



Neutral Citation Number: [2022] EWHC 773 (Comm)

Case No: LM-2022-000039

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before :

BEFORE MS CLARE AMBROSE
(Sitting as a Deputy High Court Judge)

Between :

AMIR SOLEYMANI

Claimant

- and -

NIFTY GATEWAY LLC

Defendant

Ms Angeline Welsh and Mr Ian MacDonald (instructed by **Russells**) for the **Claimant**
Mr Andrew Feld (instructed by **Osborne Clarke**) for the **Defendants**

Hearing dates: 1 March 2022

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Ms Clare Ambrose:****Introduction**

1. The Claimant, Mr Amir Soleymani, took part in an auction held on the Defendant's online platform between 30 April 2021 and 2 May 2021 and placed a bid for a blockchain-based non-fungible token (also known as an NFT) associated with an artwork by the artist known as Beeple titled "Abundance". His claim in these proceedings is for declaratory relief relating to the contractual basis of that participation.
2. The issue for me to decide is whether the English court should decline jurisdiction over the Claimant's claim or stay the proceedings. The Defendant has disputed jurisdiction and the matter before me is the hearing of its application for:
 - a) an order under CPR Part 11 declaring that the Court has no jurisdiction or will not exercise its jurisdiction; or
 - b) an order staying the proceedings under CPR Part 3.1(2)(f) and/or s.9 of the Arbitration Act 1996.

Procedural Background

3. On 9 September 2021 the Claimant commenced these proceedings by issuing a Part 7 Claim in the Queen's Bench Division, with particulars of claim seeking declaratory relief.
4. On 12 October 2021 the Defendant acknowledged service and stated an intention to contest jurisdiction. On 25 October 2021 it issued its application challenging jurisdiction and later applied for the matter to be transferred to the Commercial Court. The matter was transferred into the Circuit Commercial Court.
5. There are before me statements from the Defendant's solicitor, Mr Charles Wedin, plus a statement from Mr Soleymani.

Factual Background

6. Some factual matters appear reasonably clear from the written statement evidence and the particulars of claim.
7. The Claimant is an individual resident in Liverpool. He describes himself as an entrepreneur, activist and a philanthropist. He also collects fine art and has collected NFTs for some time. He has set up a private gallery to display his art collection.
8. The Defendant is a limited liability corporation registered in the State of Delaware with business premises in New York. It operates an online platform via which digital assets can be bought and sold. The assets can be sold via auctions. Users of the platform are also able to purchase assets directly from other users.
9. The digital assets traded on the platform are known as non-fungible tokens or NFTs. These exist as a unique string of code stored on a blockchain ledger. The NFTs traded on the platform are each specifically associated with a piece of digital artwork.

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10. On or about 26 February 2021 the Claimant opened an account with the Defendant for use of its platform. The "sign-up" page for the platform states: "By signing up, you agree to the Terms and Conditions and Privacy Policy". Both documents were hyperlinked, meaning that a new joiner was able to click through and read both documents before signing up, but was not obliged to scroll through them.
11. The Claimant has been a frequent user of the platform and prior to the auction that took place on 30 April to 2 May 2021, he had purchased over 100 NFTs on the platform. He has taken part in at least 10 separate auctions (including auctions where he bid unsuccessfully for items).
12. Between 30 April 2021 and 2 May 2021 the Claimant placed several bids on an auction on the platform for a blockchain-based NFT associated with an artwork by Beeple titled "Abundance" ("the Auction"). The Claimant's last bid, in the sum of US\$650,000.00, was made on 2 May 2021 ("the Bid").
13. There was an issue as to what the Claimant would have seen or reasonably understood before making bids in the Auction. The Defendant says that each auction is subject to rules posted under the caption "How does this work". If participants clicked on this caption for the Auction they would have been shown a message stating that it was an auction under which the 100 highest bidders would receive one of the editions, with edition numbers distributed in order of highest bids. It says that a confirmation screen would have been shown to a participant prior to confirming a bid stating that, "This is a ranked auction. The ranking you have determines the edition number you receive. As new bids update, your ranking may change. All bids are final. You may place new bids as needed". It says that this message was also shown on the leader board screen showing bids being made. The Claimant cannot recall any confirmation screen and says he was unaware that the Auction was different to a traditional auction where only the highest bidder wins the item under auction and had not previously come across a ranked auction as described by the Defendant.
14. On or about 3 May 2021, the Defendant informed the Claimant that he had been a "winner" in the Auction and that he was liable in the sum of his Bid. There is a dispute as to whether the Claimant is liable for that sum. The Defendant maintains that all accountholders whose bids were among the highest one hundred bids placed on the Auction were "winners" of a numbered edition of the Beeple Abundance artwork corresponding to the position of their respective bids. Thus the maker of the highest bid received the first edition, the maker of the second highest bid received the second edition, and the Claimant's Bid was the third highest and obliged him to pay the amount bid for which he would receive the third edition.
15. On 20 July 2021 the Defendant commenced arbitration in New York with JAMS (also known, at least formerly, as the Judicial Arbitration and Mediation Services) seeking payment of that sum. JAMS is a large and well-known private provider of alternative dispute resolution services that is based in the US.

The New York Arbitration

16. Both sides relied on what had taken place in the arbitration ("the NY arbitration") in their statement evidence and skeleton arguments, and in argument in open court.

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17. On 20 July 2021 the Defendant filed a Demand for Arbitration Form seeking arbitration in New York relying upon the arbitration clause (clause 17) in its Terms of Use and claiming US\$ 650,000 for breach of contract.
18. On 9 September 2021 the Claimant filed a “motion to stay” within the NY arbitration, and also commenced these proceedings. On 29 September 2021 the Defendant opposed the motion. On 13 October 2021 the Claimant replied on the motion to stay.
19. On 28 October 2021 the arbitrator, a retired judge, his Honour Theodore H. Katz ordered the parties to lodge submissions, by way of a "letter-brief" addressing the question of whether the Arbitration is appropriately subject to the JAMS Policy on Consumer Arbitrations and in particular on the question of whether the Claimant meets the definition of a "consumer".
20. The Claimant indicated that the JAMS Policy imposes certain standards of fairness in arbitration proceedings 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 purposes, or personal banking transactions.
21. On 7 December 2021, having considered the parties' submissions, the arbitrator issued two decisions. First, he made a procedural order stating that for present purposes the preliminary determination made by the JAMS national office, that the JAMS Policy on Consumer Arbitrations shall apply to this proceeding should remain undisturbed. This means that on a preliminary determination Mr Soleymani is being treated as a consumer as understood in the JAMS Policy.
22. On 7 December 2021 the arbitrator also issued a ruling denying the Claimant’s motion to stay and indicating he would set out a briefing schedule to determine the Claimant’s jurisdictional objection. He set out his decision in a fully reasoned written decision extending over more than 16 pages, stating that:

“Whatever factual arguments Respondent [Mr Soleymani] raises about his knowledge of the Terms of Use, their fairness, whether he effectively agreed to them, whether they are unconscionable or inconsistent with his rights under English law, and whether the auction rules were deceptive or unlawful, cannot be resolved on this instant motion...”

The only question to be resolved in [sic] whether the Arbitrator has jurisdiction to resolve those issues, and the answer to that question is clear – he does.”

23. A further conference took place on 16 December 2021 in the US arbitration where the arbitrator:

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- a) allowed the Claimant to file a further motion challenging the arbitrability of the Defendant's claim in light of UK consumer protection law, and set a timetable for submissions to be filed by the parties.
 - b) ordered that discovery in the arbitration should proceed simultaneously, with initial disclosures due on 19 January 2022, and a report to the arbitrator with a proposed discovery schedule by 1 February 2022;
 - c) indicated that the arbitration would be heard in May or June of 2022;
 - d) declined to make any order preventing the parties from introducing facts concerning the arbitration in these proceedings before the English Court.
24. On 21 January 2022 the Claimant served a 24 page submission drafted by his US lawyers to dismiss the arbitration pursuant to the New York Civil Practice Law and Rules, CPLR 3211 (described by one side as a long arm statute) mainly on 4 specified grounds, including that under New York law the Defendant's terms were not properly brought to his attention. He argues that the Defendant:
- (1) lacks standing or legal capacity to bring an action in New York;
 - (2) has no jurisdiction in respect to the subject matter of the arbitration;
 - (3) has failed to state a claim for breach of contract; and
 - (4) its claim is barred under the doctrine of payment and release.
25. On 7 February 2022 the Defendant responded in a 20 page document, and on 14 February 2022 the Claimant replied in a 15 page document. The Claimant served his own statement in the reference. The statement is said to be served with a JAMS Reference number.
26. On 7 February the arbitrator issued a procedural order making provision for pre-hearing disclosure, factual depositions to be served by June 2022 and listing an evidentiary hearing on 13-14 September 2022. He also fixed a telephone conference for 17 May 2022 as a "status conference", also to consider whether the hearing will be virtual or live.

The Terms of Use and Arbitration Agreement in Dispute

27. The Defendant's February 2020 Terms of Use provided as follows. Save for the numbering of the clauses, the arbitration and governing law clauses appear in identical form in the April 2021 Terms:

"Nifty is a platform that allows you to buy, sell and display Nifties...

...

These Terms of Use set out your rights and responsibilities when you use Nifty

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Gateway to buy, sell, or display non-fungible tokens ("Nifties" or "Nifty") or create a collection of Nifties (collectively, the "Services"), so please read them carefully. Nifty Gateway is an administrative platform that facilitates transactions between a buyer and a seller but is not a party to any agreement between the buyer and seller of Nifties or between any users. By clicking on the "I Accept" button, completing the account registration process, or using the Site, you accept and agree to be bound and abide by these Terms of Use and all of the terms incorporated herein by reference. By agreeing to these terms, you hereby certify that you are at least 18 years of age. If you do not agree to these Terms of Use, you must not access or use the Site.

Please note that Section 18 contains an arbitration clause and class action waiver. By agreeing to these Terms of Use, you agree to resolve all disputes through binding individual arbitration, which means that you waive any right to have the dispute decided by a judge or jury, and you waive any right to participate in collective action, whether that be a class action, class arbitration, or representative action.

[I footnote here that the arbitration clause and class action waiver was in clause 17 of the February Terms]

...

"7) Terms of Sale

By placing an order on Nifty Gateway, you agree that you are submitting a binding offer to purchase the non-fungible token "Nifty" or service from Nifty Gateway, LLC. Your order is accepted and confirmed once purchase is complete, and Nifty Gateway displays the Confirmation Page ("Confirmation Page"). YOU HEREBY EXPRESSLY AGREE THAT THE SUPPLY OF NIFTY BEGINS IMMEDIATELY AFTER THE CONFIRMATION PAGE IS DISPLAYED.

16) Governing Law

These Terms of Use, your use of Gemini, your rights and obligations, and all actions contemplated by, arising out of or related to these Terms of Use shall be governed by the laws of the State of New York, as if these Terms of Use are a contract wholly entered into and wholly performed within the State of New York. YOU UNDERSTAND AND AGREE THAT YOUR USE OF NIFTY GATEWAY AS CONTEMPLATED BY THESE TERMS OF USE SHALL BE DEEMED TO HAVE OCCURRED IN THE STATE OF NEW YORK AND BE SUBJECT TO THE INTERNAL LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO ITS CONFLICTS OF LAWS PROVISIONS

Approved Judgment17) *Disputes*

Please read the following agreement to arbitrate (“Arbitration Agreement”) in its entirety. This clause requires you to arbitrate disputes with Nifty Gateway and limits the manner in which you can seek relief from us.

You agree that any dispute of claim relating in any way to: your access, use, or attempted access or use of the Site; any products sold or distributed through the Site; or any aspect of your relationship with Nifty Gateway will be resolved by binding arbitration, except that (1) you may assert claims in small claims court if your claims qualify; and (2) you or Nifty Gateway may seek equitable relief in court for infringement of other misuse of intellectual property rights (such as trademarks, trade dress, domain names, trade secrets, copyright, or patent). You agree that any such arbitration shall be settled solely and exclusively by binding arbitration held in New York, New York, administered by JAMS and conducted in English, rather than in court.....

The arbitrator shall have exclusive authority to (1) determine the scope and enforceability of this Arbitration Agreement; and (2) resolve any dispute related to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including but not limited to any claim that all or part of this Arbitration Agreement is void or voidable; (3) decide the rights and liabilities, if any, of you and Nifty Gateway; (4) grant motions dispositive of all or part of any claim; (5) award monetary damages and grant any non-monetary remedy or relief available to a party under applicable law, arbitration rules, and these Terms of Use (including the Arbitration Agreement). The arbitrator has the same authority to award relief on an individual basis that a judge in a court of law would have. The arbitrator shall issue a written award and statement of decision describing the essential findings and conclusions on which the award is based, including the calculation of any damages awarded. Such an award is final and binding upon you and us.

You understand that by agreeing to this Arbitration Agreement, you and Nifty Gateway are each waiving their right to trial by jury and to participate in a class action or class arbitration.

If any part of this Arbitration Agreement is found to be invalid or unenforceable, then such part shall be of no force and effect and shall be severed and the remainder of the Arbitration Agreement shall continue in full force and effect. This Arbitration Agreement shall survive the termination of your relationship with Nifty Gateway.

....

21) *Contact Information*

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If you have any questions, would like to provide feedback, or would like more information about Nifty Gateway, please feel free to email us at support@niftygateway.com or write to us at: Nifty Gateway 600 Third Avenue, 2nd Floor New York, New York 100016”

28. The terms of use were revised on 30 April 2021, but nothing turns on this for the purpose of the application before me.

The Claim in the English Courts

29. The Claim Form was issued with a notice for service out of the jurisdiction which stated:

“I state that each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine and

a. ...

b. (i) the defendant is not a consumer, but is a party to a consumer contract within section 15B(1) of the Civil Jurisdiction and Judgments Act 1982 Act;”

30. The Claimant claims a declaration that:

- a) clause 17 of the Defendant’s February 2020 Terms of Use, either alone and/or in conjunction with clause 16 (together “the Unfair Terms”) are unfair and not binding upon the Claimant; and/or
- b) any contract entered into by the Claimant arising from the placing of the Claimant's Bid in the Auction was void for illegality.

31. The declaration was sought on the basis of three claims:

- (1) The Unfair Terms (namely the arbitration agreement at clause 17, either alone and/or in conjunction with the governing law clause at clause 16) are not binding on Mr Soleymani pursuant to sub-section 62(1), Consumer Rights Act 2015.
- (2) Further, the Unfair Terms are inconsistent with his rights under ss. 15B(2), (3) and (6) of the Civil Jurisdiction and Judgments Act 1982 (“the CJA”) and consequently ineffective and not binding on him.
- (3) Further, to the extent that the Defendant contends that he entered into a binding contract arising from the placing of his \$650,000 bid, any such contract is illegal ab initio under the Gambling Act 2005 (the “Gambling Act”).

32. The Claimant maintains that the first two grounds of claim impugn the validity of the arbitration agreement, and are relevant to his position that the arbitration agreement is null void and inoperative under s9(4) of the Arbitration Act 1996. He accepts that the claim under the Gambling Act does not impugn the arbitration agreement because of the doctrine of separability recognised by s7 of the Arbitration Act 1996.

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33. The claim for a declaration under the Gambling Act is based on an allegation that the Auction constituted either gaming within the meaning of subsection 6(2)(a)(i) of the Gambling Act or a complex lottery within the meaning of section 14(3), and the Defendant provided facilities for gambling without an operating license as required under the Gambling Act, and promoted a lottery without an operating licence in breach of prohibitions giving rise to a criminal offence punishable with imprisonment and/or a fine.

The Issues

34. There was an interesting issue on the evidence as to the nature of NFTs as assets, and whether they are artwork, with the Claimant's position being that he was trading in digital art whereas the Defendant maintained that an NFT is merely a unique string of code stored on a blockchain ledger that makes a digital artwork accessible, and marks authenticity. Fortunately, such issues need not be decided by me. It was common ground that trading in NFTs involves digital information, not merely a physical object and that NFTs are a part of blockchain technology.
35. Although there was much legal argument the parties firmly identified two key issues:
- a) Does the English court have jurisdiction under s15B of the CJJA 1982?
 - b) Is the Defendant entitled to a stay under section 9 of the Arbitration Act 1996 and/or under the court's inherent jurisdiction?
36. The parties suggested that logically I should decide whether the court has jurisdiction before deciding whether to grant a stay. I followed this course but the stay application fell for decision in any event and the court may not always be obliged to take the longest route. Indeed, in some circumstances it may be more consistent with the scheme of section 9 (and more efficient) to decide the application for a stay first rather than exploring the merits of jurisdictional arguments that it may decide are for the arbitral tribunal.
37. The Claimant also asked the court to decide summarily if the arbitration clause was unfair and unenforceable against him for the purposes of the Consumer Rights Act 2015 ("the CRA 2015"). This question arose in relation to the application for a stay and is dealt with there.

Does the English Court have Jurisdiction under s.15B of the CJJA 1982?

38. In deciding whether the English court has jurisdiction under s15B the main matters requiring consideration were:
- a) Do the claims made fall within the arbitration exclusion of Article 1(2)(d) of the Recast Regulation such that the jurisdictional provisions of s15B do not apply?
 - b) Did the Claimant conclude a "consumer contract" within s15E, and in particular, did the Defendant "pursue commercial or professional activities" in or "direct such activities to" the UK for the purpose of that part of the CJJA?

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39. A further issue was raised as to whether the Claimant was precluded from invoking jurisdiction under s15B by his position in the NY arbitration. In particular, the Defendant argued that the Claimant was precluded from arguing that he was party to a consumer contract because he maintained there was no contract in the NY arbitration, and the doctrine of approbation and reprobation precluded him asserting differently in this jurisdiction. However, the position taken as to the effect of his actions under US law at an interim stage in the NY arbitration would not preclude him arguing that he could invoke the protection of clause 15B of the CJJA in this court. The arguments and issues being developed in the two jurisdictions are quite different and the Defendant was unable to establish anything unfair, inequitable or abusive about the Claimant taking these different arguments.
40. For the purpose of this application it is not necessary to investigate whether the Claimant acted in the capacity of a "consumer" within the meaning of the CJJA (or the CRA 2015, or otherwise) at the material times. This is because the Defendant does not take the point, for the purposes of its application, that the Claimant was not a consumer. This was a sensible concession reflecting the available evidence on a jurisdictional objection, and it was notable that in the NY arbitration he is being treated as a consumer. However, the Defendant made clear that it reserved its position on this question should the substantive merits of the Claimant's claim need to be determined and it did, in this application, dispute that it was party to a "consumer contract" within the meaning of s15E of the CJJA.

The Test for a Jurisdictional Challenge

41. Before turning to the merits of the arguments on jurisdiction it is worth spelling out the approach to be applied on a jurisdictional challenge.
42. It was common ground that when determining a jurisdictional objection, the court adopts "the better of the argument" test (which restructured the earlier test of "good arguable case"). The effect of the test was reformulated in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 [7] as confirmed by Lord Sumption JSC in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; [2018] 1 WLR 3683 [9] who explained what the test means:

"What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

43. I also take into account the explanation of this test by Green LJ in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2019] EWCA Civ 10 but do not accept the Claimant's submission that this provides a further gloss that a claimant has only to persuade the court that its claim has a plausible evidential basis. The judgment does, however, provide useful guidance and makes clear at [73] that, the reference to a plausible evidential basis in limb (i) is a reference to an evidential basis showing that

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the claimant has the better argument. It also emphasises that the court has to apply the test pragmatically, usually on the basis of incomplete materials which have not been tested by cross-examination and there has usually been no order for disclosure.

44. The Claimant’s claim was properly treated as consisting of three distinct heads of claim, and counsel emphasised that the claim for declaratory relief regarding the governing law clause (clause 16) could be treated as distinct from the claim for similar relief in relation to the arbitration clause (clause 17).
45. I accept the Defendant’s submission that where jurisdiction is challenged the claimant must satisfy the court that each of its claims fall within the jurisdictional gateway relied upon. The court may conclude that it has jurisdiction in respect of some claims but not others.

Civil Jurisdiction and Judgment Act 1982

46. The arguments addressed the scope and effect of s15B of the Civil Jurisdiction and Judgment Act 1982 (as amended to take account of the Civil Jurisdiction and Judgments (amendment) (EU Exit) Regulations) (“the CJJA”). It provides as follows:

“15A.— Scope of sections 15B to 15E

(1) Sections 15B to 15E make provision about the jurisdiction of courts in the United Kingdom—

- a) in matters relating to consumer contracts where the consumer is domiciled in the United Kingdom;*
- b) in matters relating to individual contracts of employment.*

(2) Sections 15B and 15C apply only if the subject-matter of the proceedings and the nature of the proceedings are within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation would have had effect before [IP completion day] in relation to the proceedings).

15B.— Jurisdiction in relation to consumer contracts

- (1) This section applies in relation to proceedings whose subject-matter is a matter relating to a consumer contract where the consumer is domiciled in the United Kingdom.*
- (2) The consumer may bring proceedings against the other party to the consumer contract—*

...

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(b) in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract).

...

(3) Proceedings may be brought against the consumer by the other party to the consumer contract only in the courts of the part of the United Kingdom in which the consumer is domiciled.

...

(6) Subsections (2) and (3) may be departed from only by an agreement—

(a) which is entered into after the dispute has arisen,

(b) which allows the consumer to bring proceedings in courts other than those indicated in this section, or

(c) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the United Kingdom and in the same part of the United Kingdom, and which confers jurisdiction on the courts of that part of the United Kingdom, provided that such an agreement is not contrary to the law of that part of the United Kingdom.

...

15D.— Further provision as to jurisdiction

(1) Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of section 15B(6) or 15C(6).

(2) Even if it would not otherwise have jurisdiction under section 15B or 15C, court of a part of the United Kingdom before which a defendant enters an appearance has jurisdiction in those proceedings.

...

15E.— Interpretation

(1) In sections 15A to 15D and this section—

"consumer", in relation to a consumer contract, means a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession;

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"consumer contract" means—

...

(c) a contract which has been concluded with a person who—

- (i) pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled, or*
- (ii) by any means, directs such activities to that part or to other parts of the United Kingdom including that part, and which falls within the scope of such activities..."*

Does the Claim fall within the Arbitration Exclusion of Article 1(2)(d) of the Recast Regulation such that the jurisdictional provisions of s.15(B) do not apply?

The Claimant's position

47. The Claimant's position was that the subject matter and nature of all the rights engaged in his claim are English law consumer protection rights, consequently it is a claim which falls within the scope of the Brussels Recast Regulation EU No. 1215/2012 ("the Recast Regulation").
48. He maintained that the effect of the introduction of sections 15A to 15E into the CJA is to create, from 31 December 2020, a special jurisdictional regime for consumers domiciled in the UK which broadly mirrors the rules contained in the Recast Regulation. As a matter of social policy, consumer contracts are treated differently to other contracts because the consumer is in a weaker bargaining position. The consumer is given special protection which applies irrespective of any inconsistent agreement in the contract itself, and which justifies a departure from party autonomy, such that he had an entitlement under s15B of the CJA to be sued in his domestic court of residence. These rights took the matter within the scope of s15B and outside the scope of the arbitration exception.
49. The Claimant argued that if the Defendant were right as to the scope of s15B then a consumer could never bring domestic court proceedings to challenge the validity of an unfair arbitration agreement and would instead have to challenge the position in the unfair arbitration or the courts of that place, which would be a foreign jurisdiction applying foreign law. This would undermine fundamental consumer protection recognised by the Recast Regulation and also English domestic legislation. He noted that Recital 18 expressly recognises that for consumers "*the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules*" and Recital 19 recognises that party autonomy is qualified for consumers. In order to read Article 1(2)(d) of the Recast Regulation (the arbitration exception) consistently with Article 17(1), the subject matter of a consumer claim must be the exercise of consumer rights and fall within the scope of the Regulation.
50. It was argued on behalf of the Claimant that section 15B(2) and (3) mean that a consumer's right to sue or be sued in his home jurisdiction override any exclusive jurisdiction clause in a contract. It was said that this is recognised under English law in

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Bitar v Banque Libano-Francaise [2021] EWHC 2787 [4]. Section 15B(6) provides that ss15B(2) and (3) can only be departed from by an agreement entered after the dispute has arisen. His counsel argued that even though the legislation does not expressly stipulate that an inconsistent contract is unenforceable, it would be contrary to public policy to enforce such a contract. On this basis it was said that clauses 16 and 17 of the Defendant's Terms of Use are ineffective because they are inconsistent with sections 15B(2),(3) and (6).

51. The Claimant also invoked s15D which expressly provides that “*agreements or provisions of a trust instrument conferring jurisdiction*” is not binding as against a consumer unless agreed after the dispute has arisen. His counsel argued that an arbitration agreement is effectively an exclusive jurisdiction clause and to be treated as such. It was argued that on some matters relating to a contract, a party will not be bound regardless of the governing law of the contract, for example questions of capacity are governed by the law of the contracting party's domicile. Further, section 89 of the Arbitration Act 1996 provides that consumer protection applies regardless of the law applicable to the arbitration agreement.
52. Indeed, recital 12 of the Recast Regulation confirms that a national court may apply national law to decide if an arbitration agreement is null and void or inoperative. This approach was also said to be consistent with the New York Convention since the Regulation recognises that a court other than the place of the seat of the arbitration may examine whether the arbitration agreement is null and void, inoperative or incapable of being performed in accordance with their national law.
53. The Claimant also argued that even accepting the Defendant's case, two of his claims fall outside the arbitration exception, namely the claim for relief relating to clause 16 and also for a declaration that any contract was illegal under the Gambling Act 2005. the Claimant argued that the fact that part of his claim challenges the validity of the arbitration clause, does not make arbitration the subject matter of the claim. The correct question in identifying the scope of the Regulation is what are the substantive rights which he seeks to protect, and in this case, they are consumer protection rights. He argued that In *The Front Comor* (C-185/07) [2009] 1 A.C. 1138 at [24-26] the CJEU is saying that it is important to identify the substantive rights being invoked, and here they are consumer rights. It stated that [26]:

“the court finds, as noted by the Advocate General in paras 53 and 54 of her opinion, that if, because of the subject matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application.”

The Defendant's position

54. The Defendant suggested that the argument was a short one. Proceedings to determine the existence and validity of an arbitration agreement are within Article 1(d) of the Regulation, and excluded from its scope, as confirmed in *The Front Comor*. It argued that the claim under the CRA and the CJA have as their sole subject matter the validity of the arbitration clause and they are squarely within the arbitration exception, and

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outside s15B. It argued that the Gambling Act claim was not properly pleaded since it is articulated as an anticipatory defence, and there is no proper claim in respect of which the Court could have jurisdiction.

Conclusions on whether claims s.15B

55. The law of both the English courts and the CJEU on the scope of the Regulation is clear in suggesting that the Regulation does not allocate jurisdiction for disputes where the essential subject matter of the proceedings is arbitration. The ECJ in *Marc Rich v Impianti* (Case C-190/89) made clear that the exception for arbitration was “*intended to exclude arbitration in its entirety, including proceedings brought in national courts*”, and “*reference must be made solely to the subject matter of the dispute*”. In *The Ivan Zagubanski* [2002] 1 Lloyd’s Rep. 107 Aikens J made clear that a claim for a declaration as to the validity of an arbitration agreement concerns arbitration and arbitration would be “*the principle focus*” or “*essential subject matter*” of the claim and fall within the exception. That approach was approved by the Court of Appeal in *Through Transport Mutual v New India Assurance* [2004] EWCA Civ 1598. The similar characterisation of English proceedings seeking the making of an anti-suit injunction as being outside the scope of the regulation was also accepted by the CJEU in *The Front Comor* [22].
56. The Claimant’s attempt to characterise its claim for declaratory relief on the enforceability of the arbitration clause as falling outside the exception was inconsistent with all these authorities. The principal focus and subject matter of Mr Soleymani’s claim is whether he is legally obliged to arbitrate.
57. Those drawing up the Regulation (and the preceding Conventions) excluded arbitration from its scope because the member states were already party to a successful international treaty governing the recognition and enforcement of arbitration awards (i.e. the New York Convention). It is significant that the New York Convention protects a party from arbitration where an arbitration agreement is null, and void, inoperable or contrary to public policy. The treaty will give legal protection if a consumer argues that an arbitration agreement is unenforceable, and thereby enables a consumer to invoke available consumer protection that precludes an arbitration agreement being enforced. Such protection is guaranteed by way of an international treaty with much broader reach than the Recast Regulation or the CJA. While the rules of the CJA and the CRA 2015 dealing with consumers reflect social policy, there is no basis to suggest that the legislature intended such legislation to override the long-established exception in the CJA for arbitration.
58. There was no clear basis for treating the case law, the wording of the exception, and the recitals as carving out an exception to the exception where the claim is based on consumer legislation and would otherwise fall within the scope of the Regulation. Recital 12 acknowledges that national courts may rule on whether an arbitration agreement is valid but makes clear that this is not within the scope of the Regulation:

“A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules

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of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.”

59. The wording of the Recast Regulation expressly acknowledges that the legal protection conferred by the New York Convention takes precedence over the Regulation’s rules on jurisdiction and recognition of judgments on matters that would otherwise be within the Regulation. The case law of the CJEU and English courts recognise this. Recital 12 also acknowledges that the court, having concluded the arbitration agreement was ineffective, may rule on the substance of the matter but again makes clear that this is not because rulings on the validity of the arbitration are within the scope of the Regulation stating:

“This should be without prejudice to the competence of Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation.”

60. Section 15A of the CJJA makes clear that it only applies if the subject-matter of the proceedings and the nature of the proceedings are within the scope of the Regulation. There was no basis on the wording of the CJJA, or its application by the authorities, to suggest that it gives a consumer domiciled in England an entitlement to have the validity of an arbitration agreement in a consumer contract decided in England, and nowhere else. By express provision under s15A, the CJJA was following the Recast Regulation which had expressly excluded arbitration. In these circumstances arbitration agreements could not be treated as covered by section 15D which was obviously about agreements for the exclusive jurisdiction of a court.
61. The Claimant’s claim for a declaration that the arbitration clause was not binding was within the scope of the arbitration exception and the Claimant failed to establish the better of the argument on satisfying the jurisdictional gateway relied upon in invoking the English court’s jurisdiction.

Did the claimant conclude a “consumer contract” within s15E, and in particular, did the defendant “pursues commercial or professional activities” in or “directs such activities to” the UK for the purpose of the CJJA?

62. This remained a relevant question even if the arbitration exception applied to the claim for declaratory relief regarding the arbitration clause since the claim for relief under the Gambling Act and the claim that clause 16 was unfair were not clearly within the exception.

The Law

63. Both sides asked the court to take into account the well-established law built up before 30 December 2020 (when CJEU case law lost some binding effect in the UK) as to the

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meaning of the language in the CJA that is derived directly from Art. 17(1)(c) of the Recast Regulation, in particular the CJEU's decision in *Pammer v Reederei Karl Schluter GmbH & Co KG* [2012] Bus. L.R. 972. There the Grand Chamber doubted that a trader's website being accessible in the EU was sufficient to justify treating it as directing its activities to a member state. It said that the trader must have manifested its intention to establish commercial relations with consumers from one or more other member states, including that of the consumer's domicile [69, 79 & 75, and 76]:

“It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other member states, including the member state of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers.”

64. In *Pammer* the CJEU went on at [83, 84] to give a non-exhaustive list of features which might, alone or in combination, be capable of demonstrating the existence of an activity ‘directed to’ the member state of the consumer's domicile:

“[T]he international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the member state in which the trader is established, for example ‘.de’, or use of neutral top-level domain names such as ‘.com’ or ‘.eu’; the description of itineraries from one or more other member states to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various member states, in particular by presentation of accounts written by such customers.

If...the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other member states.”

65. Both parties also relied on *Bitar v Banque Libano-Francaise* [2021] EWHC 2787 (QB). The Claimant argued that the test for establishing the intention of the trader in directing business is an objective one, though its actual intention may assist in resolving this issue. There is also no requirement of a causal connection between the consumer's entry into the contract with the trader which is the subject matter of the claim and the marketing materials which manifested the trader's intention to do business in the consumer's place of domicile: *Bitar* [27].

The Parties' Positions

66. The Claimant put forward evidence as to his own personal circumstances, the nature of the Defendant's business and his involvement in the Auction and prior transactions concluded on its platform. He set out evidence relating to how the Defendant targeted

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consumers internationally and in England, referring to evidence of its stated mission statement “*We will not rest until 1 billion people are collecting nifties*”.

67. The Claimant produced evidence that the Defendant collaborated and promoted on its social media a presentation on a social platform hosted by a group based in London on 9 March 2020 entitled “1st NFTLondon LIVE webinar”. In addition, the Defendant’s founders featured in a lengthy interview in a magazine published with the UK newspaper The Times (and on its website) on Saturday, 3 April 2021, and the Defendant’s founders retweeted this article. He also says that the Defendant hosted an event in London in July 2021 at Bonhams which included British artists and related to a collection that was to be auctioned. He also noted that the Defendant’s webpages state that “*We’re currently supporting Authorized Sellers from the following 49 countries*” and the list included the UK.
68. He also refers to the Defendant’s advice and facilities on its platform for payment by customers outside the US and those not using US dollars. He refers to the fact that the Defendant’s platform has features which enable users to transfer assets through a regulated cryptocurrency exchange (called Gemini, which partly owns the Defendant’s business), and this was a feature that the Defendant had promoted on its own social media.
69. The Defendant emphasised that to satisfy s15B there must be evidence of activities existing before any contract with the consumer was concluded. *Pammer* makes clear that the accessibility of a trader’s products, for example through a website is not enough. It is also not enough for the consumer to show that the trader would not turn away business from consumers who happened to live in the UK, it was necessary for the trader to manifest an intention to target those consumers.
70. The Defendant relied on the evidence to say that it merely makes its services accessible globally and is aware that some customers come from outside the US. Mr Wedin said the Defendant does not direct or procure any marketing activity towards the UK or have any presence or employees there, nor does it arrange its services or support in a manner designed to convenience users in the UK. It acknowledged a single exception being the event hosted in Bonhams in July 2021 but said that this was an event that took place after the conclusion of the Auction. In any event it said that the event had a global outlook and London is a global art hub so the event could not be characterised as targeted at UK consumers. In relation to the article about the Defendant in the Times magazine on 2 April 2021, and the online event organised by NFT London it said that these pieces of publicity were not sought out or paid for by the Defendant.

Conclusions on whether the Defendant directed its business activities to the UK?

71. The court should avoid a mini-trial as to how the Defendant directs its business activities. However, it is required to take a pragmatic and flexible view of what the evidence shows. *Bitar* shows that the court will look at matters as a whole rather than looking at activities and factors individually.
72. The Claimant’s evidence suggested that the Defendant’s activities were directed at the UK, some generally, for example the facilities for payments, and others were more specifically directed, for example the London webinar and Times article.

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73. It was somewhat difficult to make sense of the Defendant's statement evidence, in particular as to whether it envisaged doing business with customers in any jurisdiction other than the US in the sense of being minded to conclude contracts with them. Its evidence was that its positive mission statement was to grow its business globally and to achieve 1 billion NFT collectors, yet it denied that it directed any commercial activities to the UK. Mr Wedin's evidence was qualified in several unexplained respects. For example, he suggested that the Defendant's website was accessible "*in principle*" from the UK. He relied on instructions as to the Defendant's "*proactive*" media strategy being "*focussed*" on the US but did not substantiate what that strategy was, what its broader marketing strategy was, and where and how it was directed beyond the main focus.
74. The Defendant took a somewhat narrow approach in explaining its business. For example, the Defendant accepted that it had hosted a marketing event in Bonhams in London on 21 July 2021 yet asked the court to give no weight to it on grounds that it took place after the Auction and had a global reach. However, the evidence suggested that the event was not an isolated one since it had participated in a London event in March 2021 and it was clearly a sophisticated and substantial event that would have been planned as part of a marketing strategy.
75. There were clear limitations in the evidence put before the court regarding how the Defendant envisaged doing business with consumers outside the US and there was no direct evidence from those in the commercial side of the business (unlike in *Bitar*). The Defendant's evidence was that its business is very much "New York-centric" yet it acknowledged that it envisaged doing business globally and the technology it was trading on was borderless and global. There was little evidence that activities conducted in the US were directed to consumers in New York or the US as opposed to those in the 49 jurisdictions it identified on its website as serviced by its payment services. The timing of auctions and its use of US currency and a US helpline were of limited weight in a market that it accepted was borderless. The evidence did not suggest that its business activities were directed to US customers, as opposed to customers elsewhere.
76. The position it took in its statement evidence in denying that it directed commercial activities to the UK was inconsistent with the way it presented its business on its website and on its social media, its activities in the UK in 2021, and the manner in which it proposed payment terms to its customers. This evidence suggested it was firmly minded to do business with consumers in 48 named jurisdictions as well as the US, and it was taking part in marketing activities directed at consumers in the UK, and setting up its payment terms so as to facilitate users in the UK (as well as other jurisdictions outside the US). Applying the approach in *Bitar*, gaining business in the UK was not entirely incidental or unimportant to its marketing strategy.
77. It was somewhat unrealistic for the Defendant to deny that the lengthy interview given by its founders to the Times Magazine in April 2021 (and their subsequent retweeting of the article together with Bepple images) shortly before the Auction of Bepple's work was marketing activity because it had not requested, initiated or paid for the article. It took a similar position regarding its participation in the event titled NFT London Live which was originally intended as a live event, emphasising that this was only attended by its representatives remotely and that it was available for viewing live stream from

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outside the UK.

78. In any event, the relevant considerations explored in *Pammer* (and to a lesser extent in *Bitar*) related to businesses that provided services relating to a specific location (for example staying in a hotel or providing regulated banking services) where the trader’s activity had a definite geographical centre of gravity. They were not directed at a trader whose business is borderless and decentralised by nature. The CJJA (and Recast Regulation) are intended to protect consumers whether the services provided have a geographical or legal place or not. The approach applied in *Pammer* to a trader with a geographical or legal place for its business and services does not mean that the CJJA must be construed as providing no protection where a trader purposefully directs its services and activities to consumers on a global, borderless and de-centralised basis. In those circumstances in deciding whether a trader envisages doing business with a consumer in a member state, it would be artificial to conclude that business activity only counts if it has a specific geographical boundary (whether in purpose or nature).
79. On the evidence put forward, the Claimant had the better of the argument as to whether the Defendant was directing commercial activities to England (and the UK more generally). The Claimant supplied a plausible evidential basis for the application of the relevant jurisdictional gateway. Even taking account of the issues raised by the Defendant in contesting that basis, and the limitations of the material available to the court, the Claimant has a good arguable case for the application of the gateway with a plausible evidential basis.
80. The Claimant could show that the claims for declaratory relief under the Gambling Act or that clause 16 (the governing law clause) was unenforceable were not within the arbitration exception. Their main focus was not arbitration. On these aspects it was able to establish the better of the argument in showing that these claims fell within the jurisdictional gateway relied upon. The claim under the Gambling Act was unusual but the Defendant had not sought to strike out claims on their merits so I draw no conclusions.

Is the Defendant entitled to a stay under s9 of the 1996 Act or the court’s inherent jurisdiction?

81. Here there was considerable consensus as to the applicable law. Section 9 of the Arbitration Act 1996 provides:

“(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, operative, or incapable of being performed.”

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82. This provision gives effect to the UK's international obligation to give recognition to arbitration agreements under the New York Convention. It is a mandatory provision that applies regardless of the applicable law or the seat of the arbitration (see ss2 and 4). The power to stay is treated as mandatory since if the provisions are met "*the court shall grant a stay*". The statutory jurisdiction is not discretionary.
83. The approach to be applied has been laid out in the Court of Appeal decision of *Aeroflot v Berezovsky* [2013] EWCA Civ 784 which also approved of the judgment of Popplewell J in *Golden Ocean Group Ltd V Humpuss Intermoda Transportasi Tbk Ltd (The "Barito")* [2013] EWHC (Comm)1240.
84. Aikens LJ explained the position in the *Aeroflot* case:

"72. It is necessary first to analyse the structure of section 9(1) and (4) of the AA 1996, to see where the burden lies and what standard of proof is required when there is an application for a stay of proceedings because one side asserts that two parties are bound by an arbitration agreement to submit the disputes being litigated to arbitration and the other side asserts that there was no concluded arbitration agreement or it is "null and void". Section 9(1) and (4) are based on article II of the New York Convention 1958. That stipulates that each contracting state "shall" recognise arbitration agreements in writing and it further obliges a court of a contracting state to refer the parties to arbitration if requested to do so by one of the parties in the context of an action in a matter which is the subject of an arbitration agreement, unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed".

*73. That has been translated into the terms of section 9(1) so as to give a party the right to apply for a stay of proceedings "in respect of a matter which under the [arbitration] agreement is to be referred to arbitration". Therefore, it seems to me in principle that there is a burden on the party asserting that there is: (a) a concluded arbitration agreement as defined in the 1996 Act; and (b) that it covers the disputes that are the subject of the court proceedings, to prove that this is the case. This is borne out by the authorities. If the party seeking a stay cannot prove both (a) and (b), then there is no jurisdiction to grant a stay under section 9(1) and (4) of the AA 1996. However, if the court considers that it cannot decide those issues for itself in a summary fashion on the written evidence, it has two other options, as this court made clear in *Al-Naimi v Islamic Press Agency Inc.*⁴⁰ It can direct an issue to be tried, pursuant to CPR 62.8(3), or it can stay the proceedings (under its inherent jurisdiction) so that the putative arbitral panel can decide the issue of the existence of the arbitration agreement, pursuant to section 30 of the AA 1996. If the court decides that it will and can determine whether or not there was concluded arbitration agreement on the written evidence before it*

then, in my view, the authorities establish that it is for the party asserting the existence of the concluded arbitration clause to prove it on a balance of probabilities. As I point out below, the position appears to be different if the court decides, on an application for a stay, that it cannot, on the materials before it, determine whether there was a concluded arbitration agreement.

74. *Under section 9(4) the court “shall grant a stay” unless “satisfied” that the arbitration agreement is “null and void, [or] inoperative . . .”. This means, in my view, that once the first party has established the existence of an apparently concluded relevant arbitration agreement and that it covers the matters in dispute in the proceedings, it is for the party resisting a stay to “satisfy” the court apparently existing arbitration agreement is “null and void”.*

...

77. *As for the standard of proof that must be achieved by a party wishing to establish that an arbitration agreement is “null and void” or “inoperative”, the starting point must be the wording of section 9(4). That stipulates that a stay will be granted unless the court is “satisfied” that the arbitration agreement is “null and void” or “inoperative” or “incapable of being performed”. The wording in article II of the New York Convention is stronger: it states “unless [the court] finds that” the arbitration agreement is “null and void” and so forth. The words “satisfied” and “find” suggest that, in the context of civil proceedings in the English court, the standard of proof which must be attained in order that the court should refuse a stay is one of the balance of probabilities.*

78. *I think that this must be correct. After all, it is for the court finally to decide the issue of whether or not to refuse a stay because the arbitration agreement is “null and void” or “inoperative”. No other tribunal has or can have this jurisdiction.*

79. *In theory I suppose the court could order that there be a trial of an issue to determine whether the arbitration agreement was “null and void” or “inoperative”. But if the evidence and possible findings going to the issue of whether the arbitration agreement is “null and void” or “inoperative” also impinge on the substantive rights and obligations of the parties the court is unlikely to do so unless such a trial can be confined to “a relatively circumscribed area of “investigation”. Otherwise, in such a case, where the court is satisfied of the existence of the arbitration agreement and that the matters in dispute are within its scope, then logically it must be for the arbitral tribunal finally to decide the “section 9(4) matters”, assuming it has compétence-compétence to do so. In such a case, the right course for*

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the court to take is to grant a stay under section 9(4) and let the arbitral tribunal get on with determining the dispute.”

85. Both the Court of Appeal in *Aeroflot* and Popplewell J in *The Barito* also drew on the judgment of Colman J in *A v B* [2006] EWHC 2006 (Comm) at [137], which had explored the correct approach where matters are raised under s9(4):

“Where the court takes the course of deciding the matter [under s9(4)], the Court of Appeal, again in the Al-Naimi case, indicated that the court should direct a trial where there are triable issues on the facts material to the jurisdiction question on which there were requests for cross-examination. However this principle may give way to the agreement of the parties that the matter should be decided on witness statements alone.”

86. In *The Barito*, Popplewell J also carefully explored the burden and standard of proof, and the correct weight to be given under English law to the principle of separability and the doctrine of *Kompetenz-Kompetenz*. He emphasised that as a matter of principle the court can finally decide issues under s9(4) but it has a wide discretion and practical considerations may be significant. He provided useful guidance as to the relevant considerations for the court in choosing whether to decide the matter summarily, give directions for trial, or stay the matter in order to leave it to the Tribunal at [59(6)]:

“If D has brought himself within section 9(1) it is for C to satisfy the court that the arbitration agreement is null and void, inoperative or incapable of having effect under section 9(4). If it is not clear on the evidence before the court whether the agreement is “null and void etc”, the court may order the trial of that issue, but is not bound to do so. If it declines to do so, it will be sufficient for D to show an arguable case that the arbitration agreement is valid and effective because in such circumstances C will have failed to discharge the burden imposed on him by section 9(4) of satisfying the court that the agreement by which he agreed to refer the matters in dispute is “null and void etc”.

In deciding whether to order the trial of the arbitrability issue under section 9(1) or section 9(4), or whether to grant a stay under the inherent jurisdiction to permit the arbitrability issue to be resolved by the tribunal, the court will consider all the circumstances of the case. Factors which are likely to be of significance include the following:

- (a) *Whether the arbitrability issue is likely to fall to be resolved by the court in any event, for example in the context of enforcement of an award. If so, this will be a powerful factor in favour of the court deciding the issue rather than leaving it in the first instance to the arbitral tribunal.*

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(b) *Whether the resolution of the arbitrability issue will involve findings of fact or law which impact on the substantive rights and obligations of the parties in relation to their underlying dispute, or only affects the question whether such rights and liabilities are arbitrable. In the latter case, the court can conduct the inquiry without risk of interfering with D's right to have his chosen tribunal decide the disputes, because if the issue is resolved in D's favour, there will be a stay in favour of the tribunal without the court having trespassed into considering issues which affect the merits of the underlying dispute. On the other hand where, as is not uncommon, the determination of the issue whether there is an effective agreement to arbitrate is bound up with the issues which arise in relation to the underlying dispute, there is a balance of prejudice to each party to be taken into consideration. It may be more efficient and just to leave the arbitrability issue to be dealt with by the tribunal where, if the issue is resolved in D's favour, he can at the same time obtain an award on the merits from his chosen tribunal. Against this is to be weighed the risk of any prejudice to C in being subjected to the process and decision of a tribunal on which he may not have agreed to confer jurisdiction.*

(c) *The length and cost of the inquiry into the arbitrability issue and how quickly it will be resolved. Where the issue cannot be resolved without a lengthy investigation, the court will be reluctant to order the issue to be tried in advance of the arbitration. This will be especially so where the trial of the issue is likely to extend widely over the substantive matters in dispute between the parties, in which case considerations of cost and convenience may be decisive: ordering a trial of the arbitrability issue will normally be inappropriate where the trial cannot be confined to a relatively circumscribed area of investigation.*

(d) *Whether there have been or will be related proceedings addressing the arbitrability issue between the same or other parties. If the arbitrability dispute has been or will be addressed or resolved in other proceedings, the court will be anxious to do what it can to minimise the risk of inconsistent judgments and provide for orderly case management.*

(e) *The degree of connection between the arbitrability dispute and England. In this context the law applicable to the arbitrability issue may be of significance. Where the law governing the issue of the existence, effectiveness or applicability of the agreement to arbitrate is English law, that will be a factor in favour of the issue being resolved by the English court rather than a foreign tribunal, unless it is clear that there is no real dispute as to the legal principles, or that the foreign tribunal is as well placed to apply those principles as an English court. Other relevant factors in this context will include the relative convenience for the parties of contesting the arbitrability question before the English court, on the one hand, or the arbitral*

tribunal on the other. Factors such as the location and language of witnesses and documents and other factors commonly taken into account when considering the Spiliada discretion will here be relevant. Also relevant in this context would be the potential applicability of an English jurisdiction clause if the agreement to arbitrate did not exist or was ineffective or inapplicable, as in Claxton.

(f) The strength of the arguments on the arbitrability issue. The court will not conduct a mini trial in determining whether to direct a trial of the issue. But as in other interlocutory contexts, if the court can determine on a brief perusal of the materials before it that one party has a very strong case on the arbitrability issue, the court will take this into account.

(g) The nature and quality of the arbitral tribunal and arbitral process, including the supervisory jurisdiction of the curial court. Where the English court declines to resolve the issue and leaves it to the Kompetenz- Kompetenz of the tribunal in the first instance, C has the comfort that if he is right in his contention that there is no applicable or effective agreement to arbitrate, he will have the opportunity to establish that before the tribunal, which will then decline jurisdiction. The degree of comfort will depend upon the quality of the tribunal and of the arbitral process, supported by resort to the courts having supervisory jurisdiction over the arbitral process. The degree of prejudice to C in requiring him to entrust the issue to a tribunal with whom it may transpire he has not agreed that it should be entrusted will depend to which the tribunal can be trusted to reach the correct answer.”

The Parties' positions

87. The Claimant correctly accepted (for the purposes of the application before me) that an arbitration agreement had been concluded so that the first stage of meeting s9(1) had been met. He also correctly acknowledged that the burden of proof lay upon him to satisfy s9(4) on the balance of probabilities. His position was that all the factors weighed in favour of the court now deciding the arbitrability issue (here whether clause 17 was null, void inoperative or incapable of being performed). His counsel submitted that:
- a) it was inevitable that the arbitrability issue would come back to court if not decided now, for example on enforcement within the jurisdiction;
 - b) the arbitrability question does not impact on the parties' substantive rights and obligations relating to the underlying dispute (i.e. the debt claim and Mr Soleymani's claim under the Gambling Act 2005);
 - c) his case on the invalidity of the arbitration clause is a very strong one and does not require a lengthy enquiry and this is a consumer contract case where costs and convenience dictate a procedure that avoids an expensive fact finding exercise; it would be a denial of his right under English law to protection as a consumer if the resolution of the issues was drawn out to a trial (or referred to arbitration);
 - d) the arbitrability issues have not been determined by the arbitrator as they were reserved for argument in the English court and the English court is the most

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appropriate forum for resolving those issues, consistently with the jurisdictional protection intended by the English consumer law;

- e) Mr Soleymani was entitled to raise the s9(4) arbitrability issues once the Defendant elected to apply under section 9. The Defendant chose not to submit evidence on these issues and an extensive factual enquiry is not required. A trial would be unnecessary and it was not open to the Defendant to suggest that these matters had to be decided at a later date.

88. The Claimant argued that the court should decide the question arising under section 9(4), namely whether the arbitration clause was unenforceable under the CRA 2015 on grounds that it was an unfair term of a consumer contract, and accordingly not binding on him. He relied on the evidence outlined above about his personal circumstances and the Defendant's business. He relied on the fact that Part 1 of Schedule 2 of the CRA 2015 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of Part 1: S. 63(1), CRA 2015 and provides as follows:

“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;

(b) unduly restricting the evidence available to the consumer, or

(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.”

89. His counsel pointed to *Mylcryst Builders Ltd v Buck* [2008] EWHC 2172 (TCC) and *Parking Eye v Beavis* [2015] UKSC 67 to outline the factors that are to be taken into account. It was argued that the arbitration clause created a significant imbalance between the parties, particularly in requiring Mr Soleymani to litigate any disputes in a foreign jurisdiction under a foreign law, particularly where, as a matter of public policy recognised in English and EU law, a consumer is entitled to have recourse to their domestic court and law to resolve consumer disputes as identified in s15B of the CJJA. He also argued that English law requirements of good faith and open dealing had not been complied with since he had no choice but to accept the Defendant's terms if he wanted to take part in the Auction and had no prior experience of arbitration and would have no familiarity with conflict of law rules. The wording of clauses 16 and 17 were full of legal jargon and were hidden away at the bottom of a document that he was not required to read.

Meaning of paragraph 20(a)

90. The Claimant pointed out in particular that Ramsey J had taken the view at paragraph 54 that he would adopt the view of Judge Harvey in *Zealander v Zealander* as to the meaning of “*arbitration not covered by legal provision*” in a schedule to the Unfair Terms in Consumer Contracts Regulations 1999. He concluded that it did not apply to arbitration generally “*Rather, I consider that phrase would apply to a case where,*

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for instance, there is a statutory arbitration requirement". The Defendant opposed the Claimant's reading and provided limited argument, suggesting that the matter was not decisive.

91. I agree that the matter is probably not decisive. The statutory wording is difficult to make sense of and Ramsey J only gives a limited explanation.
92. In *Zealander & Zealander v Laing* (decided 19 March 1999) Judge Havery QC said in relation to the wording at paragraph 1(q) of Schedule 2 to the 1999 Regulations that:

"A book has been cited to me: Harris Plantrose and Teck on the Arbitration Act 1996 . It explains, without giving its source, those words "not covered by legal provisions". What is said is that those words were inserted to take account of particular situations in the Netherlands, Portugal and, it is believed, also Spain, which have special statutory arbitration schemes to allow consumers easy access to justice. It goes on:

"The precise effect of the paragraph is therefore to render unfair any clause providing exclusively for arbitration to the exclusion of the courts, other than a special statutory scheme specifically designed to assist consumers."

Mr Jinadu initially argued that "not covered by legal provisions" included a reference to the Arbitration Act 1996. Therefore (q) did not apply. But he recognised that that would have rendered (q) totally nugatory and that could not possibly be the construction of the Article.

Therefore, it seems to me that whatever the words "not covered by legal provision" may mean, and it may well be that the book I have just quoted is right, it is not something which cuts down the meaning of the other words, at least for present purposes. On that basis it is perfectly clear that the clause does fall within (q)."

93. Judge Havery QC acknowledged that the court had slim basis for drawing conclusions as to the purpose of the wording. This is especially the case where the UK has a sophisticated legislative scheme for arbitration (with a specialist court for supervising arbitration) that maintains the fairness and efficiency of arbitration for all users, including consumers and those with low value claims, and where there is no statutory consumer arbitration scheme.
94. I was referred to statutory arbitration under the Arbitration Act 1996 and it refers expressly to the term "*statutory arbitration*" and also explains that term applies to "*arbitration under an enactment*". If the legislature had intended to identify arbitration by way of statutory requirement in paragraph 20 it would have used the legal term for this. If it had intended to refer to some special statutory scheme for consumers it would equally have not used the wording adopted.
95. If the matter had to be decided then the point would have merited further argument since the wording could be given different meanings. For example, taken against

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English law under the Arbitration Act 1996 it could cover arbitration not governed by legal rules or legislation or the New York Convention, including arbitration based on an oral agreement or otherwise purporting not to be subject to legal rules or in accordance with a legal system (as recognised in s46 of the Arbitration Act 1996).

Was the Consumer Rights Act 2015 applicable at all?

96. The Defendant also argued that English law was not engaged because the arbitration agreement is governed by New York Law. The Claimant relied on section 89 of the Arbitration Act 1996 which provides that the CRA 2015 is extended to apply to an arbitration agreement and applies “*whatever the law applicable to the arbitration agreement*”.
97. The Defendant submitted that this only applied to an arbitration seated in the UK and did not apply, since there was no connecting factor to the UK (or England and Wales). The Claimant relied on this provision in its broader arguments on jurisdiction and argued that it was within Part II of the Arbitration Act 1996. He also argued that there were clear connecting factors with England, where the Claimant was domiciled, and to which the Defendant was directing commercial activities.
98. On this issue I was satisfied that section 89 was part of English law and applied to an arbitration agreement regardless of the place of arbitration and the governing law of the arbitration agreement. It is in Part II and the more limited rules on the application of Part I of the Arbitration Act were not applicable. The purpose of the provision was to provide protection even where the arbitration agreement was governed by a foreign law. If the matter were to proceed (whether by consent or because a trial were ordered) then section 89 would enable the CRA 2015 to be invoked as part of English law although I need not decide whether those rights would prevail.

Conclusions of the application for a stay

99. On the application for a stay I preferred the Defendant’s analysis. It was able to satisfy section 9(1) of the Arbitration Act 1996 because it was common ground that the Claimant was party to a concluded arbitration clause (even if disputed as to whether that clause could be enforced against him). While the Claimant’s case was that the clause could not be enforced against him under the English law he relied upon he did not dispute that the clause was concluded within any contract made and its existence was not impugned under the Gambling Act or even under the English law he relied on (which would enable him to enforce the clause if he wished).
100. Whether applying English or New York law the arbitration clause clearly covered issues going to its validity and enforceability, even if the issues raised were ones of consumer protection based on English law. It was accepted that the Gambling Act claim and the dispute regarding whether clause 16 was unfair did not impugn the arbitration clause. They were plainly matters within the scope of the arbitration clause, even if they involved questions of English law. A stay must accordingly be granted under section 9 unless the Claimant can satisfy the court that the clause is “*null and void, inoperative or incapable of being performed*” on the balance of probabilities.

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101. The authorities show that the Claimant was entitled to raise issues under section 9(4) and that the court has choices (and indeed must take a view) on how to approach such issues. It can decide those issues on the evidence before it (effectively by way of a summary determination), order a trial of those issues or decline to order a trial and stay the English proceedings. It may decide to stay the matter on the basis that the NY arbitration can continue and such issues may be considered in that forum. Given that section 9(1) has been satisfied there would be no basis for exercising the court's inherent jurisdiction to stay (which appears to arise only where the court cannot be satisfied that there is an arbitration agreement).
102. The Claimant has shown plausible evidence that any contract he concluded with the Defendant was a consumer contract. The Defendant had conceded that the Claimant was a consumer for the purposes of its application to challenge jurisdiction or seek a stay. This was a useful concession as many of the points were questions of law (for example as to the scope of the arbitration exception in the Recast Regulation). However, the Defendant made clear that it reserved its position on this question should the substantive merits of the Claimant's claim ever need to be determined.
103. The authorities show that the court has a wide discretion as to whether to decide section 9(4) issues summarily or make directions for trial, or stay the proceedings, typically on the basis that such issues can be addressed in the arbitration. The Claimant relied on the fact that the Defendant had chosen not to serve statement evidence to respond to the Claimant's evidence on these issues. Both sides had taken positions in correspondence on this. However, the absence of evidence would be far from decisive whatever the reason for it. Even if evidence had been served that would not have made summary determination appropriate. The relevant considerations are those discussed by Popplewell J and whether the Court can fairly determine them on a summary basis. There was no agreement that factual issues would be decided summarily.
104. Factual issues are raised as to whether the Defendant was directing its activities at the UK and whether the arbitration clause and governing law clause were unfair within the meaning of the CRA 2015. The Claimant's evidence on these matters was not conclusive. The Claimant acknowledged that the blockchain technology underlying the transactions in question is "*fundamentally de-centralised and borderless*" so some of these issues are novel, and the existing authorities on more conventional contracts (e.g. a building dispute) are less helpful. The authorities relied on by the Claimant showed that these issues commonly require a careful investigation of the facts that may well entail disclosure and oral evidence.
105. The evidence put forward by the Claimant was plausible evidence for the purpose of establishing a gateway under clause 15B (insofar as that provision applied). The Claimant has some strong arguments in contending that the inclusion of arbitration in the Terms of Use was unfair. However, his case was certainly not so strong as to suggest that there was no triable issue on the factual questions raised under the Consumer Rights Act 2015, or that he had what Popplewell J termed "*a very strong case*" on arbitrability that would justify making a decision. In deciding whether summary judgment is appropriate the question of whether the disputed issues are triable is always a relevant consideration. While efficiency is always important the

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mere fact that a consumer is invoking consumer rights does not justify a summary determination (indeed this could be unfavourable to the consumer).

106. Factual issues arose out of the Claimant's evidence (and his factual case that the arbitration clause was unfair) that would merit investigation, taking account of the authorities that the Claimant relied on including *Mylcris Builders Ltd v Buck* [2008] EWHC 2172 (TCC) and *Parking Eye v Beavis* [2015] UKSC 67. These include questions as to the Claimant's own trading and also whether the Defendant was acting in good faith, whether its terms were common for contracts of this type, and whether sufficient care had been taken to bring terms to the consumer's attention or whether they would be treated as concealed pitfalls or traps.
107. More significantly, factual issues going to the unfairness of the arbitration agreement and the governing law clause were closely linked to underlying factual issues relevant to whether he is bound by the terms of the Auction, and liable to pay the sum claimed in the NY arbitration. The arbitration is currently subject to the JAMS Policy on Consumer Arbitration, and this includes questions as to whether the arbitration clause meets "*minimum standards of fairness*". There is a real risk that the court's enquiry would overlap with that enquiry and the Claimant's existing case that he is not liable to pay. The enquiry into fairness may not require a very lengthy trial but both sides are entitled to challenge the factual assertions put forward by the other and wished to do so.
108. It is not inevitable that questions going to fairness of the arbitration agreement and governing law clause will come back to be decided in this court whether on enforcement or otherwise. The Claimant's evidence is that he has cryptoassets and also interests in real property outside the jurisdiction. In addition, the issues he is raising now (including issues of public policy) are matters that could be raised within the arbitration or before the New York court.
109. I take into account that the issues raised by the Claimant are issues of English consumer law, and that an English court would be better placed to decide them than a US arbitrator. I also take into account that on his case he would have to argue those points in what counsel described as "an unfair arbitration". However, the questions were ones of fairness rather than technical questions of English law. In the context of transactions that were acknowledged to be "*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.
110. Significantly, there was no evidence to suggest any legitimate concern as to the quality of the arbitral tribunal or the arbitral process in New York or the supervision of the New York courts, or indeed the applicable New York law or its ability to protect consumers, or its ability to address questions of English law including matters of public policy.
111. The Claimant raised issues as to the cost of instructing New York lawyers and travelling there, and suggested there was better access to free advice in London. However, it was far from clear that any imbalance arose out of the costs of disputing the claim in New York as compared to London. There was no evidence that there would be greater delay and cost in the NY arbitration. It is significant that JAMS

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caters for consumers taking part in arbitration, and the definition it gives for consumer is consistent (even if different) with that applied under English law. Further, the arbitrator had already taken into account concerns raised by the Claimant indicating that he would be deprived of the right to appear in person at a hearing in New York, noting the possibility that matters could be dealt with remotely.

112. The Claimant has taken part in the arbitration but this is far from decisive in itself. However, there is no evidence of “an unfair arbitration” or even procedural imbalance. The Claimant did not show that the issues raised now had been reserved by the arbitrator for argument in the English court. To the contrary, the Claimant appears to have been given a very full opportunity to raise his arguments on jurisdiction (including the fairness of the arbitration agreement) in the US arbitration, and his lawyers have chosen to serve lengthy arguments on jurisdiction. If the Claimant has chosen not to run the English law arguments before the arbitrator then that is a matter of choice taken under legal advice. In any event, the jurisdictional issues have not yet been finally determined and there was no evidence to suggest that the arguments could not be raised in the arbitration.
113. Unlike in *The Barito*, the forum conveniens type factors here are not sufficient to favour the English court deciding the issues raised. The only connection between England and the dispute on section 9(4) issues is that the Claimant is resident in England, he has the better of the argument on the Defendant directing its activities to England (among 49 other jurisdictions named in its borderless business) and he invokes English legislation.
114. The Claimant accepted that any contract was concluded on terms expressly providing for choice of New York law and arbitration with a New York seat. It is open to him to challenge the fairness and enforceability of that choice of law (and forum) and argue that principles of English law are applicable. Consumer law may mean that the express agreement is unenforceable. However, at this interim stage the matters put forward did not justify using that as the starting point prevailing over the express choice, or assuming that the English court was best placed to decide these issues. Mr Soleymani has not yet explained why English gambling legislation would apply if any contract were subject to New York law so there is similarly little basis for assuming that English law applies to underlying issues of illegality at this interim stage.
115. Here there was an express choice of New York law (and seat) and the Claimant’s evidence is not conclusive on the factual issues. Accordingly, the relevance of English law remains highly disputed. In these circumstances the balance is in favour of leaving the US arbitrator and the New York court to decide issues going to the validity of the arbitration clause (especially since they are linked to the underlying merits of the debt claim), and supervise the arbitration. English judges and arbitrators are frequently asked to decide questions of foreign law, and trusted to do so, including on matters based on social policy where foreign law may be quite different from English law standards. This typically happens where there is a dispute as to whether the parties have chosen London as a forum but also applies where the English jurisdiction is entirely non-consensual. English or foreign consumer law does not fall outside this approach. The questions of consumer protection raised by the Claimant are not matters that can only be adjudicated upon by an English court.

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116. English law also recognises that the starting point is that an agreement as to the seat of an arbitration is an exclusive jurisdiction clause in favour of the courts of the seat (*Enka Insaat v OOO Insurance Co Chubb* [2020] UKSC 38). This principle, together with the approach under section 9 and the English application of *Kompetenz-Kompetenz*, means that the existence of English law issues raised by the Claimant do not tip the balance in favour of the English court deciding those issues.
117. In all these circumstances the claim for a declaration as to the enforceability of the arbitration agreement should be stayed under section 9 of the Arbitration Act 1996. The claim as to whether any contract is illegal under the Gambling Act 2005, or as to whether the choice of law provision is enforceable should also be stayed for the same reasons, and because those issues clearly fall within the substantive issues that would be for the tribunal to decide if it has jurisdiction. It was not suggested that the Gambling Act claim should be decided summarily.

Overall conclusions on the application

118. The Defendant was entitled to a stay of all parts of the claim under section 9 of the Arbitration Act 1996. It was also entitled to an order declaring that the court has no jurisdiction in relation to the claim for a declaration that the arbitration clause in the Defendant's February 2020 Terms of Use is unfair and not binding upon him.