CITATION: Lochan. v. Binance Holdings Limited, 2023 ONSC 6714
COURT FILE NO.: CV-22-00683059-00CP
DATE: 20231213

2023 ONSC 6714 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CHRISTOPHER LOCHAN and JEREMY LEEDER, Plaintiffs

– and –

BINANCE HOLDINGS LIMITED, BINANCE CANADA CAPITAL MARKETS INC., and BINANCE CANADA HOLDINGS LTD., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *James Orr, Kyle Taylor, Pujan Modi, Alexandra Allison, and Jordan Allison*, for the Plaintiffs

Caitlin Sainsbury, Pierre Gemson, Graham Splawski, and Brianne Taylor, for the Defendants

HEARD: November 29, 2023

MOTION FOR STAY OF PROCEEDINGS

I. The request for a stay

[1] The Plaintiffs have commenced a proposed class action that is still at an early stage of proceedings. The Defendant, Binance Holdings Limited ("Binance"), seeks a stay of the action in favour of arbitration.

[2] Counsel for Binance advises that the other two Defendants are related companies that are inoperative. Binance is realistically the only substantive Defendant.

[3] Binance's stay motion is brought pursuant to an arbitration agreement which the Plaintiffs and every potential class member has digitally signed. To make a somewhat long story short, counsel for Binance submits that "the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause": *Seidel v. TELUS Communications Inc*., [2011] 1 SCR 531, at para. 2.

[4] Counsel for the Plaintiffs respond that since this is a commercial relationship between parties located in different countries, the governing statue is the ICAA [*International Commercial Arbitration Act, 2017*, 7, SO 2017, c. 2, Sched. 5, Schedule 2] and the Model Law [UNCITRAL Model Law on International Commercial Arbitration, 1985, Sched. 2 to the ICAA]. They go on to submit that article 8(1) of the Model Law recognizes an exception to the general enforceability of

arbitration agreements where the agreement is “void, inoperative or incapable of being performed”: *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, at para. 88.

[5] Although Binance is the moving party seeking a stay, it is the Plaintiffs who face an uphill battle. The Supreme Court of Canada has held that, “The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate… It follows that, generally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule”: *Peace River*, at paras. 49-50.

[6] Accordingly, “[t]he burden is on the plaintiffs as the parties opposing the stay to prove on a balance of probabilities that one of the exceptions applies”: *Peace River*., at para. 88.

[7] Plaintiffs’ counsel submit that the arbitration agreement is void and inoperative on two grounds: a) it is contrary to public policy; and b) it is unconscionable. Further, it is their view that this court has jurisdiction to make that decision, applying Ontario law. The Plaintiffs have the burden of establishing these points on the balance of probabilities: *Peace River*, at para. 89.

[8] For the reasons that follow, the Plaintiffs are correct on all of these points.

II. The underlying dispute

[9] Binance is the world’s largest crypto trading platform. From 2019 until early 2022, Binance sold crypto derivatives products to Canadians over their website. These instruments have been described by the Ontario Capital Markets Tribunal as “novel and complex products that are inherently risky”: *Polo Digital Assets, Ltd (Re)*, 2022 ONCMT 32, at para. 68.

[10] Crypto derivatives contracts are securities which present “overarching investor protection concerns” and for which a prospectus is therefore required to be filed and delivered to investors: *Mek Global Limited (Re)*, 2022 ONCMT 15, at para. 65. Binance is not registered with the Ontario Securities Commission, nor has it sought any exemption from registration. In *Binance Holdings Limited v. Ontario Securities Commission*, 2023 ONSC 3825 (Div. Ct.), at para 6, the Divisional Court confirmed that Binance has never filed a prospectus with respect to any of its securities offerings.

[11] The Court further made the following findings with respect to Binance’s marketing and regulatory compliance, at paras. 710:

> [7] Binance began discussions with OSC Staff about regulatory compliance. In June 2021, Binance advised its Ontario users that it could no longer service them and that operations would cease in Ontario as of December 31, 2021. However, on December 29, 2021, Binance communicated to its users that, because of its cooperation with securities regulators, it was permitted to continue operating.
>
> [8] Binance has since acknowledged that the December communication to Ontario users was incorrect. Binance also mistakenly communicated to users and OSC Staff that restrictions were in place for Ontario accounts, when Ontario users were still able to trade on the Binance platform.

2023 ONSC 6714 (CanLII)

[9] On January 7, 2022, OSC Staff notified Binance of their intention to bring an application for a cease trade order.

[10] After further discussions, Binance and its Canadian corporation Binance Canada Capital Markets Inc. entered into the Undertaking and Acknowledgement to the OSC, dated March 16, 2022 (the 'Undertaking'). Among other things, Binance acknowledged that it had given Ontario users incorrect information and had permitted Ontario investors to continue to trade after restrictions were supposedly in place to prevent continued trading.

[12] The Plaintiffs commenced this proposed class action in June 2022. The claim is based on section 133 of the Ontario *Securities Act*, RSO 1990, c S.5 ("OSA"), which provides purchasers with a right of action for rescission or damages against a company selling securities for failure to file or deliver a prospectus. The Statement of Claim proposes a class defined as everyone in Canada who, from September 2019 to the date of the certification of this proposed class proceeding, purchased crypto derivatives contracts from Binance. In its responding materials, Binance states that as of May 2023 there were 38,003 Canadian users with Binance crypto futures accounts.

[13] Binance now seeks a stay of the plaintiffs' action based on the arbitration agreement embedded in its website terms and conditions. Binance's motion record shows that the company prompted investors to open Binance Futures accounts in "under 30 seconds." The prompt was the same regardless of whether an investor already had a Binance account or not, and whether an investor was logged in or not. Instructions that appear above the prompt state: "If you already have a Binance account, click [Log In], or click [Register] to create an account." The investors are said to have thereby agreed to roughly 50 pages of Binance terms, including a choice of law clause and an arbitration agreement.

[14] The arbitration agreement provides that Binance can make changes to any part of the arbitration agreement, and that by agreeing to the terms, users agree to any subsequent amendments to those terms. The record shows that during the proposed class period, Binance made the following changes to the arbitration agreement:

(a) From August 2019 to April 2020, the arbitration agreement directed users to arbitration in Singapore, under Singapore law, administered by the Singapore International Arbitration Centre ("SIAC") under SIAC rules.

(b) From April 2020 to January 2021, the arbitration agreement directed users to arbitration in an unspecified location, under unspecified law, under unspecified administration and rules.

(c) From January 2021 to March 2021, the arbitration agreement directed users to arbitration in Switzerland, under law to be determined in accordance with
International Chamber of Commerce ("ICC") rules, administered by the International Court of Arbitration of the ICC under ICC rules.

2023 ONSC 6714 (CanLII)

(d) From March 2021 to present, the arbitration agreement has directed users to arbitration in Hong Kong, under Hong Kong law, administered by the Hong Kong International Arbitration Centre ("HKIAC") under HKIAC rules.

[15] Binance's counsel state that its product is designed not for naïve consumers but for sophisticated investors with substantial investments. It is not apparent at this stage of the proceedings who the majority of the putative class members are and what their level of financial acuity might be. In any event, Plaintiffs' counsel take issue with Binance's characterization. They submit that the action is a consumer protection type of claim on behalf of what are primarily small investors. They point out that the Ontario Securities Commission has reported that more than half of Canadian crypto asset owners have less than $5,000 in the market.

[16] The record shows that for disputes under $1 million USD arbitrated at the HKIAC – i.e. the smallest category of disputes referenced – the median cost of arbitration in Hong Kong on an hourly rate basis is $26,743 USD (~$36,719 CAD). This figure includes registration, administrative, and tribunal fees. It does not include any other fees and costs such as travel and accommodation, the costs of tribunal appointed expert advice, legal fees, transcript services, language interpretation services, etc.

III. Grounds for the stay

[17] As indicted at the outset, Binance seeks a stay of the action pursuant to the arbitration clause, which now sets Hong Kong as the arbitral forum.

[18] The Plaintiffs rely on section 9 of the ICAA and article 8 of the Model Law to state that the agreement to arbitrate is void or inoperable. Binance replies that under article 8 of the Model Law, an agreement to arbitrate is presumptively enforceable provided that certain technical requirements are met: *Peace River, supra*, at para. 76.

[19] Plaintiffs' counsel submit that the action must not be stayed. It is their view that the arbitration agreement is null and void because it is contrary to public policy and/or because it is unconscionable.

a) Public policy

[20] Article 8 of the Model Law in the ICAA states:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[21] This exception is, among other things, an exception to the competence-competence principle by which a tribunal or arbitrator generally decides on its own competence to hear a case. The Supreme Court of Canada has stated definitively that the court, rather than an arbitrator, should determine whether the arbitration agreement is contrary to public policy when the challenge involves a "pure question of law" or one of mixed fact and law where "the relevant factual

2023 ONSC 6714 (CanLII)

questions require 'only superficial consideration of the documentary evidence in the record'": *Uber Technologies Inc v. Heller*, 2020 SCC 16, at para. 32, quoting *Dell Computer Corp v. Union des consommateurs*, [2007] SCR 801, at para 84.

[22] The Binance arbitration agreement is a standard form contract whose enforcement and interpretation has considerable precedential value. The Plaintiffs raise no individual facts for consideration and the case therefore contains "no meaningful factual matrix that is specific to the parties to assist the interpretation process": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., [2016] 2 SCR 23, at para. 24. Under these circumstances, the Court of Appeal has reasoned that "the enforceability of the arbitration clause -- falls squarely within the exception to systematic referral…[and is] very much a question of law": *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339, at para 58.

[23] Counsel for Binance submits that the arbitration agreement in issue contains a choice of law clause that designates Hong Kong law as law governing the contract and that will govern the arbitration. Accordingly, they take the position that the question of jurisdiction itself is to be determined under Hong Kong law.

[24] With respect, that makes little sense for a challenge such as that raised by the Plaintiffs. Not only is it this court's, and not the arbitrator's, jurisdiction to decide whether the matter at hand is arbitrable, but it is Ontario law, and not Hong Kong or any other foreign law, that governs the question.

[25] The Supreme Court of Canada specifically stated in *National Gypsum Co v. Northern Sales Ltd*., [1964] SCR 144 that a court cannot be asked to enforce an arbitration agreement that is "invalid as being against public policy under the *lex fori*". It is the *lex fori* – the local law of the forum – that provides the analytic measuring stick against which the proposed foreign arbitration is measured. As Justice Binnie put it in *Seidel*, *supra*, at para. 42, "whether and to what extent the parties' freedom to arbitrate is limited…will depend on a close examination of the law of the forum where the irate consumers have commenced their court case.

[26] In a challenge that alleges that arbitration in a foreign forum under foreign law contravenes public policy, the "public policy" in issue is Canadian: *Williams v. Amazon.com Inc.*, 2023 BCCA 314, at para 141. The entire point of the public policy challenge is that what may be valid in a foreign legal system is not valid and enforceable here. To insist, as Binance does, that the question be answered under the very foreign law said to violate our public policy, is to undermine the question before it can be answered.

[27] In *Uber*, *supra*, at para. 131, Justice Brown (with whom the Supreme Court majority agreed on this point) indicated that, "Several factors should be considered to decide whether a contractual limitation on legally determined dispute resolution imposes undue hardship and is therefore contrary to public policy. The first consideration is the nature of disputes that are likely to arise under the parties' agreement." In particular, he indicated that it is important to ascertain whether "the cost to pursue a claim is disproportionate to the quantum of likely disputes arising from an agreement."

2023 ONSC 6714 (CanLII)

[28] The record shows that arbitration before the HKIAC will cost each claimant just over $36,000 plus legal fees and travel expenses. This may be a feasible means of resolving disputes for large investors, but it is not viable for a consumer-type class of investors. Given that the OSC Report discloses that the average crypto investor will have something like a $5,000 claim, the choice of Hong Kong as an arbitral forum – a forum with no other connection to either the potential claimants or to Binance itself as a Cayman Islands company – could effectively amount to a grant of immunity to Binance.

[29] It is noteworthy that the Binance agreement provides no information about the fees and other costs associated with arbitration: *Uber*, at para. 96. The HKIAC rules exhibited in the record establish that as soon as an arbitration claim is filed, the claimant will have to post substantial amounts as security for costs, which can be raised and added to by order of the arbitrator as the case goes on. Accordingly, potential class member claimants will be facing a potentially large and ultimately unknown financial burden to recover a relatively small investment.

[30] It is also worth noting that that under the applicable HKIAC rules, the prospect of a virtual rather than an in-person hearing "remains a matter for the parties and the arbitral tribunal" to decide. Accordingly, the Plaintiffs or any other potential class member with a claim against Binance cannot reduce their costs by simply electing to have a virtual hearing. Binance can object and the medium itself can become contentious.

[31] For that matter, a potential claimant cannot be assured of a virtual hearing even if Binance were to agree to that procedure. They would have to go through the process of initiating arbitration, incur the costs and, presumably, post the security accompanying that process, and then apply to the Hong Kong arbitration board to determine whether then are required to appear in person at the arbitration.

[32] One additional aspect of the public policy analysis as described in *Uber*, at paras. 134-135, is the relative bargaining power of the parties. As already noted, the arbitration agreement here is part of a standard form contract. Investors click their agreement onscreen in order to invest; they cannot negotiate any of its terms, and so there is no bargaining. The process is promoted by Binance as being so quick as to take almost no time at all; and while that is likely the case, the unspoken premise is that "agreeing" to the Binance arbitration agreement takes almost no comprehension at all.

[33] Plaintiffs' counsel also point out that there is no nuance to the arbitration agreement. All claims, regardless of the specific subject matter they raise, must go to the HKIAC. The Supreme Court of Canada has long understood that the purpose of Canadian securities law is "to protect the general public against schemes or campaigns to sell shares or securities of doubtful value to unwary investors", and that, as a matter of public policy, "anything done in contravention of its prohibitions is void": *Re Northwestern Trust Co.*, [1926] SCR 412. In more modern times, the public policy of Canadian securities regulation has been to protect unwary consumers of the hidden risks inherent in their investment:

> It is clearly legislative policy to replace the harshness of *caveat emptor* in security-related transactions, and courts should seek to attain that goal even if tests carefully

2023 ONSC 6714 (CanLII)

formulated in prior cases prove ineffective and must continually be broadened in scope.

Pacific Coast Coin Exchange v. Ontario Securities Commission, [1978] 2 SCR 112, at 132.

[34] The Plaintiffs' claim does not allege breach of a technical requirement. The prospectus and other disclosure obligations in the OSA represent a "fundamental value" that is crucial to the protection of Ontario's and Canada's capital markets: *Lloyd's v. Saunders*, 2001 CarswellONT 2970, para 65. In *Lloyd's v. Meinzer*, 2001 CanLII 8586, the Court of Appeal confirmed that non-disclosure to investors such as offering securities without providing a prospectus – the very violation that Ontario's Capital Markets Tribunal has already found against Binance – offends the public policy of Ontario. Contracts entered on that basis have been held to be void *ab initio*: *Jones v. F.H. Deacon Hodgson Inc*.1986 CarswellOnt 156, para. 21.

[35] By the same logic, requiring adherence to an expensive and all-but-inaccessible arbitration procedure for resolving any and all disputes, without proper disclosure of the procedure's difficulties, offends the public policy of Ontario. It follows that if the sale of shares in contravention of public policy makes the sale contract void *ab initio*, then an agreement to arbitrate entered into contrary to public policy makes the arbitration agreement void *ab initio* as well. In that case, there would literally be nothing to enforce.

[36] On public policy grounds, I find Binance's arbitration agreement to be unenforceable.

b) Unconscionability

[37] Having determined that the arbitration agreement is unenforceable on public policy grounds, it is not, strictly speaking, necessary to turn to the Plaintiff's unconscionability argument. That said, in *TELUS Communications Inc. v. Wellman*, [2019] 2 SCR 144, at para. 85, Justice Moldaver wrote, on behalf of the majority of the Supreme Court, that "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability". Given the circumstances of the contract in issue, it is worth turning attention to the way that unconscionability applies here.

[38] Like the public policy challenge, an unconscionability challenge to an arbitration agreement is for this court, and not the designated arbitrator, to decide. Again, as the Supreme Court opined in *Uber*, at para. 46, "a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record."

[39] The Binance arbitration agreement currently specifies that the arbitration shall be governed by the laws of Hong Kong and subject to the HKIAC Rules. While the Plaintiffs concede that, generally speaking, claims under the OSA are arbitrable, the cases that confirm the arbitrability of such claims refer to domestic Canadian arbitrators applying the laws of Canada and its provinces: *Advanced Explorations Inc. v. Storm Capital Corp*. v. 2014 ONSC 3918, at para. 66.

2023 ONSC 6714 (CanLII)

[40] The HKIAC Rules, on the other hand, specify that choice of law clause identifying Hong Kong law as governing the contract "shall be construed […] as referring to the substantive law of that jurisdiction and not to its conflict of laws rules." Counsel for Binance argues that the clause's application of Hong Kong law to the dispute is a strong reason for deferring the question in the first instance to the Hong Kong arbitrator.

[41] In fact, however, the Supreme Court of Canada held in *Uber*, at para. 49, that precisely the opposite is true:

> We observe, incidentally, that departing from the general rule of arbitral referral in these circumstances has beneficial consequences. It will prevent contractual drafters from evading the result of this case through a choice of law clause. A choice of law clause could convert a jurisdictional question that would be one of law (and which therefore could be decided by the court) into a question as to the content of foreign law, which would require hearing evidence in order to make findings as to the content of foreign law, something that one would not ordinarily contemplate in a superficial review of the record.

[42] Binance makes clear in its motion materials that it is anxious for foreign law rather than Ontario law to be applied to the substantive dispute between itself and its investors. In the circumstances, that appears to mean that Hong Kong law, rather than the OSA, will be the yardstick against which Binance's conduct in marketing its product without a prospectus will be measured. This, then, raises the prospect that "staying the action in favour of arbitration would be tantamount to denying relief for the claim": *Uber*, at para. 39.

[43] The approach advocated by Binance – giving the contractually stipulated foreign law primacy over Ontario's regulatory regime – pits the policy objectives of arbitration statutes directly against the policy objectives of securities legislation in a way that makes no overall sense. In effect, it would turn our statutory encouragement of the use of arbitration as a consumer-friendly alternative to litigation into a vehicle for circumventing the consumer protection provisions of Ontario's securities legislation. This would be, in Justice Abella's words, "a significant loophole for contractual drafters to exploit": *Uber*, at para. 50.

[44] The British Columbia Court of Appeal stated in *Williams*, *supra*, at para. 85 that, "Unconscionability and public policy [are] "separate but … doctrinal cousins", each of which can justify a court departing from the general rule that contracts should be respected." The Court explained that while "public policy" emphasizes the broader societal harm in upholding a particular contract, unconscionability emphasizes the individual unfairness to a vulnerable party if the contract were to be upheld.

[45] In *Uber*, at para. 34, the Supreme Court found that unconscionability analysis, like a public policy analysis, applies to "click" contracts such as the one at issue here. I hasten to add that online click contracts are not necessarily unenforceable, and they have been upheld in other cases depending on the particular facts. But the Supreme Court has made clear that unconscionability is potentially triggered "when an arbitration is fundamentally too costly or otherwise inaccessible": *Uber*, at para. 39.

2023 ONSC 6714 (CanLII)

[46] I note that Binance has produced a Hong Kong law expert, the Hon. Geoffrey Ma, a retired former chief justice of the Hong Kong Court of Appeal. He deposes that an arbitrator under the HKIAC can, conceivably, apply foreign law such as Ontario securities law, which would be determined as a matter of fact. I also note, however, that would entail bringing expert witnesses to testify as to the content and meaning of the OSA provisions, adding yet one more layer of expense to the investors trying to have their rights determined.

2023 ONSC 6714 (CanLII)

[47] In any case, Mr. Ma indicates, at para. 34 of his report, that, "The concept of unconscionability in the context of contractual bargains…in Hong Kong law generally follows English equitable principles." That, of course, is the same origin as the Canadian law of unconscionability, so that whether the issue is one of Hong Kong law or Ontario law, the Plaintiffs' unconscionability analysis is applicable.

[48] Counsel for Binance submit that their client's product is for sophisticated investors who understood what they were getting into when they invested their money. Accordingly, they say, the unconscionability doctrine does not apply to their transactions.

[49] Without evidence on who the class members all are, it is hard to generalize in that way. But even assuming that crypto investors are not likely to be the equivalent of Lord Denning's "Old Herbert Bundy" of Yew Tree Farm, in purchasing a complicated investment product found by the Capital Markets Tribunal and Divisional Court to have been issued without an explanatory prospectus, they, like Mr. Bundy, "did a very foolish thing": *Lloyd's Bank v. Bundy*, [1974] EWCA Civ 8.

[50] Through the Anglo-Canadian cases on unconscionability "there runs a single thread. They rest on "inequality of bargaining power": *Ibid.* And given Mr. Ma's explanation, one can surmise that it is no different in Hong Kong. The Plaintiffs and other prospective class members signed an unnegotiable 'click' contract where not only were the details, including the changeable location, of the arbitration clause were buried out of sight, and the logistical complexity and expense of arbitration were not revealed anywhere.

[51] Binance, as the party that designed and whose professionals drafted the contract, engineered the arrangement to take advantage of the complexity that was hidden behind the superficially benign appearance of an arbitration clause. The inequality of information and inequality of power in the bargaining relationship that resulted from this informational deficit was at a maximum. Under English law as well as Canadian law, "Unconscionability is an equitable doctrine that is used to set aside 'unfair agreements [that] resulted from an inequality of bargaining power'": *Uber*, at para. 54, quoting John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 424.

[52] I find Binance's arbitration agreement to be unconscionable, and therefore unenforceable.

IV. Disposition

[53] Binance's motion for a stay of proceedings is dismissed.

[54] The parties may make written submissions on costs. I would ask Plaintiff's counsel to email my assistant short submissions within two weeks of today. Since that brings us to the week of the

Christmas/New Years holidays, I would ask Binance's counsel to email my assistant equally short submissions within four weeks thereafter.

Date: December 13, 2023

____

Morgan J.

2023 ONSC 6714 (CanLII)