

# Kluwer Arbitration Blog

## Lawyers, Crypto, and Public Policy: The Case of Payward v Chechetkin

Isabel Lightbody (Slaughter and May) · Saturday, August 26th, 2023

The recent case of *Payward Inc v Chechetkin* [2023] EWHC 1780 (Comm) represents a rare example of English courts refusing to enforce an arbitral award on public policy grounds. The award in question was rendered against Mr Chechetkin, a UK-domiciled lawyer who suffered significant losses trading on the Claimant's cryptocurrency platform. The English Commercial Court declined enforcement primarily because the arbitrator had not considered or applied English consumer rights and financial services laws. This blog post discusses how the English Commercial Court has reached that decision.

### Background: The Arbitral Proceedings

In 2020, Mr Chechetkin acquired various trading positions on a cryptocurrency exchange operated by Payward's UK subsidiary. The terms and conditions governing his trading on the platform (the "Payward Terms") mandated that any disputes be resolved through Judicial Arbitration and Mediation Services ("JAMS") arbitration, seated in San Francisco.

After incurring losses exceeding £600,000 on the platform, Mr Chechetkin sought to recover his funds by initiating proceedings in the English courts. He argued that Payward's operations were not authorised in the UK, which rendered his contract with the company unenforceable under the [Financial Services and Markets Act 2000](#) ("FSMA"). Consequently, he claimed that he was entitled to recover his lost funds.

In response, Payward initiated arbitration under the Payward Terms, seeking a declaration that it bore no liability to Mr Chechetkin. The arbitrator rejected Mr Chechetkin's FSMA-based jurisdictional objections and ruled in 2022 that Payward had no liability towards him. Additionally, the arbitrator held that Mr Chechetkin was required to arbitrate his disputes with Payward, effectively prohibiting him from pursuing his pending FSMA claim in the English courts.

Payward then sought to enforce the arbitral award in England, contending that, as a signatory to the [New York Convention](#), its courts were obligated to recognise and enforce arbitral awards (as incorporated into domestic legislation by section 101 of the [Arbitration Act 1996](#) ("AA 1996")). Mr Chechetkin opposed the enforcement proceedings under section 103(3) of the AA 1996, which grants the courts the discretion to refuse enforcement on 'public policy' grounds. The public policy

grounds in question were the [Consumer Rights Act 2015](#) (“CRA”) and the FSMA, two key pieces of UK legislation that the arbitral award allegedly failed to consider.

### The (Failed) Enforcement Proceedings

In the enforcement proceedings, Mr Justice Bright considered three pivotal issues:

- **Consumer Status:** The court had to determine whether Mr Chechetkin qualified as a consumer under the CRA. The judge affirmed that he met the ‘acting outside of profession’ criteria under section 2(3) of the CRA, as (i) he was a lawyer, and (ii) Payward had assessed him to be a customer, acting for non-commercial purposes.
- **Non-Binding Nature of Arbitrator’s Determinations:** The court, relying in particular on the case of *Dallah Co v The Ministry of Religious Affairs of Pakistan* [2011] AC 763, held that it was not bound by the arbitrator’s decisions due to her failure to consider either the CRA or FSMA. This runs counter to the more standard approach, highlighted by *Alexander Bros Ltd (Hong Kong SAR) v Alstom Transport SA* [2020] EWHC 1584 (Comm), of preventing enforcing courts from reopening arbitrators’ findings. However, the court distinguished *Alexander Bros* on the basis that the *Alexander Bros* tribunal had the jurisdiction to – and indeed did – decide on relevant legal issues, whereas the Californian arbitrator had not even attempted to do so. She had simply refused to apply English law and had given no real consideration to Mr Chechetkin’s FSMA-related arguments and objections.
- **Public Policy Grounds for Refusal of Enforcement:** The court confirmed that both the CRA and FSMA formed part of English public policy. The CRA was the UK’s enactment of (*inter alia*) an EU Directive on unfair terms in consumer contracts, established as public policy following several decisions from the Court of Justice of the European Union binding English courts. The FSMA is a UK statute with regulatory objectives and so too forms part of UK public policy.

The judge confirmed that the CRA applies where consumer contracts have a close connection with the UK, even where the parties have chosen a different governing law, so that the [arbitrator’s refusal to even consider](#) English law was sufficient to make the award unenforceable as a matter of public policy. Mr Justice Bright further found the arbitration clause to be ‘unfair’ (and thus prohibited under section 62 of the CRA), on the basis that:

- the case was heard by a US arbitrator who had no English law experience and was unreceptive to submissions based on the CRA or FSMA;
- US federal courts were not suitable for supervising disputes involving English law and UK statutes; and
- Mr Chechetkin could not appeal based on an error of English law.

Another key factor behind the refusal to enforce was the concurrent FSMA claim by Mr Chechetkin against Payward, which would have been halted had the arbitration award been enforced. As Mr Chechetkin had, at minimum, a *prima facie* claim against Payward over its lack of FSMA authorisation, depriving him of his right to be heard would contravene public policy.

### Analysis and Implications

Following the recent *Soleymani v Nifty Gateway* [2022] EWCA Civ 1297 decision, the case of *Payward v Chechetkin* sheds further light on the tension between arbitration and consumer rights in the UK and the complexities surrounding the [arbitration of consumer disputes](#).

*Soleymani v Nifty Gateway* similarly concerned a UK-domiciled (and highly sophisticated) consumer who participated in an NFT auction on Nifty Gateway's platform, '*pursuant to a contract providing for New York law and arbitration*'. Nifty Gateway applied for a stay of English proceedings commenced by Soleymani on the basis that the matters in dispute were subject to valid, New York-seated arbitration proceedings (under section 9 of the AA 1996). Nifty Gateway's request for a stay was rejected, despite the fact that it offered to undertake that all relevant points of the CRA should be dealt with in the arbitration. In *Payward*, Mr Justice Bright criticised the assumption that English courts are necessarily better placed to deal with English law issues than US arbitrators and that arbitration overseas places a significant burden on UK consumers. Nevertheless, given the circumstances (i.e., the US arbitrator didn't consider the CRA and rejected considering the FSMA outright), he reached a similar outcome as in *Soleymani*.

Whilst *Payward* takes a more relaxed approach towards UK consumer rights issues being dealt with by overseas arbitrators, both cases indicate that English courts require UK consumer rights to be properly considered, if not dealt with by English courts, [even in cases involving substantial transactions and 'sophisticated' consumers](#). Both cases therefore illustrate the challenges that businesses may face when seeking to enforce foreign arbitral awards against UK consumers where such awards apply non-English governing law without considering applicable UK statutory provisions.

Affected businesses may therefore need to re-evaluate their dispute resolution mechanisms in consumer contracts, and carefully consider jurisdiction, governing law, and their counterparty's domestic consumer rights legislation. This is particularly relevant for US-domiciled providers of novel online financial services, such as cryptocurrency platforms, whose standard terms often contain compulsory arbitration clauses and exclusive jurisdiction clauses purporting to exclude English law statutory protections. *Payward v Chechetkin* serves as an apt reminder that such exclusionary terms [may not ultimately be enforceable](#), nor may the awards that seek to rely on them.

As an aside, it is worth noting that outside the context of consumer rights, this case does not indicate a broader trend of English courts scrutinising arbitration awards or deviating from their pro-arbitration stance. The court's decision appears to be driven by the unique circumstances surrounding consumer disputes and the need to safeguard consumer rights and interests in the UK.

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*The opinions expressed in this blog post are those of the author alone and do not necessarily reflect the opinions or views of Slaughter and May or its clients.*

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***To further deepen your knowledge on Articles V(1)(b) & V(2) of the New York Convention, including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available [here](#).***

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