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Court of Appeal rules on primacy of consumer rights over party autonomy to agree to arbitrate disputes

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Introduction

In *Soleymani v Nifty Gateway LLC (CMA Intervening)*,[1] a United Kingdom-based collector of non-fungible tokens (NFTs) participated in an NFT auction run by a New York-based marketplace (Nifty Gateway), which was subject to terms and conditions (T&Cs) on a website. Following a dispute about the validity of the auction, the collector challenged the New York arbitration and governing law agreement in the T&Cs in the English courts as unfair under UK consumer protection laws and claimed that the auction contract was invalid under the UK Gambling Act.

The Court of Appeal held that the English courts had no jurisdiction to hear the direct challenge to the arbitration agreement. However, it lifted a stay on the other claims and ordered a trial as to whether the arbitration agreement is unfair. It made clear that the vindication of an English consumer's rights takes precedent over other factors in favour of allowing a "foreign" arbitrator to decide the matter. This decision impacts any business that sells goods, services or digital assets to customers in the United Kingdom and uses arbitration, governing law or foreign choice of court agreements in any online T&Cs.

Facts

In April 2021, Nifty Gateway LLC (Nifty) auctioned an NFT for a Beeple work called "Abundance".[2] Nifty is a well-known NFT marketplace that operates from New York but is accessible from many jurisdictions via the internet. Nifty accepted, in this case, that it envisaged doing business globally and the technology it was trading on was borderless and global.

Mr Soleymani is a high-net-worth individual domiciled in the United Kingdom and a keen collector of NFTs. Soleymani bid $650,000 for the "Abundance" NFT but, once the dispute had arisen as to the fairness of the auction, he refused to pay and withdrew all funds from his Nifty account.

Nifty used (and seems to continue to use) a single set of T&Cs that users are required to accept when creating an account and participating in an auction. The T&Cs include a New York governing law clause and an arbitration agreement that require disputes to be referred to arbitration in New York under JAMS rules.

In July 2021, Nifty commenced arbitration. Soleymani challenged the jurisdiction of the arbitrator. He also issued proceedings in the English courts seeking three declarations that sought to stop the arbitration dead in its tracks. These declarations were that:

- the arbitration clause was unfair and not binding (the arbitration claim);
- the governing law clause was unfair and not binding (the governing law claim); and
- any contract resulting from his bid was illegal under the Gambling Act 2005 (the Gambling Act claim).

In turn, Nifty challenged the jurisdiction of the English court and alternatively applied for a stay of proceedings pursuant to section 9 of the Arbitration Act 1996 on the basis that the matters in dispute were the subject of an arbitration agreement.

Background

Lord Justice Popplewell quoted the following statutory provisions in paragraphs 23 to 37 of his judgment.

Jurisdiction for consumer disputes

The English court has jurisdiction to hear consumer disputes pursuant to sections 15B-E of the Civil Jurisdiction and Judgments Act 1982 (CJJA), which replicates part 4 of the EU Recast Brussels Regulation.[3] Section 15B(2)(b) states that consumers can bring proceedings relating to a consumer contract in the courts of their domicile. However, section 15A of the CJJA states that section 15B and 15C apply only if "the subject-matter of the proceedings and the nature of the proceedings" are within the scope of the EU Recast Brussels Regulation as defined by article 1. Article 1(2)(d) excludes arbitration (the arbitration exception).

Arbitration agreements in consumer contracts

In the United States, consumer arbitration is widespread, supported by consistently pro-arbitration decisions of the Supreme Court and notwithstanding its prohibition in numerous states (including New York). In the digital asset context, there have been recent decisions in which the federal courts have ordered consumers to arbitrate claims because of arbitration agreements in website T&Cs.[4] In contrast, the United Kingdom and European Union (as the UK consumer protection law has not yet departed from EU law) adopt a more protective approach and have focused on other forms of alternative dispute resolution, such as the EU Online Dispute Resolution Platform. Arbitration agreements are not prohibited but are presumed to be unfair, and therefore invalid. The relevant rules are contained in the Consumer Protection Act 2015 (CRA) and the Arbitration Act 1996.

Application to foreign contracts
Section 74 of the CRA says that the CRA protections apply despite a choice of foreign law if the consumer contract has a "close connection" with the United Kingdom. The fairness of Nifty's T&Cs governing law agreement itself did not receive much attention in this case (as it will be a matter for trial of one of Soleymani's substantive claims, should that ever take place). However, article 6 of the EU Rome I Regulation (which continues to apply in England post-Brexit)[(5)] provides that the governing law will be that of the consumer's place of habitual residence and choice of law agreements are only permitted so long as they do not deprive the consumer of the protection afforded to them by the law of their home state.

Unfair terms
Section 62 of the CRA says that an unfair term of a consumer contract does not bind the consumer and "unfair" means "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". The CRA (section 71(2)) requires the court to consider whether a term is unfair of its own motion.

Potentially unfair arbitration
Part 1 of Schedule 2 to the CRA contains an indicative list of terms that may be regarded as unfair and includes an agreement to "take disputes exclusively to arbitration not covered by legal provisions".[(6)] Section 89(3) of the Arbitration Act 1996 says that the CRA applies regardless of the law of the arbitration agreement.

Automatically unfair arbitration
The Arbitration Act 1996 (section 91) plus delegated legislation deems an agreement unfair automatically (under the CRA) where a claim is less than £5,000.

Stay of proceedings for arbitration
Section 9 of the Arbitration Act 1996 permits a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under an arbitration agreement is to be referred to arbitration to apply to the court to stay the proceedings. A stay is mandatory unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed (section 9(4)).

High Court

Nifty's jurisdiction challenge
Clare Ambrose (sitting as deputy High Court judge) held that the arbitration claim failed because the CJJA did not give the court the jurisdiction to determine a claim by a consumer seeking to invalidate a foreign arbitration agreement.[(7)] The "arbitration exception" in the EU Recast Brussels Regulation excluded jurisdictional rules allowing consumers to sue in their home jurisdictions where the claim was a challenge to an arbitration agreement. The arbitration exception did not apply to the other claims and so consumer jurisdiction would exist (via section 15B(2)(b) of the CJJA) if Soleymani was a consumer and the Nifty T&Cs were a consumer contract.

The first point was conceded by Nifty for the purposes of the jurisdictional challenge only (perhaps not surprising as the English courts have held that users of trading platforms engaging in complex crypto trades worth hundreds of thousands of pounds were consumers where it was an investment of personal wealth).[(8)] The judge held that Soleymani had the "better of the argument" that Nifty was directing commercial activities to the United Kingdom. Those issues were not appealed but will now be determined at the trial ordered by the Court of Appeal.

Nifty's section 9 stay application
The parties accepted that section 9(1) applied as the arbitration agreement was incorporated into the Nifty T&Cs. The focus was therefore on section 9(4) and whether Soleymani could show (as it is the respondent's burden) that the arbitration agreement was "null and void, inoperative or incapable of being performed". This permitted Soleymani to mount a collateral attack on the arbitration agreement as he argued that the court had to determine the fairness of the arbitration agreement in order to determine whether it was binding for the purposes of section 9(4), and not leave the matter to the arbitrator.

The judge recognised that Soleymani had strong arguments that the arbitration agreement was unfair under consumer protection law and that these were issues that could only be determined at a trial (and not on a summary basis). However, she stayed proceedings because she felt that other factors made it more appropriate for the arbitrator to decide on jurisdiction. She highlighted that the nature of the NFT was relevant as, where transactions were "fundamentally de-centralised and borderless", an English judge could not be said to be significantly better placed than a US judge or arbitrator to decide the questions of fairness raised".[(9)]

Court of Appeal

Soleymani appealed the High Court judgment on three grounds. The first two grounds concerned the Court's jurisdiction to hear the direct challenge to the arbitration agreement under the CJJA and were dealt with by Lord Justice Popplewell. The third ground attacked the stay and was dealt with by Lord Justice Birss.

Ground one
Ground one was that the arbitration exception in article 1(2)(d) of the EU Recast Brussels Regulation did not apply (the claim fell within articles 17 and 19 instead) and the Court had jurisdiction under section 15B of the CJJA.

As a preliminary matter, Popplewell confirmed that the CJJA did no more than import the relevant parts of the EU Recast Brussels Regulation dealing with consumer claims.[(10)] This part of the judgment contains an interesting insight into how the courts will interrogate secondary legislation that imports EU laws into English law post-Brexit in order to establish whether the intent was to merely copy or to modify the EU law.[(11)] Popplewell reviewed the ministerial memorandum that had been laid before Parliament and held that there was no intent to expand the EU Recast Brussels Regulation upon its incorporation into English law.

As section 15A of the CJJA stated that the rest of the provisions applied only if the EU Recast Brussels Regulation applied, two issues therefore arose:

- What is the scope of the arbitration exception in article 1(2)(d) of the Recast Brussels Regulation? It applies not only to proceedings directly relating to the validity of an arbitration agreement but also those that are "essentially concerned with that question" (ie, to impugn the validity or existence of the arbitration agreement).[(12)] Soleymani's challenge to the arbitration agreement fell squarely within the exception.[(13)]

- Do the consumer protection jurisdiction grounds (in section 15B-E of the CJJA) take precedence over the arbitration exception? There was no authority on this specific point so Popplewell proceeded from first principles. In doing so he expressed a particular concern that the courts of the seat of arbitration could be undermined if the arbitration exception did not apply if, for example, a consumer could use consumer protection jurisdiction grounds to apply to their home courts for the removal of an arbitrator.

Notwithstanding the lack denial of jurisdiction to hear the arbitration claim, Popplewell said that he was confident that his conclusion would not have a significant impact on consumers because they can bring substantive claims in respect of any goods or services purchased on international platforms (using the section 15B gateway). If the provider seeks a stay, then the court will assess the validity of the arbitration agreement as part of section 9 (see ground three below) or, alternatively, on enforcement of any award. Secondly, such claims will be easier to serve on foreign parties following the introduction of new jurisdictional gateways into the Civil Procedure Rules in October 2022, which now apply to claims arising from contacts where offers were received in England (rather only where made in England). Popplewell said that this gave the English court jurisdiction whenever a consumer "clicks the mouse" in England.

Ground two

Ground two was that section 15D(1) of the CJJA should have applied to the governing law and Gambling Act claims.

Popplewell dismissed ground two because he had already found as part of ground one that section 15D(1) of the CJJA was concerned with jurisdiction agreements and not arbitration agreements.[(14)]

Ground three

Ground three was that the stay of the governing law and Gambling Act claims were wrong because the judge did not determine "fairness" or direct a trial on that issue.

Where there is a dispute as to the existence or effectiveness of an arbitration agreement for the purposes of a section 9 Arbitration Act 1996 stay application, the English courts have identified four courses of action. They can:

- decide that an arbitration agreement exists in a "summary fashion" based on the written evidence and grant a stay;
- decide that an arbitration agreement does not exist on a summary basis and refuse a stay;
- order a trial where there are triable issues (eg, complex disputes of fact); or
- let the arbitral tribunal determine the matter.[(15)]

In principle, the courts have very broad discretion to decide on their approach[(16)] but frequently have held that a stay will be granted only where they are "virtually certain" (on a summary basis or after a trial) that an arbitration agreement exists.[(17)] This has been justified on grounds of convenience, fairness and cost.[(18)] However, the approach has been criticised heavily as encroaching on the general principle that an arbitral tribunal determines its own jurisdiction (ie, *kompetenz-kompetenz*).[(19)] There are some cases in which the courts have shown more deference to foreign-seated arbitral tribunals.[(20)] The presence of mandatory provisions of law that restrict (or potentially restrict) the use of arbitration add an additional layer of complexity.

Against that background, the judge's decision to grant a stay in favour of the arbitrator could be characterised as contrary to the general approach of the English courts. However, she was not criticised for her general approach. Instead, Birss took issue with the weight given to the different factors and, in particular, he gave Soleymani's consumer rights primacy. The central theme of his judgment is clear from the warning issued at the outset of his analysis that:

> *no matter how global, borderless or decentralised a trader would say its internet business is, if the trader has directed its relevant commercial activities to this country then its dealings with consumers here are subject to our consumer law.*[(21)]

In his view, the "vindication" of Soleymani's consumer rights (notwithstanding that in this case that was the narrow issue of the challenge to the foreign governing law agreement) would best be decided by a domestic court because:

- the English courts were better placed than the arbitrator to make the assessment as to whether the arbitration agreement was unfair under consumer protection legislation because it involved "domestic concepts";[(22)] and
- there was precedential value in decisions regarding consumers' rights and so such matters and that would not be possible in private arbitration.[(23)]

Birss referred repeatedly to this principle being a "powerful factor" in the analysis and distinguished other authority on section 9 on the basis that it did not deal with consumer contracts.

The UK Competition and Markets Authority (CMA) had intervened on this ground and had urged the court to determine the fairness of arbitration agreements to avoid undermining the high level of protection given to UK consumers. The CMA's position was that the courts were required to determine compliance of an arbitration agreement with the CRA when hearing any section 9 Arbitration Act 1996 application pursuant to section 71 of the CRA. Birss did not accept that section 71 created any freestanding jurisdiction but said that it was strong support for his view that the matter should not be left to a foreign arbitrator.

Birss rejected the other factors identified by the judge. He did not accept that there was significant overlap between the issues of fairness under New York law (and the JAMS Consumer Policy) and English law and, at the time of the hearing, it remained unclear whether the arbitrator would consider the CRA at all.[(24)] Birss also held that the judge had been wrong to attribute significant weight to the fact that the T&Cs were New York law governed and subject to a New York seated arbitration. In his view, there was a strong connection between the dispute and England.[(25)] Finally, Birss held that a stay would effectively pre-judge the issue of whether the arbitration agreement was unfair as, if it was, permitting the arbitrator to decide on jurisdiction would be an unreasonable burden on Soleymani.[(26)]

Comment

The New York arbitration has continued in parallel with the English proceedings. An award is awaited. Therefore, there is now a likelihood of conflicting decisions on the validity of the arbitration agreement in Nifty's T&Cs. If the New York arbitrator finds in favour of Soleymani then this will likely be the end of the matter.

If not, the English High Court will have to consider the potentially difficult issues of whether Soleymani is a consumer in this context, how online marketplaces target their business at different jurisdictions (and whether the nature of NFTs and other crypto assets is relevant in that assessment) and when a requirement to arbitrate is unfair in this case. The outcome is not a foregone conclusion; assessments of

the fairness of arbitration agreements have gone both ways in the past, often influenced by the personal circumstances of the consumer.[27]

The CRA is not new (it had several predecessors) but the issues in this case have not been considered recently by the English courts. Reported decisions in which arbitration agreements are challenged under consumer protection legislation arise from older legislation. Global ecommerce is equally not new but has not resulted in the use of consumer arbitration in England for various reasons. The recent growth of crypto exchanges and decentralised autonomous organisations may force the courts to grapple with the issue anew as many of those entities use US-centric T&Cs, which include dispute resolution provisions not tailored to different jurisdictions.[28] This decision may therefore open the door to similar cases (in England and across the European Union given the similarities in the consumer protection legislation).

There remain a number of open questions that may be refined in future similar cases:

- the role of the relevant foreign law – only brief consideration was given to the protection that New York law (or the JAMS rules) would provide consumers or whether that protection was equivalent to the CRA. To the extent that protection was equivalent, that may be an argument against the English courts having to consider the fairness of arbitration agreements. That may have been a difficult question in this case. Mandatory arbitration agreements in consumer contracts are banned under New York law[29] but are permitted under US federal law.[30] Would Birss have reached a different conclusion if the applicable law was that of an EU member state that had similar legislation to the CRA?;
- burden on parties – Birss accepted the judge's finding that there was no actual burden on Soleymani and no imbalance between the parties but said this did not displace the "powerful factor" of vindicating consumer rights. It is arguable that there are good reasons for giving those factors more weight, such as avoiding conflicting decisions and reducing the burden on the English court's time and resources;
- public decision – the argument in favour of consumer cases being heard in public is that it raises public awareness of rights, claims and issues with goods and services in the market. However, there are other groups that would benefit equally from public decisions and precedents but that is not a freestanding ground on which a court can determine the jurisdiction of an arbitral tribunal. This also ignores the potential benefits of arbitration to consumers (even if private) and the fact that arbitration does not have to be private at all. One issue that may arise at trial is whether an arbitration agreement can be fair under the CRA if it is not held in private (following the example of reforms made by the International Centre for Settlement of Investment Disputes in respect of investment treaty arbitration; and
- the role of foreign arbitrators and courts – Birss's view that the English courts are better placed than arbitrators to determine the issues was not supported by any detailed reasoning and was contrary to the view expressed by the judge that the US arbitrator and New York courts would be well equipped to handle such disputes, in the same way that English courts and arbitrators frequently decide questions of foreign law.[31] Again, would the outcome have been different if the T&Cs provided for arbitration in Paris or Madrid? As consumer arbitration is not banned outright in England, but is subject to a general test of fairness, there are good practical and principled reasons for that to be assessed by an arbitrator.

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Endnotes

(1) [2022] EWCA Civ 1297.

(2) "Abundance".

(3) Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(4) For example, in respect of the MakerDao crash, see *Johnson v Maker Ecosystems Growth Holdings, Inc.*

(5) The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc,) (UK Exit) Regulations 2019 (SI 2019/834).

(6) The words "not covered by legal provisions" are taken directly from the EU directive on which the CRA is based and their meaning as a matter of English law is the subject of some debate.

(7) [2022] EWHC 773 (Comm) (the High Court judgment).

(8) *Ang v Reliantco Investments Ltd* ([2019] EWHC 879 (Comm).

(9) High Court judgment, [109].

(10) Judgment, [58]-[59].

(11) Judgment, [55].

(12) Judgment, [62]-[71].

(13) Judgment, [96].

(14) Judgment [83] and [91].

(15) *Birse Construction Ltd v St David Ltd* [2000] B L R 57; *Ahmad Al Naimi v Islamic Press Agency Inc* [200] 1 Lloyd's Rep 150 (CA).

(16) See list of factors in *The Barito (Golden Ocean Group Ltd V Humpuss Intermoda Transportasi Tbk Ltd)* [2013] EWHC 1240 (Comm), [59].

(17) *Al-Naini v Islamic Press Agency Inc* [2000] Lloyd's Rep 522.

(18) *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] 2 Lloyd's Rep. 755, [35]-[36].

(19) Merkin and Flannery on the Arbitration Act 1996, para. 9 7 2; D Joseph, "Jurisdiction and Arbitration Agreements and their Enforcement" (third edition), para 11 33.

(20) D Joseph, "Jurisdiction and Arbitration Agreements and their Enforcement" (third edition), para 11.33. See approach in *JSC Aeroflot Russian Airlines v Berezovsky* [2013] 2 Lloyd's Rep 242, [73] (Zurich seated arbitration) and *A v B* [2006] EWHC 2006 (Comm) (Swiss arbitration).

(21) Judgment, [137].

(22) Judgment, [142] and [145].

(23) Judgment, [145].

(24) Judgment, [21]. Nifty had argued that the arbitrator should not apply these but, in a (ultimately futile) attempt to shore up its position after the Court of Appeal hearing, it undertook to the court to ensure that the arbitrator did consider all English consumer protection law issues.

(25) Judgment, [147].

(26) Judgment, [153].

(27) Arbitration agreements were considered in unfair in *Mylcrist Builders Limited v Buck* [2009] 2 All ER (Comm) 259 and in *Zealander & Zealander v Laing Homes* [2000] TCLR 724. But an agreement to arbitrate in Denmark (under Danish Arbitration Board rules and in Danish) was held fair in *Heifer International Inc v Christiansen* [2008] Bus LR D49, a case involving a wealthy individual engaging a foreign designer for a major house renovation in England.

(28) The ever-growing number of such entities makes any generalisations difficult but an ambitious attempt at an empirical review can be found in Meshel, Tamar and Yahya, Moin A, "Crypto Dispute Resolution: An Empirical Study" (5 October 2021). *Journal of Law, Technology and Policy*, Volume 2021, No. 2, 2021.

(29) New York General Business Law article 399-c.

(30) For example, see *Andersen v Walmart Stores, Inc*, 2017 WL 661188, *8 (W D N Y 17 February 2017).

(31) High Court judgment, [115]. See also Merkin and Flannery on the Arbitration Act 1996, para 9.7.5.