Neutral Citation Number: [2023] EWHC 1780 (Comm)

Case No: CL-2023-000029

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/07/2023

Before :

MR JUSTICE BRIGHT

- -

Between :

(1) Payward, Inc.
(2) Payward Ventures, Inc.
(3) Payward Limited — **Claimant**

- and -

Maxim Chechetkin — **Defendant**

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- -

Hugh Sims KC and Lucy Walker (instructed by Squire Biggs Law Ltd) for the Claimants
Chloë Bell and Henry Reid (instructed by Blake Morgan LLP) for the Defendant

Hearing date: 3 July 2023

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Approved Judgment

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Mr Justice Bright :

A: Introduction

A1: The claim

1. This judgment concerns the Claimants' claim, by an arbitration claim form issued on 23 October 2022, for the enforcement of an arbitration award in the same manner as a judgment or order of the Court to the same effect. The award in question is the Final Award dated 18 October 2022 ("the Final Award") in an arbitration under the Judicial Arbitration and Mediation Services ("JAMS") Rules, Case No. 5100000163. The seat of the arbitration was San Francisco, California. The claim is brought pursuant to s. 101 of the Arbitration Act 1996.

2. The Defendant ("Mr Chechetkin") contends that the Final Award should not be enforced by this Court. He relies on the following exceptions, provided for in s. 103 of the Arbitration Act 1996:

    i) Recognition or enforcement may be refused if it would be contrary to public policy: s. 103(3).

    ii) Recognition or enforcement may be refused if the award deals with matters beyond the scope of the submission to arbitration: s. 103(2)(d).

A2: The parties

3. The Claimants are corporate entities within the same group ("the Payward group"). The business of the Payward group is the operation of the Kraken global digital online cryptoasset exchange. The group headquarters are in San Francisco, California, USA.

4. The First Claimant ("Payward"), a Delaware corporation with an address in San Francisco. The Second Claimant ("Payward Ventures") is also a Delaware corporation and has the same address in San Francisco.

5. The Third Claimant ("Payward Ltd") is a company incorporated in England. It is the corporate entity by which the Payward group provides the services of Kraken in the UK, to UK customers – including Mr Chechetkin.

6. The Defendant ("Mr Chechetkin") is a British citizen resident in England. He qualified as a lawyer in Russia and has an LLM from the Connecticut School of Law in the US. He has worked as a lawyer for a number of international organisations but has never qualified as a lawyer in England or in the USA.

7. At all material times until 31 December 2021, he was employed full-time as in-house legal counsel for the European Bank for Reconstruction and Development. Since then, he has not had a job. Much of his time and resources have been devoted to the litigation between himself and the Payward group, both in the JAMS arbitration and in this country.

A3: The evidence

8. This being an arbitration claim, commenced by way of a CPR Part 8 claim form, the evidence was essentially written. I received witness statements made by Mr Grant Squire of the Claimants' solicitors and by Kimberly Pallen of Withers Bergman LLP, the Claimants' US attorneys; and from Mr Chechetkin.

9. One of the main issues between the parties was whether Mr Chechetkin was a consumer for the purposes of the Consumer Rights Act 2015. Mr Chechetkin gave evidence on this in his witness statement. The Claimants' skeleton

argument indicated an intention to apply for permission to cross-examine Mr Chechetkin on this point, an application that Mr Sims KC (leading counsel for the Claimants, along with Ms Walker) duly made. The skeleton argument submitted by Ms Bell and Mr Reid (counsel for Mr Chechetkin) indicated that there was no objection to this.

10. While oral evidence is unusual in an arbitration claim, I considered that the question whether Mr Chechetkin should be considered a consumer was likely to be so critical that it was appropriate to permit cross-examination. I therefore heard Mr Chechetkin's oral evidence at the beginning of the hearing.

B: Mr Chechetkin's contract with Payward Ltd

B1: Conclusion of the contract

11. In March 2017, Mr Chechetkin opened an online trading account via the Kraken website. The website is set up such that, in whatever country or territory the customer may be located, that customer's contract will be with a Payward group entity local to that country or territory. In the USA, this would be Payward Ventures. In the UK, it is Payward Ltd. Thus, Mr Chechetkin contracted with Payward Ltd. He had no contractual nexus with any other Payward group entity.

12. Opening an account required Mr Chechetkin to fill out a standard on-line form. As well as giving conventional details as to name, address and age, he was asked to state his occupation – he said "Lawyer" – and give his source of wealth – he said "Employer". A box in relation to "Crypto Trading Experience" was left blank.

13. Kraken accounts are offered to customers at various levels, entitled "Starter", "Express", "Intermediate" and "Pro". Each level has different limits for

withdrawals and deposits, the highest limits being for "Pro" accounts. This was what Mr Chechetkin selected, checking a box to indicate that he did so because of the higher withdrawal limits.

14. The application form asked, "Are you creating the account on behalf of a 3rd party" and "Do you intend to use your account as a bitcoin reseller or reseller of other digitals as a business." The form stated in relation to both these questions: "If yes you will need to apply as a corporate client." Mr Chechetkin answered "No" to both questions.

15. He checked boxes indicating that his net worth was "$1mil-2mil" and that his liquid net worth was "$250k-1mil", and that his source of wealth was "Employment income". These answers were reflected in a "T4 risk score", along with other items.

16. One such item was including: "Works in Crypto or Fintech Industry – No". That item made a contribution of zero to his risk score. I assume that the T4 risk score is used to evaluate and accept Mr Chechetkin as a customer.

17. His T4 risk score was evidently acceptable, and he was accepted as a customer, with a "Pro" account. I am not sure of the precise date when his account was opened, but some time in March 2017. It is common ground that, in legal terms, this was when a contract was concluded between Mr Chechetkin and Payward Ltd.

B2: The Payward Terms

18. All such contracts are subject to the Payward Terms of Service ("Payward Terms"). The Payward Terms are set out in a clickwrap agreement through the

account sign-up page, with a blue hyperlink to the Payward Terms. Mr Chechetkin checked a box, by which he purported to confirm that that he had read and agreed to the Payward Terms. These include clause 23, providing as follows:

> "23. **Applicable Law; Arbitration**
> PLEASE READ THE FOLLOWING PARAGRAPH CAREFULLY BECAUSE IT REQUIRES YOU TO ARBITRATE DISPUTES WITH US AND IT LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF.
> You and Payward agree to arbitrate any dispute arising from these Terms or your use of the Services, except for disputes in which either party seeks equitable and other relief for the alleged unlawful use of copyrights, trademarks, trade names, logos, trade secrets or patents. ARBITRATION PREVENTS YOU FROM SUING IN COURT OR FROM HAVING A JURY TRIAL. … You and Payward further agree…(b) that any arbitration will occur in San Francisco, California; (c) that arbitration will be conducted confidentially by a single arbitrator in accordance with the rules of JAMS; and (d) that the state or federal courts in San Francisco, California have exclusive jurisdiction over any appeals of an arbitration award and over any suit between the parties not subject to arbitration. … Any dispute between the parties will be governed by these Terms and the laws of the State of California and applicable United State law, without giving effect to any conflict of laws principles that may provide for the application of the law of another jurisdiction."

B3: The JAMS Rules

19. The main rules governing the JAMS arbitration process are the JAMS Comprehensive Arbitration Rules & Procedures ("the JAMS Rules"). Rule 1 provides that parties are deemed to have made the JAMS Rules a part of their arbitration agreement whenever they have provided for arbitration by JAMS.

20. Rule 4 provides as follows:

> "**Rule 4. Conflict with Law**
> If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected."

21. Also relevant are the JAMS Consumer Arbitration Minimum Standards. These apply:

> "… where a company systematically places an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause. A consumer is defined as an individual who seeks or acquires any goods or services, primarily for personal family or household purposes, including the credit transactions associated with such purchases, or personal banking transactions."

22. Rule 3 of the JAMS Consumer Arbitration Minimum Standards provides as follows:

> "3. Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court."

C: Mr Chechetkin's trades and his FSMA claim

C1: Mr Chechetkin's trades

23. Mr Chechetkin placed trades on the Kraken trading platform from March 2017 until 16 October 2020, when he closed the account.

24. Mr Chechetkin's use of the Kraken platform was reasonably active from 2017 onwards. On some days he made several trades. However, until about May 2020 there were also significant intervals when there was no activity on the account. My impression is that, from March 2017 until about March 2020, he made some gains and some losses – probably more gains than losses, but neither was on the scale of what followed in 2020.

25. The ledger records that I have seen show that the frequency and magnitude of his trades increased from about March 2020 – essentially, after the UK went

into Covid lockdown and Mr Chechetkin (like many others) spent more time at home.

26. The dispute between Mr Chechetkin and the Payward group concerns deposits that Mr Chechetkin made between 15 March 2020 and 6 June 2020, totalling £613,000. These deposits were made by payments from his UK bank account to the UK bank account of Payward Ltd. I have received no evidence regarding any previous deposits, but I assume (a) that there will have been such deposits and (b) that they, too, will have been paid from his UK bank account to the UK bank account of Payward Ltd.

27. Mr Chechetkin's trading pattern was explored in the oral evidence. Initially, his trading was outside the normal working-hours of his job. After March 2020, when he was working from home, the picture is more mixed. However, he continued to work full-time as a lawyer. His trading activities were conducted around his job and his obligations to his employer.

28. Mr Chechetkin explained that some of the money deposited was his; some came from his parents, but (he said) some of that was also his money. He said that the arrangement with his parents was informal; he did not charge commission and there was no expectation that he would account to them. On the contrary, the intention was that any profits would be used to pay his mortgage. He did not trade on behalf of any other third party, apart from his parents.

29. He said that he deposited about £289,000 over four days in March 2020. His trading positions turned negative and from May 2020 he was trying to recover the situation. The Kraken platform allows negative positions as long as the customer tops up the account. He did so, making further deposits and hoping

to trade his way out of trouble. He said that he started to panic, made more deposits and more trades, and this ultimately led to the loss of the whole balance.

30. Mr Chechetkin says that he ended up losing £608,534.

31. From then on, until 16 October 2020, he placed trades on the Kraken trading platform, using sums he had deposited.

C2: Mr Chechetkin's case that Payward Ltd is in breach of FSMA

32. Mr Chechetkin's case is that Payward Ltd's activities in the UK amounted to dealing in or arranging deals in investments, within the meaning of paragraphs 2 and 3 of Part 1 of Schedule 2 to the Financial Services and Markets Act 2000, as further clarified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. As such (Mr Chechetkin says), they constituted regulated activities within ss. 19(1) and 22 of the Financial Services and Markets Act 2000 and were subject to the "General Prohibition" provided in s. 19 of the Financial Services and Markets Act 2000, pursuant to which persons not authorised are prohibited from carrying on regulated activities.

33. Mr Chechetkin further says that Payward Ltd has at no material time had the necessary authorisation, and so was in breach of the General Prohibition.

34. If this case is correct, then:

    i) Payward Ltd was almost certainly committing a criminal offence under s. 23 of the Financial Services and Markets Act 2000.

    ii) Mr Chechetkin's agreement(s) with Payward Ltd are unenforceable, pursuant to s. 26 of the Financial Services and Markets Act 2000.

35. I was not provided with detailed evidence in relation Payward Ltd's regulatory status. In particular, I should make it clear that none of the Payward group entities has yet had to plead a case on this point. I assume for the time being that they take issue with Mr Chechetkin's case. However, as matters stand, I have to proceed on the basis that there is at least a prima facie case that the provisions of the Financial Services and Markets Act 2000 that I have identified above are engaged.

C3: Mr Chechetkin's FSMA claim

36. On 12 April 2021, Mr Chechetkin sent a letter to Payward Ltd informing it that he was formulating a claim against it to be brought in the English High Court and asking it to provide information about the Kraken platform. The Claimants responded, noting that Mr Chechetkin had agreed to the dispute resolution provisions in the Payward Terms.

37. On 26 July 2021 Mr Chechetkin sent a letter before claim, referring to alleged breaches of the Financial Services and Markets Act 2000. The letter also stated that the arbitration clause or jurisdiction clause in the Payward Terms were unenforceable under the Consumer Rights Act 2015 and/or s. 26 of the Financial Services and Markets Act 2000.

38. Further correspondence ensued, with the Claimants referring to cl. 23 of the Payward Terms and Mr Chechetkin contending that cl. 23 was unenforceable.

39. On 23 February 2022 Mr Chechetkin issued proceedings in the English High Court, FL-2022-000006, alleging breaches of the Financial Services and Markets Act 2000 ("the FSMA Proceedings"). The First Defendant was

Payward Ltd. There were three other defendants, including Payward and Payward Ventures.

40. Mr Chechetkin's Particulars of Claim in the FSMA Proceedings were served on 24 April 2022. The only Defendant named in the Particulars of Claim, and the only Defendant against whom any allegations were made or from whom any relief was sought, was Payward Ltd. It may be that this means that the claim under the Financial Services and Markets Act 2000 is, therefore, only pursued against Payward Ltd.

41. On 11 May 2022, Payward Ltd filed and served an acknowledgement of service, indicating its intention to dispute jurisdiction in the FSMA Proceedings. I am not aware that any other defendant acknowledged service.

42. Be that as it may, my understanding is that, on 21 June 2022, all the defendants to the FSMA Proceedings issued an application disputing English jurisdiction. I should note that, despite the agreement to arbitrate in cl. 23 and the arbitration proceedings that had, by this time, already been commenced (see below), there was no application to stay under s. 9 of the Arbitration Act 1996.

43. On 23 October 2022, the Claimants issued the arbitration claim in this action. On the same date, they also applied, in the context of the FSMA Proceedings, for an injunction pursuant to s. 44(2)(e) Arbitration Act 1996 and under s. 37(1) Senior Courts Act 1981 that Mr Chechetkin should not take any further steps within the FSMA Proceedings until a final determination of this claim; alternatively, that the hearing of their challenge to English jurisdiction be adjourned until after the determination of this arbitration claim.

C4: The judgment of Miles J

44. On 25 October 2022, Miles J heard the challenge to English jurisdiction in the FSMA Proceedings and the application for an injunction/adjournment: [2022] EWHC 3057 (Ch). The essential question was whether the Claimants (there, as defendants) could rely on cl. 23, or whether Mr Chechetkin was right to contend that the FSMA Proceedings concerned a contract with a consumer domiciled in the UK within the meaning of s. 15B of the Civil Jurisdiction and Judgments Act 1982. Under s. 15B, the parties may depart from that provision by an agreement, but only by one which (amongst other things) has been entered into after the dispute has arisen. Mr Chechetkin agreed to cl. 23 more than three years before this dispute. Thus, Mr Chechetkin's case was that (i) he was a consumer; and (ii) this meant that cl. 23 was not effective to prevent the English Courts from having jurisdiction.

45. In his judgment, Miles J said at [43] that he reached the clear view that Mr Chechetkin was a consumer within the definition contained in s. 15E of the Civil Jurisdiction and Judgments Act 1982.

46. Miles J also rejected an argument that he was bound by the decisions of the JAMS arbitrator, even prior to enforcement under s. 101 of the Arbitration Act 1996.

47. Miles J therefore dismissed the challenge to jurisdiction and refused the application for an injunction/adjournment. It follows that the FSMA Proceedings will continue, unless the outcome of this claim is in favour of enforcing the Final Award.

D: The JAMS arbitration

D1: The Demand for arbitration, the Response

48. In the meantime, following Mr Chechetkin's initial assertion of rights under the Financial Services and Markets Act 2000 and/or the Consumer Rights Act 2015, on 14 January 2022, the Claimants issued a Demand for arbitration ("the Demand"). The Demand was a reasonably detailed document of 14 pages. It referred to cl. 23 and asserted that the arbitration should be under the JAMS procedure, in California, and that the law of California should apply.

49. Mr Chechetkin responded on 25 February 2022 ("the Response"). The Response was much briefer than the Demand, stating that he appeared to challenge the applicability, effectiveness and enforceability of the arbitration agreement but not setting out any arguments.

50. There was a dispute about the appointment of the original arbitrator. This was resolved and, on 21 April 2022, a new arbitrator was appointed.

51. Following her appointment, the Claimants' US attorneys wrote to the arbitrator on 17 May 2022, asking her to treat their letter as a motion requesting her to confirm and enforce the arbitration agreement. The letter went on to note the fact that Mr Chechetkin challenged the arbitration agreement, the applicability of the JAMS Rules and the applicability of the laws of California (or other US law).

D2: Procedural Order No. 1

52. On 31 May 2022, there was a preliminary telephone hearing at which the arbitrator rejected Mr Chechetkin's request to stay the arbitration pending the jurisdictional challenge in England (i.e., in the FSMA Proceedings).

53. Later that day, Ms Claiborne issued Procedural and Scheduling Order No. 1. This gave preliminary directions regarding pleadings, discovery, etc. It also stated:

> "2. ***Arbitration Agreement***
> The parties' arbitration provision is set forth in Payward's Terms of Service under the heading "Applicable Law; Arbitration." The arbitration provision calls for an arbitration in San Francisco pursuant to the JAMS Rules and governed by the laws of California.
> 3. ***Governing Rules and Law***
> (a) This Arbitration proceeding is governed by the JAMS Comprehensive Arbitration Rules and Procedures, effective June 1, 2021. The arbitration shall be administered by JAMS.
> (b) The merits are to be decided pursuant to California law and the [Federal Arbitration Act]."

54. No reasons were attached. It is not clear what submissions had been received by the arbitrator, apart from those summarised above.

D3: Mr Chechetkin's motion, Procedural Order No. 2, Partial Award

55. On 24 June 2022, Mr Chechetkin submitted a motion challenging the jurisdiction of the arbitration and the arbitrability of the dispute. This appears to have been the first time that Mr Chechetkin articulated to the arbitration his case as to the Financial Services and Markets Act 2000, and his case that cl. 23 was legally unenforceable under English law. The motion also made other points, including that cl. 23 violated the JAMS Consumer Arbitration Minimum Standards.

56. Further submissions were made by both sides in July 2022, with the Claimants asserting the enforceability of cl. 23. They also argued (among other things) (a) that arbitration under cl. 23 did not deprive Mr Chechetkin of the opportunity to make his arguments as to his hypothetical claims and his choice of law arguments when the arbitration moved forward (chiefly in a submission filed on

1 July 2022); but also (b) that the arbitrator could and should now rule on arbitrability under JAMS Rules, California law and the Payward Terms (chiefly in a submission filed on 6 July 2022).

57. A remote hearing took place on 8 July 2022. On 12 July 2022, the arbitrator issued Prehearing Order No. 2. She ordered as follows:

> "1. Pursuant to JAMS Rule 11, the Arbitrator is to resolve disputes regarding arbitrability and jurisdiction. As set forth in the Payward Terms of Service ("Terms"), consumers using the Payward platform to buy and sell crypto assets are required to accept the company's arbitration provision. The Terms are set forth in a clickwrap agreement through the account signup page with a blue hyperlink to the Terms. Respondent was required to check a box showing that he read and agreed to the Terms in order to use Payward's services. The Terms are clear that the arbitration will be administered pursuant to California law and the JAMS Rules. The Rules are easily available on line. The entire process is typical of those used in many online businesses and routinely enforced in California. *Crawford v. Beachbody, LLC*, No. 14cv1583-GPC (KSC) (S.D. Cal. Nov. 5, 2014).
> Respondent is an attorney in the U.K. who has been a customer of Payward since March 31, 2017. At the outset of the relationship with Payward, he had an opportunity to click on a blue hyperlink and review the Terms. The Terms include an arbitration provision that is highlighted and set off in capital letters: "PLEASE READ THE FOLLOWING PARAGRAPH CAREFULLY BECAUSE IT REQUIRES YOU TO ARBITRATE DISPUTES WITH US AND IT LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF" followed by the details of the arbitration provision.
> Respondent clearly made a choice to use the Payward platform even though he could have chosen to work with one of Payward's competitors. He has failed to prove procedural or substantive unconscionability. The arbitration provision is enforceable under California law. *Uptown Drug Co., Inc. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172 (N.D. Cal.2013). Respondent's acceptance of the Terms shows consent to jurisdiction in California. *Automattic, Inc. v. Steiner*, 82 F. Supp. 3d 1011 (N.D. Cal. 2015).
> Respondent's challenges to arbitrability and jurisdiction are denied. Payward's Motion to Confirm Arbitration and Jurisdiction is granted. Pursuant to Rule 11, the resolution of this issue by the Arbitrator is final.
>
> 2. Payward's assertion that this is not a consumer arbitration is denied. The Arbitration Minimum Standards apply "where a company

systematically places an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause."
This language describes the situation in the current case. There is no evidence that this case involves financial services as they are described in the Minimum Standards.
The requirement that the arbitration must be held where the consumer resides will be met by using the Zoom platform for this hearing. The cost and risk to health involved in travel to the U.K. require a virtual hearing. Rule 22(g). We will schedule the timing of the hearing days to accommodate both parties as is usual in international matters. Please note Rule (j) concerning handling of the hearing in the unlikely event that one party has notice of the hearing and fails to attend.

3. Pursuant to Rule 10, Payward may file its amended Demand promptly."

58. On 29 July 2022, the arbitrator issued a Partial Final Award, again flowing from the hearing on 8 July 2022 dealing with the same matters as Prehearing Order No. 2. It was in the following terms:

"**PARTIAL FINAL AWARD**

I. INTRODUCTION AND PROCEDURAL STATEMENT
THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement between the parties, and having been duly sworn, and having read and heard argument on the motions submitted by the parties at a hearing held on the Zoom platform on July 8, 2022, hereby Denies Respondent's challenges to arbitrability and jurisdiction and Grants Claimants' Motion to Confirm arbitrability and jurisdiction. My determinations on these issues are set forth in Prehearing Order No. 2 dated July 12, 2022.

II. ANALYSIS
Pursuant to JAMS Rule 11 (b), the Arbitrator is to resolve disputes regarding arbitrability and jurisdiction. As set forth in the Payward Terms of Service ("Terms"), consumers using the Payward platform to buy and sell crypto assets are required to accept the company's arbitration provision. The Terms are set forth in a clickwrap agreement through the account sign up page with a blue hyperlink to the Terms. Respondent was required to check a box showing that he read and agreed to the Terms in order to use Payward's services. The Terms clearly state that disputes will be resolved through arbitration administered through JAMS pursuant to California law and the JAMS

> Rules. The JAMS Comprehensive Arbitration Rules and Procedures are easily available on line. The entire process is typical of those used in many online businesses and routinely enforced in California. *Crawford v. Beachbody, LLC*, No. 14cv1583-GPC (KSC) (S.D. Cal. Nov. 5, 2014).
> Respondent is an attorney in the U.K. who has been a customer of Payward since March 31, 2017. At the outset of his relationship with Payward, he had an opportunity to click on a blue hyperlink and review the Terms. The Terms include an arbitration provision that is highlighted and set off in capital letters: "PLEASE READ THE FOLLOWING PARAGRAPH CAREFULLY BECAUSE IT REQUIRES YOU TO ARBITRATE DISPUTES WITH US AND IT LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF" followed by the details of the arbitration provision.
> Respondent clearly made a choice to use the Payward platform even though he could have chosen to work with one of Payward's competitors. He has failed to prove procedural or substantive unconscionability. The arbitration provision is enforceable under California law. *Uptown Drug Co., Inc. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172 (N.D. Cal.2013). Respondent's acceptance of the Terms shows consent to jurisdiction in California. *Automattic, Inc. v. Steiner*, 82 F. Supp. 3d 1011 (N.D. Cal. 2015).
>
> **III. DETERMINATIONS ON THE CLAIMS**
> Respondent's challenges to arbitrability and jurisdiction are **denied.** Payward's Motion to Confirm Arbitration and Jurisdiction is **granted.** Pursuant to JAMS Rule 11, the resolution of this issue by the Arbitrator is final.
> **IV. FURTHER PROCEEDINGS**
> As set forth in the PROCEDURAL AND SCHEDULING ORDER (AMENDED) dated June 15, 2022, hearings in this case will take place on the Zoom platform on October 5-7, 2022. The time of each hearing day shall be set to accommodate Respondent who may be participating from the U.K.
> After the hearings, final briefing, and closing arguments, I will issue a **Final Award** that shall incorporate the contents of this Partial Final Award.
> July 29, 2022"

59. I have set out Prehearing Order No. 2 and the Partial Final Award in full, for the following reasons:

i) First, to allow the reader to form an impression of the depth of reasoning that is developed in documents like this, under the JAMS Procedure. My own impression is that the process (perhaps especially where consumers

are involved) prizes speed and decisiveness, perhaps at the expense of analytical detail or lengthy reasons. This is often no bad thing in arbitration proceedings, but it is relevant to some of the issues that I have to consider. Some support for my impression comes from the JAMS website, which states (in introductory remarks):

> "We understand that there is a lot on the line in arbitration. We know attorneys count on JAMS to provide highly skilled arbitrators who use JAMS Managed Arbitration Process to save time and money. JAMS offers efficiency, speed, and results."

ii) Second, to show that the arbitrator considered the enforceability of cl. 23 essentially by considering whether its terms had been brought sufficiently to Mr Chechetkin's attention, whether they were sufficiently comprehensible and whether he had indicated his acceptance. No points along these lines were developed before me. If they had been, my views on them would have been similar to the arbitrator's.

iii) Third, to show that, although points were articulated to the arbitrator, on Mr Chechetkin's behalf, regarding the significance of the Financial Services and Markets Act 2000, and of English law more generally, they were given no consideration in her decision. My impression is that, having decided that cl. 23 was incorporated into the contract, and having had regard to the express choice of law that this provision contains, she had no further interest in any issue as to applicable law, or as to whether the enforceability of cl. 23 could be attacked on any other basis (as Mr Chechetkin sought to contend).

iv) Fourth, to show that the arbitrator stated in express terms that the determinations in Procedural Order No 1 were final and binding. I note

this because, in submissions before me, Mr Sims KC argued that, after the hearing on 8 July 2022 and after the arbitrator had issued these documents, Mr Chechetkin still had the opportunity to file a counterclaim, in which (Mr Sims KC contended) he could have raised his claim under Financial Services and Markets Act 2000. In circumstances where the arbitrator had already decided, and now reiterated, that the matter was subject to the law of California, I do not see how claims under an English statute could sensibly have been advanced in the JAMS arbitration.

v) Fifth, to show that the arbitrator regarded Mr Chechetkin as a consumer, for the purposes of the JAMS Rules. I appreciate that the test under those rules is different from the definition of "consumer" that I have to apply, but the arbitrator's conclusion on this point is nevertheless of interest.

D4: The Final Award of 18 October 2022

60. The JAMS arbitration proceedings continued. As already noted, Mr Chechetkin did not bring a counterclaim in the JAMS arbitration in respect of his claim under the Financial Services and Markets Act 2000. However, the arbitrator was made aware that this claim was being pursued in the parallel FSMA Proceedings in the English High Court.

61. A substantive merits hearing took place on 5 October 2022, again remotely. Following post-hearing submissions, the arbitrator issued the Final Award on 18 October 2022.

62. Part I of the Final Award ("Introduction and Procedural Statement") summarised the procedural history and said that this Final Award incorporated

Prehearing Order No. 2 and the Partial Final Award. Part II ("Facts") largely repeated the facts and the findings in those documents. Those passages do not need to be set out here. However, it is appropriate to set out the final section of Part II, and Part III ("Determinations on the Claims"):

> "**Respondent Blames Payward for his Losses and Hires U.K. Counsel**
> Despite the warnings presented in the Terms, Mr. Chechetkin attempted to blame Payward for his losses. Worse, he hired U.K. attorneys who began "formulating a claim" to be brought in the U.K. courts despite the fact that his claims were subject to the arbitration provision in the Terms of Service. The details of the U.K. claims need not be recited here, except to say that Payward was forced to hire its own counsel in the U.K. and incurred the costs of doing so. All of these actions by Mr. Chechetkin caused delay and unnecessary expense.
>
> III. **DETERMINATIONS ON THE CLAIMS**
> 1. Respondent's challenges to arbitrability and jurisdiction are **denied** as set forth in the Partial Final Award that is incorporated herein. The arbitration agreement set forth in the Terms is both valid and enforceable.
> 2. Pursuant to the contract, Respondent is bound to arbitrate his disputes with Payward. He is enjoined from filing or prosecuting a claim against Payward in court, whether in the U.K. or other jurisdiction.
> 3. Respondent Anticipatorily Breached the Terms when he threatened suit in the U.K.
> 4. Respondent breached the Terms of Service in the contract, when he filed an action against Payward in the U.K. The Terms clearly called for the resolution of disputes through arbitration administered by JAMS under the JAMS Rules.
> 5. Respondent assumed the risk of trading on Payward's platform. As set forth above, Payward adequately disclosed the risks of margin trading in detail in the Terms.
> 6. As set forth in Prehearing Order No. 2, Payward's assertion that this is not a consumer arbitration is denied. The Consumer Minimum Standards apply to this arbitration.
> 7. Respondent's assertion that Payward should repay the 613,000 pounds he deposited into his account is denied. Respondent engaged in risky margin trading, assumed the risk, and caused the loss of the money in his account.
> 8. Payward's claim for attorneys' fees and costs for both this arbitration and the case brought in the U.K. is denied as prohibited by the Consumer Minimum Standards (see Standard No. 6).
> This Final Award is in full and complete settlement and satisfaction of any and all claims submitted in this arbitration. Any other claim not specifically addressed herein is deemed denied.

October 18, 2022"

63. I have set this out in full for the same reasons as before, but also because the final section of Part II (i.e., under the heading "Respondent Blames Payward for his Losses and Hires U.K. Counsel") confirms that it would have served no useful end for Mr Chechetkin to pursue his claims under the Financial Services and Markets Act 2000 in the JAMS arbitration. The arbitrator had already decided that no such claim could properly be made. I say this not meaning to suggest that the arbitrator was unfairly prejudiced, but that she had already decided – as reflected in the two previous Orders and the Partial Final Award – that only California law was applicable.

64. It is the second sentence of paragraph 2 of Section III that the Claimants are now especially keen to have enforced as an Order of this Court – i.e., that Mr Chechetkin be "enjoined from filing or prosecuting a claim against Payward in court, whether in the U.K. or other jurisdiction".

E: Enforcement under Arbitration Act 1996

65. The Claimants emphasized before me that this Court generally seeks to give effect to arbitration awards, as required under the New York Convention. I naturally accept this, and of course recognize that this preference is effectively enshrined in the provisions of ss. 101 to 103 of the Arbitration Act 1996.

66. It was common ground that the formal requirements of s. 102 were satisfied. Thus, everything turned on s. 103, in particular the following provisions:

> 1. "**103 Refusal of recognition or enforcement.**
> (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
>
> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
>
> (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
>
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
>
> (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted."

67. Mr Chechetkin relied primarily on the second limb of s. 103(3), on the basis that enforcement would be contrary to public policy. In this regard, he relies on the Consumer Rights Act 2015 and on the Financial Services and Markets Act 2000.

68. As fallbacks, Ms Bell also suggested that the Final Award was in respect of a matter that what not capable of settlement by arbitration (cf. the first line of s. 103(3)) and/or that the Final Award dealt with a difference beyond the scope of the submission to arbitration (cf. s. 103(2)(d)).

F: Is Mr Chechetkin a "consumer" under CRA 2015?

F1: The meaning of "consumer"

69. This was the critical threshold issue for much of Mr Chechetkin's case. The definition given in s. 2(3) of the Consumer Rights Act 2015 is as follows:

> *2.* "**2 Key definitions**
> …
> (3) "Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession."

70. The word "consumer" is of course familiar as a matter of ordinary language. It is also a word that arises in a number of other legal contexts – not least that of jurisdiction, where it arose for Miles J in the FSMA Proceedings.

71. Ms Bell took me to *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm) – a jurisdiction case. Ms Ang, the claimant, was an individual who, much like Mr Chechetkin, invested in speculative cryptocurrency transactions (Bitcoin futures) on an online trading platform. Andrew Baker J held that she was a consumer for the purposes of Section 4 of the Brussels Regulation (Recast), i.e., Parliament and Council Regulation (EU) No 1215/2012. This was despite her being a person of substantial means (more than Mr Chechetkin) and with some previous familiarity with cryptocurrency transactions (more than Mr Chechetkin, at least in 2017).

72. Ms Bell further submitted that the definition of "consumer" in the jurisdiction context is narrower than in that of Consumer Rights Act 2015, in that the use of the words "wholly or mainly" in s. 2(3) of the Consumer Rights Act 2015 are not present in the equivalent provisions for jurisdiction, notably s. 15E of the Civil Jurisdiction and Judgments Act 1982. The addition of the words "wholly

or mainly" means that even someone contracting in part for commercial or professional purposes is still a consumer, as long as the relevant activities are pursued "wholly or mainly" as a consumer. The additional words recognise and take into account that individuals may act in more than one capacity.

73. Ms Bell said that it follows that the same individual might not be a consumer for the purposes of jurisdiction, but could nevertheless be a consumer for the Consumer Rights Act 2015. In this regard, she cited *Weco Project Aps v Loro Piana* [2020] EWHC 2150 (Comm), where Christopher Hancock QC made precisely these contrasting findings in relation to Mr Piana, at [75]-[76] and at [107].

74. Ms Bell also submitted that the test had to be applied at the time the contract is concluded. Mr Sims KC resisted this, but it seems to me to follow from s. 62(5)(b) of the Consumer Rights Act 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…".

F2: The evidence of Mr Chechetkin

75. In the light of the evidence that I heard from Mr Chechetkin, I do not find this point difficult.

i) Mr Chechetkin's sole profession was as a lawyer, and this was his full-time job.

ii) When he applied for and obtained his account, he made it clear that his employment as a lawyer was his source of income.

iii) He was asked to state if he had any experience of cryptocurrency trading, and he gave no details, indicating that he did not – as was indeed the case, in March 2017.

iv) He was assessed as a customer on this basis, and on the basis that he did not work in crypto or fintech.

v) If he had said (when asked) that he was acting on behalf of a third party or that he intended to resell, he would have had to open a corporate account – in which case I have no doubt Payward Ltd would have treated him as someone who was not a consumer, and with good reason. However, he said "No" to both these questions.

F3: The Claimants' case

76. The main factor relied on by Mr Sims KC was that Mr Chechetkin used his account frequently, in particular during 2020, and the sums invested were reasonably large. It was said that this demonstrated that Mr Chechetkin's trading was knowledgeable, experienced and sophisticated, and that he entered into these transactions in order to generate an income stream with which to support himself and his family.

77. This is largely unexceptionable (save for the suggestion that Mr Chechetkin's investments were reasonably large – that is very much is in the eye of the beholder; Mr Chechetkin's investments would not have looked large to the claimant in *Ang v Reliantco* or to the claimant in *Weco Project*). However, none of it demonstrates that Mr Chechetkin's cryptocurrency transactions were entered into wholly, mainly, or at all for purposes within his trade, business, craft or profession.

78. His only profession was as a lawyer. I have received no evidence to suggest that he had any other trade, business, craft or profession. I accept that he opened his account with Kraken with the intention of making money, but I do not consider that he did so in the course of a trade, business, craft or profession. Many people with full-time jobs have accounts with online bookmakers. They all hope to make money, but few of them are professional gamblers.

79. Furthermore, all the specific transactions that Mr Sims KC took Mr Chechetkin to, and suggested that they demonstrated his knowledge, experience and sophistication, post-dated the opening of Mr Chechetkin's Kraken account. In March 2017, when his contract with Payward Ltd was concluded, he had no material knowledge, experience or sophistication whatsoever in relation to cryptocurrency. I accept that evidence of an individual's conduct after the date of the contract might, in some cases, suggest a pattern of behaviour that already existed before the contract, and continued after it. However, that is not so here.

80. Mr Sims KC relied on the fact that Mr Chechetkin invested money that he had received from his parents. However, on Mr Chechetkin' evidence (which I accept on this point) this was in no sense a business arrangement.

81. Finally, Mr Sims KC relied on the fact that, when asked by him if he had declared the gains that he made in 2017 as income tax, Mr Chechetkin said that he had. This answer was given, and was not challenged by Ms Bell in re-examination, but I am very doubtful about its value. I suspect that Mr Chechetkin was confused at this point of his evidence; not least because I do not see how cryptocurrency trading gains could properly be treated as income, for tax purposes, rather than capital gains. When I raised this with Mr

Chechetkin, I was not at all sure that Mr Chechetkin had in fact declared his 2017 profits to the revenue at all.

F4: Conclusion on "consumer"

82. I have no doubt that Mr Chechetkin was a consumer for the purposes of the Consumer Rights Act 2015. I would have come to this conclusion in any event, with no hesitation, but I cannot help but note that every other tribunal that has had to consider whether Mr Chechetkin was a consumer has decided it the same way, irrespective of the definition being applied.

G: Should the FSMA claim have been brought in the JAMS arbitration?

G1: The Claimants' case

83. Much of Mr Sims KC's submissions were devoted to the suggestion that Mr Chechetkin should not be permitted to pursue the FSMA Proceedings, his claim under the Financial Services and Markets Act 2000 having already been determined against him by the Final Award. This point was first put by Mr Sims KC on the basis that the arbitrator had the kompetenz-kompetenz power to decide her own jurisdiction. When I suggested that the jurisdiction of the English Court was no longer in issue, following the judgment of Miles J, Mr Sims KC suggested that the Final Award gave rise to an issue estoppel.

84. When asked which finding in the Final Award gave rise to the relevant issue estoppel, Mr Sims KC referred to determination 7 of Section III, but he also (and, I think, primarily) suggested that Mr Chechetkin was estopped by reason of the principle in *Henderson v Henderson* (1843) 3 Hare 100, on the basis that it would be an abuse of process for Mr Chechetkin to pursue the claim in England, when it could and should have been pursued in the JAMS arbitration.

I understood the contention to be that, following the hearing on 8 July 2022 and Prehearing Order No. 2 and the Partial Award, it was open to Mr Chechetkin to file a counterclaim, and this was his opportunity to set out his claim under the Financial Services and Markets Act 2000 in the arbitration. Not having taken that opportunity, Mr Chechetkin cannot now complain that the Final Award did not go his way.

85. Allied to this line of argument, when asked by me how Mr Chechetkin could have brought in the JAMS arbitration a claim that was wholly dependent on an English statute, despite the arbitrator's firm view that English law was irrelevant, Mr Sims KC pointed to JAMS Rule 4 and (above all) to Rule 3 of the JAMS Consumer Arbitration Minimum Standards. He said that, having decided that the JAMS Consumer Arbitration Minimum Standards applied, the arbitrator was bound to apply Rule 3; and so was obliged to hold that Mr Chechetkin's claims under the Financial Services and Markets Act 2000 was a remedy that would otherwise be available to Mr Chechetkin under applicable English (i.e., local) laws; so it must either remain available in the arbitration or Mr Chechetkin must have the right to pursue it in court in England.

86. When I suggested that this reasoning was entirely inconsistent with the arbitrator's repeated determination that the laws of California applied and the law of England did not, Mr Sims KC did not disagree. I understood him to be saying that the arbitrator was wrong not to apply Rule 3 of the JAMS Consumer Arbitration Minimum Standards in the manner that he (Mr Sims KC) said was correct; and that this might mean that the arbitrator's decision was wrong, but it

did not show that the JAMS Rules were unfair in themselves, or (therefore) that their incorporation into the contract was unfair.

87. There are a number of problems with all this – even ignoring the novelty of Counsel seeking to persuade the Court to enforce an award by positively contending that the award is wrong.

G2: Could Mr Chechetkin have brought the FSMA claim in the JAMS arbitration?

88. The first problem is that I do not think that Mr Sims KC's submissions are right on the facts. As I have already indicated, the arbitrator was against the application of any law other than the laws of California (and other US laws), from the outset – see Procedural and Scheduling Order No. 1. Given her firmly held and repeated views on this subject, formally pronounced in her Orders and Awards, there was no scope for Mr Chechetkin to bring a counterclaim in the JAMS arbitration under the Financial Services and Markets Act 2000.

89. This makes it unrealistic for the Claimants to criticise Mr Chechetkin for not bringing such a counterclaim, or for them to invoke *Henderson v Henderson*. Further support for this comes from an email of 31 May 2022, which the arbitrator intended to send to her clerk but inadvertently sent to Mr Chechetkin's US counsel, criticising his team's approach to these matters; and from some of the arbitrator's comments at the preliminary hearing on 31 May 2022, where the arbitrator was noticeably impatient when reference was made to the possibility that English law might apply.

G3: Can the court be bound by the Award, when applying s. 103 AA?

90. Second, the underlying premise of Mr Sims KC's submissions is that, when considering whether to enforce an award, the court should have regard to any

points of issue estoppel that arise from the award; and, by extension, *Henderson v Henderson* points.

91. This is inconsistent with the approach of the House of Lords in *Dallah Co v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763, esp. per Lord Mance at [21]-[23] and per Lord Collins of Mapesbury from [79]-[98]. Both judgments make it clear that a tribunal's decision on its own jurisdiction does not bind the courts of a different (non-supervisory) country when they are asked to enforce the award.

92. The findings of the arbitrator in this case as to the enforceability of cl. 23 were inter-dependent with her determination that only the laws of California were applicable. Mr Chechetkin's case is that, under English law, the Consumer Rights Act 2015 has the effect that the imposition of arbitration in California is unfair on him as a consumer. The arbitrator's refusal to take English law into account therefore was critical to her finding that she had jurisdiction. On the basis of *Dallah*, I therefore am not bound by her approach.

93. That said, even without the dicta in *Dallah*, and/or even if the relevant issue that the arbitrator was said to have decided in this case was not one going to her own jurisdiction, I do not think that I would necessarily be obliged to enforce an award that I thought was contrary to English public policy, merely because the arbitrator's decision was said to mean that the award was not contrary to public policy.

94. In *Alexander Bros Ltd (Hong Kong SAR) v Alstom Transport SA* [2020] EWHC 1584 (Comm), Cockerill J dealt with a case of alleged illegality (bribery). She reviewed a considerable number of cases, holding that, if the arbitrator has

found that the alleged illegality did not occur, the court asked to enforce the award should not re-open that issue except perhaps in exceptional circumstances. That must be right, where a factual issue has been raised before the arbitration tribunal and determined by it; although the implication of Cockerill J's judgment at [105(1)] is that the position may be different if the tribunal had dismissed the allegation not because of a finding on the facts but because of its own conclusion on a question of pure law (perhaps especially English law).

95. Here, however, the arbitrator has not made any relevant factual findings; nor even purported to decide any question of law that is relevant to my decision. She simply declined to consider English law at all, on the basis of cl. 23. This meant that there was no issue of illegality (or otherwise of public policy) for her to decide. In the circumstances, and under s. 103(3), the court must form its own view of the award's consistency with English public policy. If necessary, the court can disagree with the arbitrator about this.

G4: Rule 3 of the JAMS Consumer Arbitration Minimum Standards

96. Third, and still ignoring its novelty, I am not persuaded by Mr Sims KC's reliance on Rule 3 of the JAMS Consumer Arbitration Minimum Standards.

97. If I had to decide whether Mr Sims KC's approach to this provision is right, meaning that the arbitrator must have been wrong, I would find it hard to do so. I see how Mr Sims KC can find support in the text for what he says. But I can see at least two possible answers.

i) One is that the phrase "federal, state or local laws" in Rule 3 is redolent of the hierarchy within the US legal system; the "local laws" it has in

mind are laws within the US that are subordinate not only to federal laws but also to state laws – e.g., municipality by-laws. It does not comprehend or make space for the application of the national laws of a foreign country.

ii) The second is that the JAMS Rules are incorporated into the contract by cl. 23 only in so far they are as consistent with cl. 23; and a Rule that provides for the application of any system of laws other than the laws of California is not consistent with cl. 23.

iii) If either of these answers is correct, then the arbitrator was not wrong. She was right. But this would make the JAMS Rules, taken in conjunction with cl. 23, unfertile ground for a claim whose existence depends on the application of an English statute.

98. Fortunately, I do not think that it is necessary for me to decide whether Mr Sims KC is right about the effect of Rule 3 of the JAMS Consumer Arbitration Minimum Standards. This is because there is a larger problem with Mr Sims KC's ingenious attempt to suggest that a JAMS arbitration in California is a suitable forum for a claim under Financial Services and Markets Act 2000. Namely: the facts here vividly demonstrate the opposite.

99. A US arbitrator with no experience of English law, let alone the English regulation of financial services and marketing, is not obviously the ideal tribunal for this kind of claim. Where the arbitral institution makes it a priority to "save time and money", and prioritises "efficiency, speed and results", the arbitrator may well wish to favour the short and simple route over one that would require

the investigation of foreign laws. My reading of the arbitrator's rulings, and her other comments, is that this factor was heavily in play.

G5: Conclusion on *Henderson v Henderson*/issue estoppel

100. In all the circumstances I see no real basis for the suggestion that Mr Chechetkin's claim under the Financial Services and Markets Act 2000 could or should have been brought in the JAMS Arbitration. Nor do I consider myself bound by any of the arbitrator's determinations, when applying s. 103 of the Arbitration Act 1996.

H: Public policy

H1: The meaning of "public policy" in s. 103(3) AA 1996

101. In *Alexander Bros,* Cockerill J said at [71]:

> "[71] "Public policy" as referred to in section 103(3) of the Arbitration Act means the public policy of England and Wales (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice. The classic formulation as to what is seen as contrary to public policy is "contrary to the fundamental conceptions of morality and justice" of the forum. *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2005] EWHC 726 (Comm) [13]; *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1987] 3 WLR 1023, 1035."

102. It is worth adding that most of the authorities on public policy have not arisen in the context of s. 103(3) of the Arbitration Act 1996. Many have arisen in the different context of illegality, where a party has alleged that a contract that is tainted by illegality should not be enforced because to do so would be contrary to public policy. In both contexts, however, the question that the Court has had to grapple with is the relationship between illegality and public policy.

103. I stress this from the outset because none of the difficulties that can sometimes arise in this area are really present in this case.

H2: Is CRA 2015 an expression of English/UK public policy?

104. The Consumer Rights Act 2015 is in part a re-visitation of the Unfair Contract Terms Act 1977, and in part the enactment in the UK of EU Directive 93/13 on unfair terms in consumer contracts ("the UTCCD"), which had previously been brought into UK law by the Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCCRs").

105. There can be no dispute that the UTCCD represents public policy. This has been authoritatively established by the decisions of the CJEU in C-168/05 *Mostaza Claro* [2007] 1 CMLR 22 [35]-[38] and C-40/08 *Asturcom Telecomunicaciones SL* [2010] 1 CMLR 29. In *Asturcom*, the CJEU confirmed at [51-52] in the context of a final arbitration award that *Mostaza Claro* was authority for the proposition 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".

106. These decisions have the status of retained CJEU case law. Accordingly, they bind this Court: as confirmed by the Court of Appeal in *Lipton v BA City Flyer* [2021] EWCA Civ 454 at [69].

107. The purpose of the UTCCD is in any case spelt out in express language by its preamble. As is typical of EU directives, this gives a fairly full explanation of the underlying reasons for the UTCCD's enactment, all of which relate to consumer protection. Words like "must" and "essential" are used liberally. They are highly indicative of public policy objectives. While the preamble is

not incorporated into the Consumer Rights Act 2015, the same underlying reasons must also apply.

108. The fact that Consumer Rights Act 2015 is a UK statute, rather than a mere English statute, arguably underlines its general significance, in policy terms. This also means that it expresses the policy of the UK as a whole.

109. A number of provisions within the Consumer Rights Act 2015 are of particular relevance. The first is s. 71, which provides as follows:

> 3. "71 **Duty of court to consider fairness of term**
> (1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.
> (2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.
> (3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term."

110. The fact that the Court is obliged to consider the fairness of consumer contract terms (subject to s. 71(3)), even if not raised by the parties, reinforces the importance of this as a public policy. It also means that I must consider fairness in the present proceedings – specifically, the fairness of cl. 23 under the Consumer Rights Act 2015. It is worth noting that, if the fairness of cl. 23 under the Consumer Rights Act 2015 is not considered by me in the context of this hearing, it will never be considered at all.

111. The second provision of particular relevance is s. 74(1), which provides as follows:

> 4. "74 **Contracts applying law of a country other than the UK**
> (1)If—

> (a)the law of a country or territory other than the United Kingdom or any part of the United Kingdom is chosen by the parties to be applicable to a consumer contract, but
> (b)the consumer contract has a close connection with the United Kingdom,
> this Part applies despite that choice."

112. This provision was enacted in part to reflect ss. 66 and 27 of the Unfair Contract Terms Act 1977, but also (and more immediately) to enact Article 6(2) of the UTCCD, drawing upon and replacing regulation 9 of the UTCCRs. Article 6(2) of the UTCCD provides:

> "*Article 6*
> …
> (2) Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States"

113. Given the relationship between s. 74(1) and Article 6(2) of the UTCCD, and in the light of *Mostaza Claro* and *Asturcom*, it follows that I am obliged to treat s. 74(1) as an expression of UK public policy. I would have done so in any event, on the straightforward application of the test outlined in *Alexander Bros* and *Deutsche Schachtbau*: it would not be consistent with the fair and orderly administration of justice, and fundamental conceptions of justice, if consumer protections such as are enacted in the Consumer Rights Act 2015 could be outflanked merely by the choice of a different system of law.

114. The other especially relevant provision of the Consumer Rights Act 2015 is s. 62, which provides as follows:

> **5.** "62 **Requirement for contract terms and notices to be fair**
> (1) An unfair term of a consumer contract is not binding on the consumer.
> (2) An unfair consumer notice is not binding on the consumer.

> (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
> (5) Whether a term is fair is to be determined—
> (a) taking into account the nature of the subject matter of the contract, and
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
> (6) A notice 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.
> (7) Whether a notice is fair is to be determined—
> (a) taking into account the nature of the subject matter of the notice, and
> (b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends."

115. I treat s. 62 as emblematic of Part 2 of the Consumer Rights Act 2015 as a whole, in that its sub-sections effectively bring into play the general apparatus of the Act that are concerned with unfair terms. This includes s. 63 (which deals with contract terms which may or must be regarded as unfair) and the indicia of unfairness in Schedule 2.

116. Treated in this metonymic manner (which, I would add, is the approach taken in the explanatory notes that accompanied the Consumer Rights Act 2015 on its enactment), s. 62 replaces regulations 5 and 6 of the UTCCRs and implements Articles 3, 4 and 5 of the UTCCD, which provide as follows:

> "*Article 3*
> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been

> able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
> The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
> Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
> 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> *Article 4*
>
> 1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
> 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.
>
> *Article 5*
>
> In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2)."

117. It follows that s. 62 must also be treated as an expression of UK public policy, in the light of *Mostaza Claro* and *Asturcom*, because it enacts the UTCCD. Once again, this is a conclusion I would have come to in any event.

H3: Is FSMA 2000 an expression of English/UK public policy?

118. The introductory text to the Financial Services and Markets Act 2000 describes it as: "An Act to make provision about the regulation of financial services and markets…" It appoints the Financial Conduct Authority ("the FCA") as the regulatory body for financial services (among other things).

119. The duties of the FCA are set out in Part 1A. Under s. 1B, they expressly include the duty to advance both a strategic objective, which is to ensure that the relevant markets function well, and operational objectives, namely, "the consumer protection objective", "the integrity objective" and "the competition objective". These objectives are all defined and explained in the provisions that follow. Every one of them is, unquestionably, a matter that has been expressly identified by Parliament as a matter of public policy.

120. The Financial Services and Markets Act 2000 is, again, a UK statute and so an expression of UK national policy.

121. The key provisions, for the purposes of this case, are the following:

i) First and foremost is the general prohibition, provided in s. 19:

> 6. "19 **The general prohibition.**
> (1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—
> (a) an authorised person; or
> (b) an exempt person.
> (2) The prohibition is referred to in this Act as the general prohibition."

ii) Contravention of the general prohibition is provided for in s. 23:

> 7. "23 **Contravention of the general prohibition or section 20(1) or (1A).**
> (1) A person who contravenes the general prohibition is guilty of an offence and liable—
> (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
> (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both."

iii) The unenforceability of agreements made in contravention of the general prohibition, and the consequences of such unenforceability, is provided for in s. 26:

> 8. "26 **Agreements made by unauthorised persons.**
> (1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
> (2) The other party is entitled to recover—
> (a) any money or other property paid or transferred by him under the agreement; and
> (b) compensation for any loss sustained by him as a result of having parted with it."

122. These provisions are obviously associated with the regulatory objectives identified in Part I. Accordingly, they, too, are part of UK public policy.

I: Would enforcement be contrary to public policy?

123. In the light of everything set out above, I have not found this difficult.

I1: Enforcement would be contrary to the public policy objective of s. 71 CRA 2015

124. By asking this Court simply to enforce the Final Award, the Claimants are effectively asking me not to consider whether cl. 23 is fair within the meaning of the Consumer Rights Act 2015. But the Court is obliged to consider fairness, under s. 71. This is not a case where the exception in s. 71(3) applies.

125. Mr Chechetkin invokes s. 71, and the Consumer Rights Act 2015 as a whole, in support of his own private interests and for the protection that the Act gives to his own consumer rights. However, the public policy objectives of the Consumer Rights Act 2015 go beyond this. I note the observations on s. 71 made by Birss LJ in *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297 at [145]:

> "Part of the purpose of s 71 itself is so that decisions on consumer rights are made in public. They may have precedential value. The decisions are not only for the benefit of the individual consumer in the instant case but for the benefit of the consumers as a class (see *Oce´ano Grupo Editorial SA v Roccio´ Murciano Quintero* (Joined cases C-240/98 to C-244/98) EU:C:2000:346, [2000] ECR I-4941, [2002] 1 CMLR 1226 (at para 28))."

I2: Enforcement would be contrary to the public policy objective of s. 74 CRA 2015

126. Enforcement of the Final Award would be contrary to the specific public policy embodied in s. 74 of the Consumer Rights Act 2015. This is that where a consumer contract has a close connection with the UK, the consumer rights issues that fall under the scope of the Consumer Rights Act 2015 should be dealt with under that UK statute rather than any foreign law.

127. As a contract between a UK national, domiciled in England, and a company incorporated in England, for services that were paid for in UK sterling and paid for under transactions to and from English bank accounts, the contract between Mr Chechetkin and Payward Ltd was one with a close connection with the UK. s. 74 is applicable on the facts.

128. The Final Award applies only the laws of California. The arbitrator took no account of the Consumer Rights Act 2015 or any other element of English/UK law. She applied the choice of law set out in cl. 23, which s. 74 would have disapplied. Enforcement of the Final Award therefore would be contrary to the public policy objective of s. 74.

129. This conclusion is not arrived at on the basis of a qualitative comparison of the protection afforded to consumers by the laws of California, and/or by the JAMS Rules, with that afforded under the law of England/the UK. I have no familiarity with Californian or US federal consumer protection laws, but I have no doubt

that they exist and are carefully drafted. I have considered the JAMS Consumer Arbitration Minimum Standards and they seem very sensible, so far as they go.

130. The point is, rather, that the UK Parliament has decided that the protection of consumers domiciled in the UK should be governed by the Consumer Rights Act 2015, not by foreign laws or standards.

131. This alone is sufficient to make the Final Award unenforceable. Questions that should have been answered under the Consumer Rights Act 2015 have instead been answered under the laws of California and that, in itself, is contrary to UK public policy.

I3: Enforcement would be contrary to the public policy of s. 62 CRA 2015

132. The application of the Consumer Rights Act 2015 (pursuant to s. 74) brings into play s. 62 and the associated provisions. The issue now is not whether cl. 23 is unfair in so far as it applies the laws of California; it is whether it is unfair because it requires disputes to be resolved in arbitration, in California, under the JAMS Rules.

133. Schedule 2 to the Consumer Rights Act 2015 sets out sample consumer contract terms that may be regarded as unfair – sometimes referred as "the Grey List". Paragraph 20 refers to:

> "20. A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by… (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions…"

134. The mere fact that a consumer contract provides for disputes to be resolved in arbitration does not make it unfair. *Mostaza Claro* establishes that this is a question for the national court to decide in every case.

135. Under s. 62(4) 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.

136. In *Cavendish Square Holdings BV v Makdessi, ParkingEye Ltd v Beavis* [2016] AC 1172, Lords Neuberger and Sumption (in a joint speech with which four of the five other SCJJ agreed) stated at [109] that the test is objective: would a reasonable consumer in the position of this consumer have agreed? In so doing, they drew upon the opinion of the Advocate General in C-415/11 *Aziz v Caxia d'Estalvis de Catalunya, Tarragona i Manresa*, at [AG71].

137. In *Aziz*, the CJEU held at [68] – drawing upon the opinion of the Advocate General at [AG71] as follows:

> "… in order to ascertain whether a term causes a "significant imbalance" in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force."

138. It may be that a reasonable consumer in the position of Mr Chechetkin would have agreed to arbitration in the UK, subject to the Arbitration Act 1996 – under which, for example, there would have been a qualified right to appeal in the event of an error of law, e.g. if the Consumer Rights Act 2015 or the Financial Services and Markets Act 2000 were not applied correctly. However, I do not think that such a reasonable consumer would have agreed to arbitration in California, under the JAMS Rules and subject to the Federal Arbitration Act.

139. Again, this is not because any qualitative assessment of the virtues of the JAMS Rules or the Federal Arbitration Act. It is, rather, a reflection of the fact that arbitration under that system brought with it significant disadvantages as regards the application of English law, including the statutory provisions on which Mr Chechetkin now relies.

140. First, there are the technical disadvantages that result from the English Courts not having a supervisory role under the Arbitration Act 1996, with the result that (among other things) there cannot be an appeal on the basis of an error of (English) law.

141. When paragraph 20 of the Schedule 2 to the Consumer Rights Act 2015 refers to "arbitration not covered by legal provisions", I take this to mean arbitration not supervised by a competent court, pursuant to an appropriate statutory framework. The US federal courts are not competent, in the legal sense, to supervise disputes that are concerned with English law and UK statutes, and the Federal Arbitration Act is neither an appropriate statutory framework nor one that a reasonable consumer would have selected.

142. Leaving aside these technical disadvantages, arbitration in California has caused other problems to Mr Chechetkin, which a reasonable consumer who took time to think about this would almost certainly have foreseen and preferred to avoid.

143. The fact that the geographical location of the seat of the arbitration was in San Francisco would have been one such disadvantage. This is not because San Francisco is a long way from London. That was a problem that the arbitrator dealt with perfectly sensibly, by providing for hearings to take place remotely, at mutually convenient times.

144. However, the fact that the forum was in California made it practically necessary for Mr Chechetkin to use US attorneys. This was, inevitably, both expensive and inconvenient. Mr Chechetkin gave evidence that the cost of having to engage US attorneys was a significant burden to him, and it was apparent to me that this has caused him great stress. By contrast, San Francisco appears to be the headquarters of the Payward group.

145. More significant still was the fact that, as I have already noted, the appointment of a US arbitrator, in the context of a US arbitration system, meant that (through no fault of her own) this arbitrator was not an appropriate tribunal for the issues raised by Mr Chechetkin's case. She had no experience of English law, let alone the English regulation of financial services markets and she was not receptive to submissions that focussed on this area.

I4: The decision of the CA in *Soleymani v Nifty Gateway LLC*

146. In this regard, it is relevant to say a little more about *Soleymani v Nifty Gateway LLC*. The facts had some similarities with this case, in that it involved a UK resident who took part in an auction held on an online platform, pursuant to a contract providing for New York law and arbitration. It was not a case relating to enforcement, but to issues of jurisdiction and whether Mr Soleymani's English proceedings should be stayed pursuant to s. 9 of the Arbitration Act 1996.

147. The s. 9 issues included points under the Consumer Rights Act 2015 and were dealt with by Birss LJ, whose view at [149] was that there should not be a stay in circumstances where the challenge to the arbitration agreement was "based on a vindication of a claimant's arguable consumer rights". This view was itself

based on the factors set out at [147], i.e., "(i) the claimant is resident in England, (ii) he has the better of the argument that Nifty directed its activities to England, (iii) and he invokes English jurisdiction."

148. Against this, Mr Soleymani had very significant means, he therefore was in an unusual position as a consumer and he would not be disadvantaged in having to litigate in New York (see at [150]; not points that apply to Mr Chechetkin in this case). Furthermore, Nifty offered an undertaking that all of the fairness points raised by Mr Soleymani under the Consumer Rights Act 2015 should be dealt with in the arbitration, i.e., Nifty would not simply contend that only New York law was applicable (again, very different from this case).

149. Birss LJ nevertheless concluded that a stay would not be appropriate, at [151]-[153]:

> "[151] There are in my view three answers. The first comes back to the public importance of decisions vindicating (or not) consumers' rights. The case Mr Soleymani is seeking to make has implications for consumers in general in this jurisdiction and it is important that they are considered and ruled upon in public in a court. Therefore, the s 9(4) issues should be decided at a trial and not left to be decided in the arbitral tribunal.
>
> [152] The second answer is that the consumer protection rights under our law involve domestic concepts which our court is far better placed to adjudicate upon than a New York arbitrator. Even if it were certain that the New York Tribunal would apply UK law (as to which see the effect of the proffered undertaking addressed below), it engages principles which are the subject matter of our domestic jurisprudence, not simply some general notion of fairness.
>
> [153] The third answer is that the suggested approach prejudges the issue, which is not suitable for summary determination, as to whether the arbitration agreement does in fact operate unfairly on Mr Soleymani. If the invalidity argument is good, the very reasons which make it good, namely that it places an unfair burden on Mr Soleymani, weigh against allowing the tribunal to decide the issue under its Kompetenz-Kompetenz jurisdiction. The Judge's finding that there

> would be nothing unfair about leaving it to the arbitrator to decide that issue is inconsistent with her recognition that there was a triable issue whether this was an unfair arbitration agreement."

150. This reasoning cannot be applied wholesale in the present case, because the decision for the Court under s. 101 is different from that under s. 9, and because the facts are different. However, it is striking that Birss LJ took it for granted (a) that an English court was better placed to deal with the English law issues than a US arbitrator and (b) that arbitration overseas would place a significant burden on a British consumer.

151. In that case, these points were approached as assumption, because the arbitration proceedings had barely commenced. In this case, it is not necessary to make assumptions. I can instead rely on the evidence of Mr Chechetkin's real-world experience. The fact that the arbitrator was not receptive to arguments based on English law, and that Mr Chechetkin had to use US attorneys, were prominent features of the JAMS arbitration. Before me, these points have been heavily relied on in Ms Bell's submissions on Mr Chechetkin's behalf.

152. Apart from these points, the fundamental reason why Mr Chechetkin says that proceeding in the JAMS arbitration, in San Francisco, has been unfair to him is that it was not possible for him to bring his claim under the Financial Services and Markets Act 2000 in those arbitration proceedings. I therefore turn to that claim, and to the public policy associated with it.

I4: Enforcement would be contrary to the public policy of FSMA 2000

153. It is not my role to assess the merits of Mr Chechetkin's claim under the Financial Services and Markets Act 2000. That task will fall to the Court in the context of the FSMA Proceedings. However, on the basis of the case set out in

the Particulars of Claim in those proceedings, Mr Chechetkin has at least a prima facie claim.

154. Enforcement of the Final Award would stop those proceedings in their track. The claim will not be determined. That in itself represents yet a further reason why cl. 23 (which has this effect, on the Claimants' case) must be unfair within the meaning of the Consumer Rights Act 2015. As such, it would be contrary to the public policy considerations underlying the Consumer Rights Act 2015.

155. Beyond that, the stifling of Mr Chechetkin's claim under the Financial Services and Markets Act 2000 would also be contrary to the public policy considerations underlying the Financial Services and Markets Act 2000. From Mr Chechetkin's point of view, the most important such considerations are those relating to s. 26: that contracts concluded in contravention of the general prohibition in s. 19 should be unenforceable and that the customer should be entitled to recover his money.

156. From the point of view of the public, no less important is s. 23. The investigation and criminal 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 UK.

157. More broadly, the FCA's ability to advance its statutory objectives is likely to be enhanced if claims like those advanced by Mr Chechetkin are pursued in this country, rather than being pursued overseas, or not at all. If everything happens overseas, the customer's complaints are less likely to come to the FCA's attention.

J: Mr Chechetkin's fallback arguments

158. The fallback arguments strike me as having no real force.

J1: Is the Final Award in respect of a matter not capable of settlement by arbitration?

159. I do not accept that the issues under the Consumer Rights Act 2015 and the claim under the Financial Services and Markets Act 2000 were incapable of settlement by arbitration.

160. This can be illustrated by imagining what would have happened if, at an early stage of the JAMS arbitration, the Claimants had adopted the approach foreshadowed by the undertaking offered to the Court in *Soleymani*. The JAMS arbitration would have proceeded on the basis that cl. 23 did not shut them out and that the arbitrator should deal with them. I assume she would have done so.

161. Ms Bell did not suggest that the remedies sought by Mr Chechetkin are remedies that would be beyond the powers of a JAMS arbitrator. JAMS arbitration would still have had practical disadvantages, from Mr Chechetkin's point of view, but it would have been possible in principle for the JAMS arbitration to determine and dispose of all the relevant issues.

J2: Does the Final Award deal with a difference beyond the scope of the submission to arbitration?

162. The significance of this argument ultimately fell away. Mr Chechetkin's principal objection is to the enforcement of the second sentence of paragraph 3 of Section III of the Final Award, which enjoins him from pursuing the FSMA Proceedings. However, Ms Bell accepted in submissions that this was part of the Claimants' original Demand, and so had undoubtedly been submitted to arbitration.

163. Ms Bell suggested that paragraph 7 of Section III was, however, beyond the scope of the submission to arbitration. I accept that, because Mr Chechetkin never advanced a counterclaim in the JAMS arbitration, he cannot be said to have asserted in that arbitration that Payward Ltd should repay him £613,000. However, the arbitrator was made aware by both parties that he was making that assertion in the FSMA Proceedings.

164. Furthermore, her finding in the second sentence of paragraph 7, i.e., that Mr Chechetkin engaged in risky margin trading, assumed the risk and caused the loss of the money in his account, was one she was entitled to make. That finding may not have justified the first sentence, but this is only because of the issues arising under the Consumer Rights Act 2015 and under the Financial Services and Markets Act 2000 – which the Final Award does not address.

165. In other words, the objection to paragraph 7 adds nothing to Mr Chechetkin's case under s. 103(3). Indeed, if (as I consider) the Final Award does not in fact deal with the issues arising under the Consumer Rights Act 2015 and under the Financial Services and Markets Act 2000, paragraph 7 has no real significance.

K: Discretion under s. 103 and conclusion

166. Enforcement of the Final Award would be contrary to UK public policy, within the meaning of s. 103(3) of the Arbitration Act 1996. This means that recognition and enforcement "may be refused", in the words of that provision.

167. The parties agreed that, while this phrase might have the appearance of an open discretion, they have been included only to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused.

168. This common ground reflects the view expressed in *Dallah* per Lord Mance at [67], who went on to say that, absent some "fresh circumstance" such as another agreement or an estoppel, the court would normally decline to enforce. That is the approach that I will take.

169. Here, there is no such "fresh circumstance". The Final Award therefore will not be recognised or enforced by this Court. The Claimant's arbitration claim accordingly fails.