being granted in favour of Payward in October 2022. The award found that Payward was not liable for Chechetkin's losses and affirmed the arbitrator's jurisdiction over the dispute.

Parallel proceedings in the English High Court

Having unsuccessfully contested the jurisdiction of the arbitrator in the arbitration, Chechetkin brought parallel proceedings in the English High Court for the repayment of sums in respect of the losses he incurred, basing his claim on alleged breaches by Payward of the UK's Financial Services and Markets Act 2000[4].

[4] *Financial Services and Markets Act 2000*

The jurisdiction application

The present judgment concerned a jurisdiction application brought by Payward in respect of the proceedings issued by Chechetkin in the English High Court. Specifically, Payward sought a declaration from the English High Court that it lacked the jurisdiction to hear Chechetkin's claim in light of the existence of the arbitration clause.

Prior to the hearing of the present case, Payward issued separate proceedings seeking to have the arbitration award enforced in the UK. Payward therefore sought to have the jurisdiction application adjourned, pending the outcome of the enforcement proceedings. The Court rejected this application, reasoning that to adjourn at this stage of the proceedings would be a waste of the costs already incurred in preparation for the jurisdiction hearing.

The decision

In determining whether it had jurisdiction to hear the claim, the Court had to consider two key issues:

i. Whether the arbitration clause and final arbitration award precluded the English High Court's jurisdiction?

ii. Whether Chechetkin was a "consumer" and therefore entitled to have his claim heard in that capacity?

(i) Whether the arbitration clause and final award precluded its jurisdiction?

Payward submitted that the final award granted by the arbitrator had the effect of requiring the Court to declare that it lacked jurisdiction to hear Chechetkin's claim. In support of this position, Payward relied on section 101 of the English Arbitration Act[5], which provides that awards made under the New York Convention are binding on the parties and can be used to set-off legal proceedings in England.

The Court disagreed and found that, while section 101 of the English Arbitration Act 1996 permits the court to stay proceedings where the parties have entered into a binding arbitration agreement, it nevertheless did not expressly deprive the court of jurisdiction in relation to the dispute. In making this finding, the Court followed the recent decision of the English Court of Appeal in the case of *Soleymani v Nifty Gateway LLC [2022] EWCA CIV 1297*[6] in which it overturned a High Court decision to stay proceedings in favour of New-York based arbitration provided for in Nifty Gateway's terms and conditions. That case has been remitted to the High Court for trial on the issues (including whether Mr Soleymani was a consumer) later this year.

(ii) Whether Chechetkin was a "consumer" and therefore entitled to have his claim heard in that capacity?

Section 15B of the CJJA[7] provides that a consumer may bring proceedings against another party to the consumer contract in the courts located where the consumer is domiciled, regardless of the domicile of the other party to the consumer contract. In the context of the CJJA, a "consumer" in relation to a consumer contract means "*a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession*[8]."

Chechetkin argued that he was party to the agreement in a consumer capacity and the proceedings related to a consumer contract. For these reasons, the matter fell within the CJJA and the English High Court therefore had jurisdiction notwithstanding the exclusive arbitration clause.

[5] *Section 101 of the Arbitration Act 1996*
[6] *Soleymani v Nifty Gateway LLC [2018] 1 WLR 3683*
[7] *Section 15B of the Civil Jurisdiction and Judgments Act 1982*
[8] *Section 15E of the Civil Jurisdiction and Judgments Act 1982*

Payward rejected this argument, submitting that Chechetkin was not acting as a "consumer" in his trading on its platform. In support of this statement, Payward referred to the fact that Chechetkin had several years' experience as a banking lawyer and that he had opened a 'pro-account' on their platform, permitting him to undertake trades with higher leverage.

The Court agreed with Chechetkin and found that he was a consumer such that he was acting outside his profession when engaging with Payward's platform. The Court noted that "*the sophistication, expertise or knowledge of the person is irrelevant for the purposes of the statutory definition" and that "the reference to the account being a pro account…does not mean that he was in any way an investment professional".*

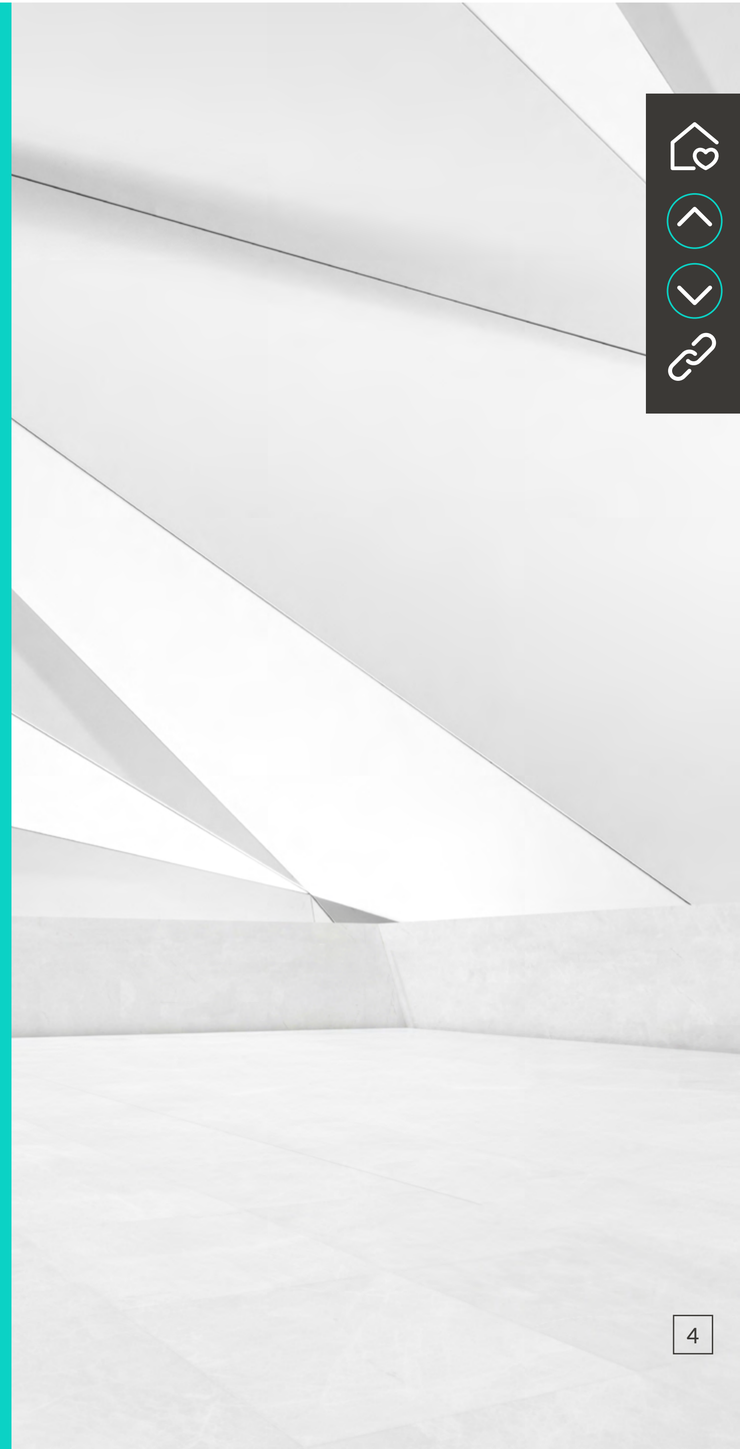
Implications for Irish cryptocurrency providers

This case is particularly interesting in an Irish context considering the recent introduction of the Consumer Rights Act 2022[9] (the **CRA**), which came in to force on 29 November 2022[10] and which applies to contracts concluded on or after that date. The CRA introduces a number of changes to Irish consumer law, strengthening and clarifying consumer rights in Ireland. These changes include the introduction of what are called '*greylist terms*[11]' and '*blacklist terms*[12]'. Broadly, these are terms that will be deemed under the CRA to be 'unfair', or 'non-binding' on consumers depending on the circumstances. In particular, 'blacklist terms' are terms which are always considered unfair to consumers. An example of a blacklist term is, *"a term that grants exclusive jurisdiction for contract disputes to a court where the business is based even though the consumer does not live there."*[13]

An interesting aspect of the case, and one which cryptocurrency exchanges operating in Ireland should bear in mind, is the broad interpretation of the definition of a "consumer" and its similarity to the definition of a consumer under the CRA. In particular, the CRA defines a consumer as *"an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession".*

The Court also did not seem to consider the value of the claim (stg£600,000) to be detrimental to Chechetkin's argument that he was a consumer. The Irish Arbitration Act 2010[14] provides that a term concerning the requirement to submit disputes to arbitration will not be enforceable in instances where the term has not been individually negotiated and where the value of the claim does not exceed €5,000. This may lead to an argument that a claimant with a claim similar in value to Chechetkin's may have more difficulty challenging the enforceability of a similar award in Ireland even if the claim involved a consumer contract. This argument is unlikely to succeed because the claimant can fall back on the fact that the term has not been individually negotiated. In addition, if the claimant can prove that he or she is a consumer under a mandatory provision of Irish law such as the CRA, the claimant may be able to challenge the enforcement of an award on the grounds of public policy. This is a similar argument to that being run in Nifty Gateway case.

[9] *Consumer Rights Act 2022*
[10] *S.I. No. 596/2022 - Consumer Rights Act 2022 (Commencement) Order 2022*
[11] *Section 133 of the Consumer Rights Act 2022*
[12] *Section 132 of the Consumer Rights Act 2022*
[13] *CCPC - Guide to Unfair Terms in Contracts*
[14] *Section 31, Arbitration Act 2010*



Whilst the Court in the present case did not consider the fairness of the arbitration clause, there is a risk that such a clause would be considered a 'blacklist term' under the CRA and thus non-binding.

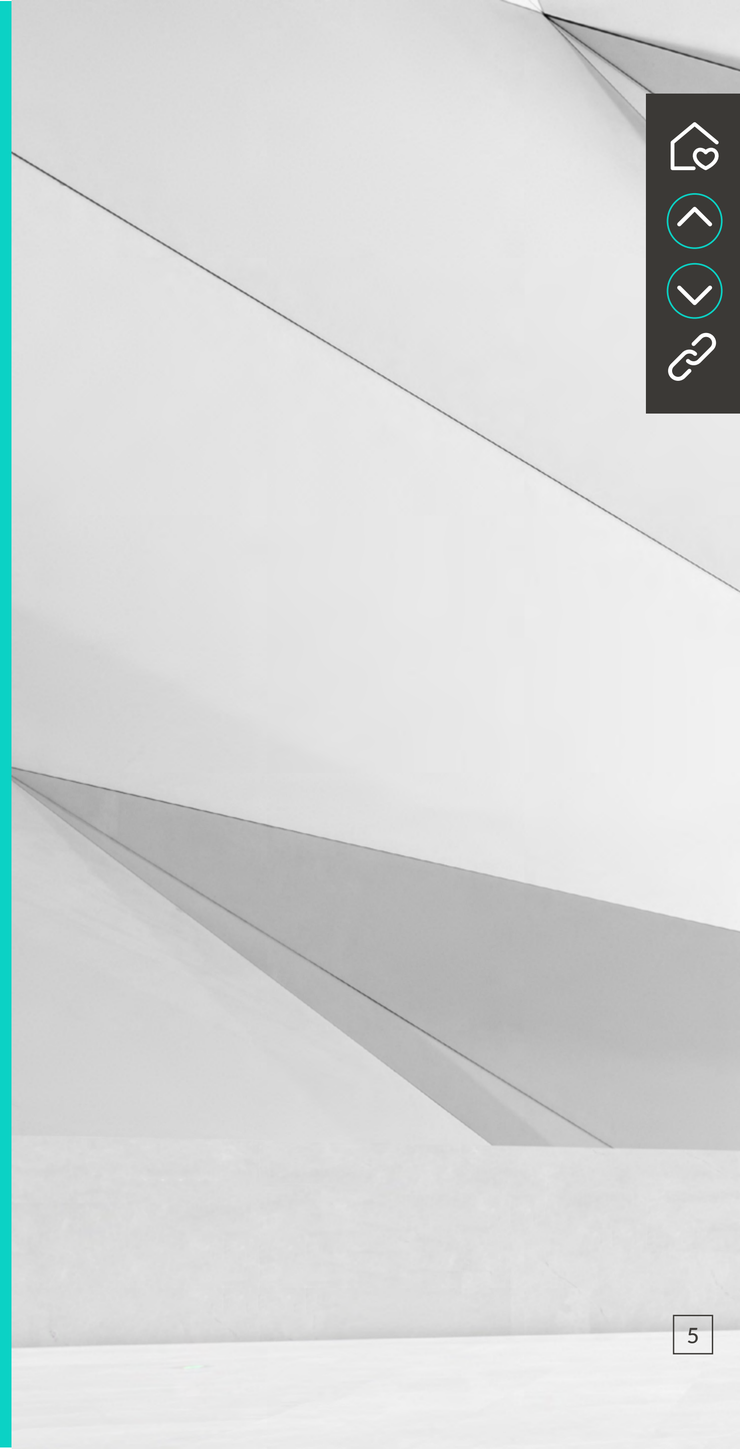
Key Takeaways

This case is a further warning to cryptocurrency platforms that arbitration clauses in their standard terms and conditions may be challenged successfully by their users in certain jurisdictions.

- While this may lead to enforcement and jurisdiction disputes with certain investors in their home countries, it is likely that cryptocurrency exchanges will continue to prefer to use arbitration clauses in their standard terms and conditions where their users are located worldwide. The use of arbitration clauses rather than local jurisdiction clauses provides them with more certainty over the dispute resolution process, the procedural rules and enforceability of awards around the world, given that 172 countries have acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Despite this, there seems likely to be an increase in activity in this space, in terms of cryptocurrency exchanges and other technology companies facing jurisdiction challenges from consumers to arbitration clauses in their standard terms and conditions and challenges to enforcement of awards.
- This English jurisprudence on the definition of consumer, though not binding, may well be persuasive in Ireland as these sort of issues fall to be litigated. Cryptocurrency exchanges and other providers of digital services should be cognisant of the fact that users of their platforms who are acting outside their trade, business, craft or profession may be considered a "consumer". ALG will keep clients apprised of any further developments in this ever-evolving area.

With thanks to Catherine Moloney for her assistance with this piece.

For further information in relation to this topic, please contact Dario Dagostino, Partner, Sarah Murphy, Partner, Mark Devane, Partner, Paula Gibbs, Senior Associate, Aisling Ennis, Solicitor, or any member of ALG's Regulatory Investigations team and/or Disputes and Investigations team.



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