Enforceable Terms and Arbitration Provisions Important for Providers in Current Crypto Cyberthreat Environment

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According to a recent [Bloomberg Law article](#) [subscription required], in the past year there has been a sharp decline in active civil suits against cryptocurrency exchanges, digital wallet, mobile phone providers and others involving claims related to crypto hacking incidents or cybertheft, due, in part, to increased security protocols and concerted electronic contracting legal strategies that have updated terms of service provisions and moved such cases to arbitration. In addition, the report suggests that providers have also reexamined user agreements to update limitations of liability provisions and class action waivers. These legal strategies remain important for providers, given the continuing threat of crypto theft, protocol exploitation and wallet hacks – according to a recent [crypto crime report from Chainalysis](#), while the amount of funds stolen decreased by half from the previous year's numbers, the number of individual hacking incidents rose.

Indeed, the importance of enforceable terms was evidenced in a recent appeals court decision where the Ninth Circuit rejected a user's challenge to a crypto exchange's arbitration provision. In the case, the Ninth Circuit reversed a district court ruling denying cryptocurrency exchange Coinbase, Inc.'s ("Coinbase") motion to compel arbitration of claims brought by Plaintiff Abraham Bielski ("Plaintiff") related to an alleged unauthorized and fraudulent transfer of funds taken by cyberthieves from his Coinbase account. (*Bielski v. Coinbase, Inc.*, 87 F.4th 1003 (9th Cir. 2023), *rehearing en banc denied*, No. 22-15566 (9th Cir. Jan. 16, 2024)).[1] The appeals court found that the delegation provision included in Coinbase's arbitration agreement was enforceable, rejecting arguments that such a provision was unconscionable.

Coinbase's user agreement at issue included an arbitration agreement with a delegation provision, which delegated to the arbitrator any dispute arising out of the agreement, "including the enforceability, revocability, scope, or validity of the [a]rbitration [a]greement." Upon the filing of the Plaintiff's suit, Coinbase moved to compel arbitration, arguing that under the user agreement, Plaintiff's claims and any questions of arbitrability rest with an arbitrator, not the court. Plaintiff countered and advanced a challenge that the delegation provision was unenforceable because it is procedurally and substantively unconscionable, presented as an adhesion contract and lacking mutuality and imposing one-sided, onerous pre-arbitration procedures on users.

The district court agreed with the Plaintiffs and denied Coinbase's motion to compel arbitration. However, on appeal,[2] the Ninth Circuit reversed and found that the delegation provision enforceable. The court noted that in evaluating an unconscionability challenge to a delegation provision under California law, a court "must be able to interpret that provision in the context of the agreement as a whole, which may require examining the underlying arbitration agreement as well." Examining the agreement, the appeals court found that while the Coinbase delegation provision presented as part of an adhesion contract "contains some level of procedural unconscionability," the agreement's pre-arbitration dispute resolution procedures that require certain informal resolution processes "are not onerous or beyond the reasonable expectation of the user." Ultimately, the court held that "the delegation provision's low levels of procedural and substantive unconscionability fail to tip the scales to render the provision unconscionable and therefore unenforceable."

Beyond the claims of Plaintiff Bielski, it should be noted that the previously filed Third Amended Complaint includes two other named plaintiffs in addition to Bielski. While the case was still pending in court back in early 2023, Coinbase moved to similarly compel arbitration of these other plaintiffs' claims and dismiss other claims on the merits. At the time, the district court ordered that oral argument on Coinbase's motions would be postponed due to pending appeals. However, in a recent Order, the court agreed to offer the parties additional time to confer on how to proceed with the pending motions to compel arbitration in light of the Ninth Circuit's recent decision adverse to the remaining plaintiffs. A review of the court docket shows that Coinbase has moved to dismiss or compel arbitration as to the remaining defendants, a petition which has been opposed by the two other named plaintiffs; oral argument is scheduled for later this spring.

Regardless on how the litigation proceeds, the Ninth Circuit's decision, beyond its importance on certain procedural issues, highlights the value of sound online contracting practices. As we've written in a [prior post](#), it is prudent for online entities to have enforceable terms presented in a mandatory, reasonably-presented user interface and written to avoid basic unconscionability and "illusory" contract challenges, remain important for online companies – including crypto-related entities – in limiting litigation and liability risks.

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[1] Incidentally, the Ninth Circuit recently decided another case where it affirmed a lower court's order granting an online company's motion to compel arbitration after finding that the presentation of the hyperlink to the terms near the "Place Order" button was sufficiently conspicuous to place the user on notice of the terms and the arbitration clause itself was not substantively unconscionable due to the mere presence of a unilateral modification provision in a separate part of the terms. See *Patrick v. Running Warehouse, LLC*, No. 22-56078 (9th Cir. Feb. 12, 2024).

[2] Note: The caption of the instant case may be familiar to many readers as the parties brought a procedural issue up to the Supreme Court, which issued a decision in June 2023 that facilitated the recent Ninth Circuit's decision. Following the district court's denial of Coinbase's motion to compel arbitration in April 2022, the district court later denied Coinbase's motion to stay proceedings pending resolution of its interlocutory appeal of the court's decision on the arbitration issue. The Ninth Circuit likewise declined to stay the district court's proceedings pending appeal, prompting Coinbase to file a further petition for Supreme Court review, which was granted. In June 2023, the Supreme Court [reversed](#), holding that a district court must stay its pre-trial and trial proceedings while an interlocutory appeal on the question of arbitrability is ongoing (*Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023)).

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