



Neutral Citation Number: [2023] EWHC 1964 (Comm)

Case No: CL-2022-000545

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (KBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, WC4A 1NL

Date: 28 July 2023

Before :

**MR JUSTICE BRIGHT**

Between :

**Eternity Sky Investments Ltd**

**Claimant**

- and -

**Mrs Xiaomin Zhang**

**Receivers**

**David Lewis KC and Gemma Morgan** (instructed by **Clifford Chance LLP**) for the  
**Claimant**

**Philip Marshall KC, Jonathan Kirk KC, Wilson Leung and Lee Finch** (instructed by  
**McDermott Will & Emery LLP**) for the **Defendant**

Hearing dates: 18, 19 July 2023

**APPROVED JUDGMENT**

**I direct that no official shorthand note shall be taken of this Judgment and that copies  
of this version as handed down may be treated as authentic.**

.....

## **Mr Justice Bright:**

### **A: Introduction**

1. This judgment concerns a New York Convention arbitration award, its enforcement under s. 101 of the Arbitration Act 1996, and the public policy exception under s. 101(3). The public policy exception was invoked by the losing party on the basis that she is a consumer, resident in the UK. She says that enforcement would infringe her rights under the Consumer Rights Act 2015.
2. It happens that, very shortly before this hearing, I gave judgment in another case involving some similar points: *Payward Inc. v Chechetkin* [2023] EWHC 1780 (Comm). That judgment featured prominently in some of the submissions made to me by the parties in this case.

### **B: Background**

#### **B1: Mrs Zhang, Mr Zhang, Chong Sing and Eternity Sky**

3. On 8 May 2016, the Defendant (“Mrs Zhang”) put her signature to the signing-page of a personal guarantee (“the Personal Guarantee”). The beneficiary under the Personal Guarantee was the Claimant (“Eternity Sky”). The subject-matter of the guarantee comprised the obligations of Chong Sing Fin Tech Holdings Group Limited (“Chong Sing”, formerly named Credit China Holdings Limited) in relation to a bond issue.
4. The relationship between these parties can be summarised as follows:
  - i) Mrs Zhang was then and is now resident in London.
  - ii) Her late husband (“Mr Zhang”) was resident in Hong Kong (as she had been, until she moved to London in 2013).
  - iii) Mr Zhang managed and controlled Chong Sing and owned a significant shareholding.
  - iv) Mrs Zhang had no managerial involvement in or control over Chong Sing.
  - v) She held a shareholding in Chong Sing. Her case was that it was a small percentage which she held as a nominee for her husband.
  - vi) Chong Sing was incorporated in the Cayman Islands but was registered in and run from Hong Kong. It conducted its business in Hong Kong and in the PRC. It was listed on the Stock Exchange of Hong Kong (“SEHK”).
  - vii) Eternity Sky is incorporated in the BVI but is registered in Hong Kong, where it conducts its business.
  - viii) Mrs Zhang says that, prior to the 2016 bond issue, Chong Sing was already heavily indebted to the corporate group to which Eternity Sky belongs.
  - ix) In the course of the bond issue, Chong Sing issued and Eternity Sky subscribed HK\$ 500,000,000 of convertible bonds under a subscription agreement dated 8

May 2016 (i.e., the same date as that of the Personal Guarantee) (“the Subscription Agreement”).

B2: The bond issue and the Personal Guarantee

5. The bond issue was held in Hong Kong, under the aegis of the SEHK and subject to its GEM Listing Rules. Cl. 3 of the Subscription Agreement provided for Chong Sing’s performance to be guaranteed by Mrs Zhang’s Personal Guarantee, as well as by a further personal guarantee from Mr Zhang. The formal public announcement of the bond issue on the SEHK also referred to both guarantees.
6. The Subscription Agreement provided for Hong Kong law and arbitration in Hong Kong.
7. The recitals to the Personal Guarantee referred to the Subscription Agreement, stated that the Personal Guarantee was entered into as security for the obligation of Chong Sing, and noted at (C) that it was a condition precedent to the Eternity Sky completing the transactions contemplated under the Subscription Agreement that Mrs Zhang should execute the Personal Guarantee. This made it clear that the consideration being provided to Mrs Zhang by Eternity Sky for the Personal Guarantee was completion under the Subscription Agreement – i.e., fundamentally, Eternity Sky’s payment of HK\$ 500,000,000 to Chong Sing in Hong Kong.
8. The critical provisions of the Personal Guarantee for the purposes of the application before me were Clauses 2 and 17:

**“2. GUARANTEE**

2.1 The Guarantor hereby irrevocably, absolutely and unconditionally:

- (a) guarantees to the Subscriber the due and punctual observance and performance by each of the Obligors of all of the obligations of, or expressed to be assumed by, any or all of the Obligors under or pursuant to any or all of the Transaction Documents and agrees to pay to the Subscriber from time to time, upon demand by the Subscriber, any and all sums of money which any and all of the Obligors are at any time liable, or expressed to be liable, to pay to the Subscriber under or pursuant to any or all of the Transaction Documents and which have become, or are expressed to have become, due and payable but have not been paid at the time such demand is made as if she was the principal obligor in respect to that amount;
- (b) agrees as a primary obligation to indemnify the Subscriber from time to time, upon demand by the Subscriber, from and against any loss incurred by the Subscriber as a result of any of the obligations of or expressed to be assumed by any or all of the Obligors under or pursuant to any or all of the Transaction Documents being or becoming void, voidable, unenforceable or ineffective as against any or all of the Obligors for any reason whatsoever, whether or not known to the Subscriber or any other person, the amount of such loss being the amount which the Subscriber would otherwise have been entitled to recover from any or all of the Obligors; and
- (c) agrees with the Subscriber that if, for any reason, any amount claimed by the Subscriber under this Clause 2 is not recoverable from the Guarantor on the basis of a guarantee then the Guarantor will be liable as a principal debtor and

primary obligor to indemnify the Subscriber in respect of any loss it incurs as a result of any Obligor failing to pay any amount expressed to be payable by it under a Transaction Document on the date when it ought to have been paid. The amount payable by the Guarantor under this Guarantee will not exceed the amount she would have had to pay under this Clause 2 had the amount claimed been recoverable on the basis of a guarantee.”

**“17. GOVERNING LAW AND JURISDICTION**

17.1 This Guarantee shall be governed by and construed in accordance with the Laws of Hong Kong without regard to any conflict of laws principles which may exclude the laws of Hong Kong.

17.2 In the event the Parties are unable to settle a dispute among them regarding this Guarantee, such dispute shall be referred to and finally settled by arbitration at Hong Kong International Arbitration Centre (the "HKIAC") in accordance with the UNCITRAL Arbitration Rules in effect when the notice of arbitration is submitted, which rules are deemed to be incorporated by reference into this subsection.

17.3 The arbitration proceedings must be conducted by one (1) arbitrator.

17.4 The arbitration must be conducted in Hong Kong.

17.5 The arbitration award is final and binding on the parties and the Parties agree to be bound and to act accordingly. Unless the Parties otherwise agree in writing or until the arbitral tribunal hands down an award, the Parties are obliged to continue to fulfil their obligations under this Agreement notwithstanding the commencement of an arbitration hereunder.”

9. Also of some relevance were the preamble – which described Mrs Zhang as a holder of a passport of the PRC, while giving her address at a residential property in London; cl. 4, which set out a number of representations and warranties given by Mrs Zhang, including that she was a citizen of and domiciled in the PRC, that she fully understood the contents of the Personal Guarantee and had obtained independent legal advice with respect to it and that the choice of Hong Kong law would be recognised and enforced in the jurisdiction of her domicile or nationality; and cl. 18, by which Mrs Zhang again acknowledged that she had been afforded sufficient opportunity to obtain independent legal advice and fully understood all the terms in the Personal Guarantee and the associated documents (including the Subscription Agreement).

B3: Mrs Zhang’s signature of the Personal Guarantee

10. The provisions summarised in the preceding paragraph were materially inaccurate:
- i) Mrs Zhang was not domiciled in the PRC in 2016. Her only place of domicile/residence was the address in London, as recorded in the preamble. (It is worth adding that Mrs Zhang was a PRC passport holder in 2016, but renounced Chinese nationality when she became a British national, in 2019.)
  - ii) Mrs Zhang did not read the Personal Guarantee before signing and she had not obtained any legal advice.
  - iii) Recognition of the choice of Hong Kong law and arbitration is in issue before me.

11. The page signed by Mrs Zhang is not numbered (unlike the 17 preceding pages) and appears to be a free-standing signature page. She signed it while on holiday in Spain with a friend, who acted as her witness.
12. This came about because Mr Zhang's PA sent her this single page and asked her to sign it by a message that said that "... the listed companies is issuing bonds, requires the majority shareholder couple to provide guarantee..."
13. Mrs Zhang had previously signed several similar documents, invariably doing so at her husband's request and without considering the terms or taking legal advice. She did so understanding that her signature was necessary for the purposes of her husband's business interests.
14. The signature page was headed as follows:

“**IN WITNESS WHEREOF** this Guarantee has been executed as a deed by the Guarantor and signed by the Subscriber under hand, and is intended to be delivered and is hereby delivered on the date specified on the first page of this Guarantee”
15. Immediately under this text, Mrs Zhang was identified as “**The Guarantor**” (in heavy bold font). Her signature was placed under this text.

#### B4: Eternity Sky's demand under the Personal Guarantee

16. On 20 May 2019, Chong Sing failed to redeem the bonds and defaulted under the Subscription Agreement. Shortly after this it suspended trading amid allegations of financial irregularities and embezzlement.
17. Mr Zhang died on 18 September 2019, leaving Mrs Zhang as the sole living guarantor. On 19 December 2019, Eternity Sky served a statutory demand on Chong Sing, followed on 17 June 2020 by a winding up petition in the Cayman Islands. Chong Sing was ordered to wind up, and liquidators were appointed, on 14 September 2020.
18. On 6 May 2020, Eternity Sky sent a letter of demand to Mrs Zhang under the Personal Guarantee for payment of the outstanding amounts due under the Subscription Agreement.

#### B5: The Hong Kong arbitration

19. On 19 June 2022, Mrs Zhang commenced arbitration proceedings in Hong Kong against Eternity Sky under the Personal Guarantee. She sought (i) declarations that the arbitration agreement in cl. 17, and/or the Personal Guarantee as a whole, were not valid or binding for lack of agreement and intention to be legally bound; alternatively (ii) a declaration that the Personal Guarantee was rescinded on grounds of undue influence; or (iii) a declaration that the Personal Guarantee was rescinded on the grounds of it being an unconscionable bargain.
20. Mrs Zhang's Statement of Claim in the arbitration expressly stated that she:

*“... submits to the jurisdiction of the Tribunal to determine its own jurisdiction, at present reserving her right as to any ongoing jurisdiction of the Tribunal*

*should the Tribunal determine that there was no valid arbitration agreement.”*

21. Eternity Sky brought a money counterclaim.
22. The arbitration duly took place in Hong Kong, by a virtual hearing in November 2022. The seat being in Hong Kong, it was conducted under the legal framework of the Arbitration Ordinance of Hong Kong (Cap. 609), as well as being subject to the HKIAC Procedures and the UNCITRAL Rules. Mrs Zhang was represented by Squire Patton Boggs (both the London office and the Hong Kong office) and by English leading counsel. She attended remotely and gave oral evidence.
23. The arbitrator issued his award on 22 August 2022 (“the Award”). He summarised each party’s evidence and submissions. Mrs Zhang’s case focused on the circumstances in which she had signed the Personal Guarantee.
24. The arbitrator found, on the evidence, that Mrs Zhang was well-aware of what a bond issuance was. When asked about this, she gave an explanation, which he set out in the Award, describing her evidence on this as “highly competent” and expressed “in exceptionally detailed and sophisticated terms.”
25. He also found that she understood the implications of signing a guarantee.
  - i) He referred to the text on the signature page, set out above.
  - ii) He referred to the explanation in the cover message from Mr Zhang’s PA.
  - iii) He noted that Mrs Zhang:

“...repeatedly gave evidence at the hearing that she always signed whatever her husband or his associates asked her to sign, as she trusted him and it was his responsibility to look after the business and to provide for the family.”
  - iv) He referred to her evidence that:

“I knew that when I signed my name I certainly should have some responsibility because I signed my name.”
  - v) In the light of this evidence, he concluded that Mrs Zhang had intended to enter into legal relations and to provide the security necessary to secure the bond issuance.
  - vi) He also regarded it as significant that Mrs Zhang could have asked to see the terms of the Personal Guarantee before signing, but negligently chose not to. He held that Mrs Zhang could not rely on her own negligence:

“I find, upon consideration of the evidence, that Mrs. Zhang was aware of what she was signing and its purpose. She knew that by signing the signature page of the Personal Guarantee that certain risks and obligations attached to her actions, but she nevertheless chose not to request a copy of the Personal Guarantee or to ask anything about the specific terms, obligations or consequences of being bound by the Personal Guarantee. In signing the Personal Guarantee, Mrs. Zhang's careless actions induced Respondent (which was not involved in the

process of acquiring Mrs. Zhang's assent), to subscribe to and make payment for Chong Sing's bonds, and I determine that she is estopped from now denying her consent to the Personal Guarantee and escaping her liability thereunder.”

26. Importantly, the arbitrator recorded that Mrs Zhang’s evidence was that she regularly signed documents like this Personal Guarantee without reading them, having made a deliberate choice not to read them. She could have asked to see the entire Personal Guarantee if she had wanted to, and it was careless of her not to have done so. He characterised this as negligence on her part.
27. The arbitrator therefore rejected the arguments that Mrs Zhang made before him of (i) lack of agreement and intention to be legally bound, (ii) undue influence and (iii) unconscionable bargain.
28. It was common ground that he had jurisdiction to determine these issues (Mrs Zhang having positively invoked his jurisdiction, when she commenced the arbitration proceedings in order to seek declarations on these very grounds) and that his decision on them could not be attacked before me.
29. Having rejected Mrs Zhang’s claims, the arbitrator found that the Personal Guarantee was on foot and binding. This was significant, given the terms of Mrs Zhang’s express submission to his jurisdiction. It meant that the reservation to which that submission had been subject was no longer operative, such that she expressly accepted that the arbitrator had jurisdiction to decide his own jurisdiction. The arbitrator duly confirmed that he had jurisdiction, arising out of the arbitration agreement in the Personal Guarantee (i.e., cl. 17).
30. The arbitrator then dealt with Eternity Sky’s counterclaim, which he held succeeded in respect of the principal sums due under the Personal Guarantee. He also awarded interest, albeit he rejected Eternity Sky’s claim that interest should be set at the default rate under the Subscription Agreement of 15% and awarded simple interest of 7%.
31. The Award therefore ordered Mrs Zhang to pay Eternity Sky the sum of HK\$ 500,000,000, plus interest and costs.
32. The Award was the subject of some typographical corrections, by an addendum issued by the Tribunal on 26 September 2022, but these were not material.

### **C: The proceedings in this action**

#### **C1: The Enforcement Order**

33. On 18 October 2022, Eternity Sky commenced these proceedings, by way of an arbitration claim seeking enforcement of the Award pursuant to s. 101 of the Arbitration Act 1996. An order giving permission for enforcement of the Award was granted by Bryan J on 27 October 2022 (“the Enforcement Order”).
34. Because it had been applied for and granted without notice and on documents, the Enforcement Order provided for Mrs Zhang to apply for it to be set aside.

### C2: Mrs Zhang's set-aside application

35. Mrs Zhang's application for the Enforcement Order to be set aside was issued on 14 November 2022. The grounds relied on in Mrs Zhang's application notice (as further developed in the supporting evidence and in submissions) were that enforcement would be contrary to English public policy within s. 103(3) of the Arbitration Act 1996 and CPR 62.18(9), specifically the UK consumer legislation in the Consumer Rights Act 2015. The supporting evidence consisted of a witness statement made by Mrs Zhang and a further witness statement made by Philip Annett of Mrs Zhang's then solicitors, Baker & Mackenzie LLP.
36. Eternity Sky served a responsive witness statement made by Thomas Walsh of Clifford Chance LLP, on 12 December 2023.
37. On 19 January 2023, Mrs Zhang's application was listed to be heard at this hearing (i.e., 6 months later).

### C3: The application for a freezing order

38. On 20 March 2023, Eternity Sky's solicitors served an application on Mrs Zhang for a freezing order. Mrs Zhang responded with an affirmation made by Mr Annett.
39. This application was heard on 6 April 2023 and was dismissed. I received very limited information about this hearing.

### C4: Mrs Zhang's adjournment application and the hearing on 30 June 2023

40. On 20 June 2023, (i.e., less than one month before the date for the hearing), Mrs Zhang issued an application seeking the adjournment of the set-aside application, to the earliest available date after 19 December 2023 ("the Adjournment application"). I note in passing that this application notice was issued shortly after Mrs Zhang's original solicitors, Baker Mackenzie LLP, were replaced by McDermott, Will & Emery UK LLP.
41. The application notice also sought an order that Mrs Zhang have permission to file and serve further evidence (but did not state what that evidence would be, or when it could/should be served) ("the New Evidence application") and an order that Eternity Sky provide specific disclosure of specified classes of documents ("the Specific Disclosure application").
42. The application notice was supported by a witness statement made by Ennio Keyte of her new solicitors, McDermott, Will & Emery UK LLP. The common thread running through all three limbs of the application notice was that Mrs Zhang said that her legal team were now investigating the possibility that the underlying transaction (including the Subscription Agreement) was affected by illegality; in which case (it was further said) the Personal Guarantee would also be affected by illegality; and this gave rise to a further basis on which enforcement of the Award could be said to be contrary to public policy under s. 103(3) of Arbitration Act 1996.
43. That application was heard by Foxton J on 30 June 2023. He refused the application for an adjournment, but followed this with a direction at paragraph 2 of his order, as follows:

“2. Mrs Zhang is not prevented, if so advised, from making a further application to adjourn the final determination of the Set Aside Application on the basis that further time is required to for Mrs Zhang (i) to adduce additional evidence on the issue of substantive unfairness arising under the Consumer Rights Act 2015, to the extent Mrs Zhang wishes to rely on material which is also said to be relevant to possible allegations of underlying illegality, and/or (ii) to advance allegations of underlying illegality. For the avoidance of doubt, it will not be open to Mrs Zhang to make a further application to adjourn in respect of any other aspects of the Consumer Rights Act 2015 argument which will be finally determined at the July Hearing.”

44. At paragraph 3 of his order, Foxton J adjourned the New Evidence application and the Specific Disclosure application, for further directions, if necessary, at this hearing. It is important to note that this was preceded at the hearing by the following:

i) In the course of submissions, Foxton J had the following exchange with Mr Marshall KC (for Mrs Zhang):

“2 MR JUSTICE FOXTON: Mr Marshall, we  
3 are in a jurisdiction in which, rare exceptions  
4 apart, a party generally needs to set forth a  
5 non-demurrable case before they get  
6 disclosure, rather than getting disclosure to  
7 be able to plead a non-demurrable case. At  
8 the moment one of the issues that is troubling  
9 me is: is Mrs Zhang currently able to put  
10 forward a case that would withstand the  
11 strike out test, and if so, why has it not been  
12 done?

13 MR MARSHALL: Yes, in terms of the  
14 demurrable test for getting disclosure, what I  
15 would say in relation to that is these  
16 materials would actually be relevant not just  
17 to the illegality defence that she would like to  
18 advance on completing the investigation she  
19 is undertaking, but actually is also relevant to  
20 the Consumer Rights defence itself because  
21 of issues regarding transparency, et cetera”

ii) In his ruling at the end of the hearing, Foxton J said:

“... if Mrs Zhang's legal team is currently able to put its name to a written assertion that there is an illegality defence which applies to the award, then I would invite them to formulate a proposed amendment on that basis before the 18 July hearing, setting that case out. Not least, I am keen to understand the structure of an argument of that kind which might reveal whether it is in part susceptible to a preliminary issue. It is very difficult to grapple with the possible illegality case when it formulated by reference to adjectives alone. Obviously, if that cannot be done, it cannot be done, but if it can be, I believe

it would be in Mrs Zhang's interest to do so.”

- iii) In short, Mrs Zhang was put on notice that the New Evidence application and the Specific Disclosure application – both of which were predicated on a possible case of illegality – were likely to face difficulties if her legal team were not able to put its name to a written assertion of illegality.
45. At paragraph 4 of his order, Foxton J directed that Mrs Zhang could file and serve further evidence regarding (a) her ability to make payment into court as a condition of adjournment and (b) whether she had delayed in investigating the illegality of the underlying loan transaction. I note the following:
- i) Paragraph 4(b) arose because, at the hearing, Eternity Sky had argued that the adjournment application should be refused because it had been made too late.
  - ii) Paragraph 4(b) refers to passages in Eternity Sky’s skeleton for the hearing on 30 June 2023 where these arguments were set out.
  - iii) The only obvious situation in which Mrs Zhang might wish to serve further evidence in accordance with paragraph 4(b) would be if she intended to exercise the right preserved to her in paragraph 2, i.e., to make a further application to adjourn.
46. At paragraph 5 of his order, Foxton J directed that, if Eternity Sky intended to argue that the Specific Disclosure application should be dismissed at this hearing without further evidence being filed, it should inform Mrs Zhang by letter of 4 pm on 5 July 2023.

#### C5: Developments after the hearing of 30 June 2023

47. On 5 July 2023, Eternity Sky’s solicitors, Clifford Chance LLP, wrote stating that her counsel would argue at this hearing that the Specific Disclosure should be dismissed. This letter corresponded to paragraph 5 of Foxton J’s order.
48. On 9 July 2023, Mrs Zhang served a second witness statement, setting out her assets. This corresponded to paragraph 4(a) of Foxton J’s order.
49. Mrs Zhang also served a second witness statement from Mr Keyte, which addressed the timing of Mrs Zhang’s investigation of the issue of illegality. This corresponded to paragraph 4(b) of Foxton J’s order.
50. My reading of paragraph 2 of Foxton J’s order is that, when Foxton J allowed the possibility of Mrs Zhang “making a further application to adjourn”, he anticipated that this would entail the issue of a further application notice. I say this because the Adjournment application in the application notice of 20 June 2023 had been finally disposed of, by paragraph 1 of Foxton J’s order.
51. Mrs Zhang has not issued a further application notice, seeking an adjournment. Nor did her solicitors indicate in the correspondence that preceded the hearing before me that there would be a further application to adjourn. However, the witness statement of Mr Keyte, corresponding as it did to paragraph 4(b) of Foxton J’s order, implied that Mrs Zhang intended to seek an adjournment. When Mrs Zhang’s skeleton argument

was served it duly contained an application to adjourn – albeit on a somewhat curious, contingent basis, as I discuss further below.

52. However, Mrs Zhang’s legal team have not (in Foxton J’s words) “put its name to a written assertion that there is an illegality defence which applies to the award.” In oral submissions, Mr Marshall KC (who dealt with this aspect on behalf of Mrs Zhang) confirmed that he was not advancing a case of illegality.
53. The skeleton argument served on behalf of Mrs Zhang also addressed disclosure and further evidence. Rather than making positive submissions of the kind conventionally advanced in the context of an application for specific disclosure (i.e., explaining how the relevant documents were relevant to the issues, why they could be expected to be within the other party’s possession, custody or power, what searches should be made, etc.), the skeleton simply advanced suggested directions. Furthermore, these directions effectively assumed (without explaining the position) that the disclosure that should be directed should not be confined to the terms sought by Mrs Zhang’s application notice of 20 June 2023, but should be significantly different and broader (“the New Specific Disclosure Application”).

#### **D: The rival positions before me**

##### D1: Mrs Zhang’s case on the Consumer Rights Act 2015

54. The primary case advanced for Mrs Zhang before me was (as foreshadowed in her application notice of 14 November 2022) that enforcement would be contrary to the public policy in that the terms of the Personal Guarantee were unfair within the meaning of the Consumer Rights Act 2015. The specific terms of the Personal Guarantee that were alleged to be unfair were the following:
  - i) Cl. 17, in that it provided for arbitration in Hong Kong
  - ii) Cl. 17, in that it provided for Hong Kong law.
  - iii) Cl. 2, the substantive guarantee terms.
55. The submissions made by Mr Kirk KC (who presented this part of Mrs Zhang’s case on her behalf) proceeded on the following basis:
  - i) Eternity Sky contracted as a “trader” and Mrs Zhang as a “consumer”, each within the meaning of the Consumer Rights Act 2015. It was common ground that Eternity Sky was a trader, so the only issue here was whether Mrs Zhang contracted as a consumer.
  - ii) The Consumer Rights Act 2015 applies, notwithstanding the choice of Hong Kong law in cl. 17, pursuant to s. 74(1) of the Consumer Rights Act 2015, because the Personal Guarantee had a close connection to the UK.
  - iii) The provisions in cl. 17 in respect of Hong Kong arbitration and Hong Kong law were unfair within the meaning of s. 62 of the Consumer Rights Act 2015. As regards Hong Kong arbitration, reliance was placed on para. 20 of Schedule 2 to the Consumer Rights Act 2015.

- iv) Cl. 2 is at the core of the Personal Guarantee and so falls within s. 64 of the Consumer Rights Act. Thus, it can only be assessed for fairness if it was not transparent or prominent within the meaning of s. 64(2). (This was common ground). Mrs Zhang's case was that cl. 2 was neither transparent nor prominent, and it should be assessed as unfair.
- v) The relevant provisions in the Consumer Rights Act 2015 represent UK public policy. Enforcement therefore should be refused under s. 103(3).

D2: Eternity Sky's case on the Consumer Rights Act 2015

56. The submissions in response from Mr Lewis KC (on behalf of Eternity Sky) were as follows:
- i) Mrs Zhang was not a consumer within the meaning of the Consumer Rights Act 2015.
  - ii) The Consumer Rights Act 2015 was not applicable, because of the choice of Hong Kong law and because the Personal Guarantee did not have a close connection to the UK within the meaning of s. 74(1)(b) of the Consumer Rights Act 2015.
  - iii) In any event, none of the impugned terms was unfair.
  - iv) Even if they were unfair, enforcement should not be refused under s. 103(3).
57. Mr Lewis KC said that, in so far as substantive unfairness under the Consumer Rights Act 2015 arose, I had the materials necessary to decide whether the relevant terms were unfair and should do so.

D3: Mrs Zhang's alternative case

58. Mr Marshall KC made submissions on behalf of Mrs Zhang in relation to adjournment and disclosure/further evidence, as follows:
- i) If I should conclude that Consumer Rights Act 2015 points arise, but were to consider that I did not have sufficient information and evidence to decide substantive fairness, I should require further disclosure to be provided.
  - ii) Alternatively, if I should find against Mrs Zhang on points arising under the Consumer Rights Act 2015, I should not make an order that finally disposed of her challenge to enforcement, but should adjourn her application, in order to enable her to investigate whether the transaction which gave rise to this matter was affected by illegality.
  - iii) If so, I should give directions providing for specific disclosure and then for further factual witness statements, to be followed by a case management conference.
59. Eternity Sky opposed all these suggestions, saying I should decide the application rather than leaving matters open. Mr Lewis KC also said that, if I were minded to adjourn, this should be subject to the condition of a payment into court by Mrs Zhang.

## **E: Was Mrs Zhang a “consumer”?**

### E1: The test under s. 61 CRA 2015

60. The Consumer Rights Act 2015 deals with unfair terms in Part 2. This applies as provided in s. 61:

#### **“61 Contracts and notices covered by this Part**

(1) This Part applies to a contract between a trader and a consumer.”

61. As already noted, it was common ground that Eternity Sky was a “trader” within the meaning of the Consumer Rights Act 2015. However, Eternity Sky disputed that Mrs Zhang was a “consumer”.

62. The definition of “consumer” is (per s. 76(2)) that set out in s. 2(3):

“(3) “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.”

### E2: The evidence as to Mrs Zhang’s status

63. At no material time did Mrs Zhang have any trade, craft or profession. Nor was she in employment or actively running a business. Her evidence in her witness statements in these proceedings, and in the arbitration, was that, since marrying Mr Zhang, she had occupied herself as wife to Mr Zhang, mother to their daughter and home-maker. The arbitrator summarised her evidence in this regard as follows:

“Mr. and Mrs. Zhang had clearly delineated responsibilities within their relationship, which they had agreed between them. Mrs. Zhang not only accepted, but in fact, expected Mr. Zhang to fulfil his side of their bargain, which involved him making all of the business decisions necessary to support their family.”

64. The Personal Guarantee and the Subscription Agreement that it supported were certainly intended to benefit Chong Sing. I did not understand Mrs Zhang to dispute that Chong Sing might be regarded as her husband’s business (in that he managed and controlled it, was a board director and had a beneficial interest in, at least, a large minority shareholding). However, her case was that it was in no sense her business: she had never held any formal or informal role within Chong Sing nor had she ever exercised any influence over it (not even via her husband).
65. Eternity Sky contended that Mrs Zhang had a real business interest in Chong Sing, sufficient to negate her status as a consumer. This makes it necessary to consider the evidence regarding the shares held by or for Mr Zhang and Mrs Zhang.
66. Chong Sing’s annual report for 2016 identified the shareholding interests of Mr Zhang as totalling 3,933,308,000, said to be about 18.27%. This total comprised 593,148,000 held by him as beneficial owner, 3,250,160,000 held via a company he owned (First Pay Limited) and 90,000,000 described as “family interests”, which were held by Mrs Zhang. It identified Mrs Zhang as having the same total interest, most of this being “family interests” (i.e., shares held directly or indirectly by Mr Zhang) and 90,000,000

being held by Mrs Zhang, whom the report described as the “beneficial owner” of this shareholding.

67. The information sheet that Chong Sing filed with the SEHK shortly prior to the bond issue, on 5 May 2016, repeated that Mrs Zhang was the beneficial owner of 90,000,000 shares, said to be about 0.39% of the company.
68. Chong Sing’s formal public announcement of the bond issue put the position slightly differently. It gave Mr Zhang’s total shareholding interest as 781,148,000<sup>1</sup> (said to be about 18.90% of the company at the time, and about 17.67% after full bond conversion), and said that this was held “beneficially, by First Pay Limited... and by [Mrs Zhang]”.
69. Mr Kirk KC submitted that the meaning of this document was that Mr Zhang was the beneficial owner of the 90,000,000 shares held by Mrs Zhang, so that she was his mere nominee. I do not understand the document in this way. My understanding is that, just as explained in more detail in the earlier document, (i) some shares were held by Mr Zhang beneficially, (ii) some were held by First Pay Limited and (iii) some were held by Mrs Zhang.
70. My understanding seems to me to be confirmed by a later document – Chong Sing’s first quarterly report of 2020 (dated 15 May 2020), which reiterated that Mrs Zhang was the beneficial owner of 90,000,000 shares.
71. Mr Lewis KC said that Mrs Zhang had become extremely wealthy through the business dealings of her husband in Chong Sing, and the Personal Guarantee was intended to allow this to continue. This was not merely because Mrs Zhang expected her husband to continue to support her, but because of her own shareholding in Chong Sing – i.e., the 90,000,000 shares, which Mr Lewis KC said she owned beneficially (relying on the corporate filings referred to above) and which he said (relying on a report on Chong Sing of December 2016, published by Anonymous Analytics) had a value of about HK\$55,800,000.
72. I note that Mr Lewis KC’s figure appears to reflect what that report gave as the current trading price of shares in Chong Sing. The report was in fact very critical of the company’s conduct, governance and financial standing and the authors’ own view was that its true current value was approximately 4 ½ times less than the current trading price.

### E3: Legal principles for “consumer” under CRA 2015

73. The Consumer Rights Act 2015 was enacted in the UK in order to give effect to EC Directive 93/13, on unfair terms in consumer contracts (“the UTCCD”) and replace the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCRs”). Accordingly, there is a body of European case-law that is relevant, as well as some English cases.
74. It is well-established, and was common ground between the parties, that being wealthy does not prevent an individual from being a consumer. Wealthy consumers are

---

<sup>1</sup> It is not obvious to me how the number of shares attributed to Mr Zhang, or their percentage of the company, can be reconciled with the other filings. I wonder if the figure given for the number of shares may have been a mistake.

consumers none the less: *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm), per Andrew Baker J at [62]. It follows that the amounts at stake under the Personal Guarantee, and the degree of wealth that Mrs Zhang no doubt hoped the bonds issue would generate with the support of the Personal Guarantee, have no bearing on this analysis.

75. It is also well-established, and was common ground between the parties, that whether a guarantor providing a personal guarantee in support of a company is a “consumer” for the purposes of the UTCCD (and, therefore, for the Consumer Rights Act 2015), depends on the test first formulated by the CJEU in *Tarcău Banca Comerciala Intesa Sanpaolo Romania SA* (Case C-74/14) at [29]:

“... whether that person acted for purposes relating to his trade, business or profession or because of functional links he has with that company, such as a directorship or a non-negligible shareholding, or whether he acted for purposes of a private nature.”

76. *Tarcău* involved security including a personal guarantee given by Mr and Mrs Tarcău in support of the business of their son. They had no connection with the activities of their son’s company. The CJEU left it to the national court to apply the test set out above.

77. This test was applied in *Dumitraş v BRD Groupe Société Générale* (Case C-74-715). The CJEU noted that Mr Dumitraş originally gave a personal guarantee in support of a company in which he was the director and sole member, and so could not be treated as a consumer. However, those arrangements were replaced by new agreements involving a new company, in which he and Ms Dumitraş (who also gave a personal guarantee) were never directors and did not have a non-negligible shareholding, and so did not appear to have acted by reason of functional links with the new company.

#### E4: Analysis

78. In so far as Mrs Zhang’s Personal Guarantee was given in support of her husband’s interest in Chong Sing, and ignoring for the time being her own shareholding, it seems to me incontestable that she acted for purposes of a private nature – fundamentally, her marriage. Mrs Zhang’s evidence was that she signed documents such as this at her husband’s request direct out of love and as part of her affectionate duty as a wife. Mr Lewis KC, echoing the arbitrator’s finding of a “clearly delineated responsibilities” which had been the subject of agreement, suggested that the relationship involved at least as much financial pragmatism as romance.

79. I accept Mrs Zhang’s evidence that she acted predominantly out of love and do not for a moment doubt her evidence as to the nature of her marriage.

80. In any case, the motives of human beings are seldom pure. Many marriages could be assessed as including some transactional features (or, in the arbitrator’s words, “carefully delineated responsibilities”), real life being what it is. That does not mean that their mainspring is not love, but money. Above all, it does not derogate from the fact that marital relationships are fundamentally private (notwithstanding that they are occasionally the subject of legal scrutiny). A contract entered into solely on account of marriage is one entered into for private reasons – not because of a functional link of the

sort described in *Tarcău and Dumitraş*. Even Mr Lewis KC, I think, would shrink from describing marriage as a functional link with the spouse's company.

81. Turning to Mrs Zhang's own shareholding of 90,000,000 shares, while I note Mrs Zhang's evidence that she would also deal with matters like this as her husband said, there does not appear to have been any trust or similar binding arrangement that negates the beneficial ownership indicated by Chong Sing's corporate filings. For example, when Mr Zhang sadly died, these shares will not have formed part of his estate. I therefore treat this as Mrs Zhang's shareholding.
82. This then leaves the question whether it is to be treated as "non-negligible" (per *Tarcău*). In financial terms, its market value in May 2016 was not negligible, no matter whether one takes Mr Lewis's figure or some fraction of it. However, looking at the question in this light would be taking account of the mere quantum of the sums at stake, which *Ang* suggests, and I consider, is not the correct approach.
83. The test set out in *Tarcău and Dumitraş* is aimed at seeing whether there is a "functional link" between the individual providing the personal guarantee and the company supported by it. In my view, the percentage of the company's capital that a shareholding represents is much more likely to be indicative of this than the market value of that shareholding. A shareholding that amounts to about 0.4% of the company is not one that constitutes or can give rise to any functional link. Furthermore, Mrs Zhang in fact had no involvement in the functioning of Chong Sing.
84. Moreover, it seems to me necessary to acknowledge the reality that both her own shareholding and her husband's interests were at play, but his predominated. On the evidence before me, Mrs Zhang did not think of her 90,000,000 shareholding as her own (even though it was) and did not consciously consider in May 2016 the possibility that the Personal Guarantee would add to their value and thus would directly affect her own personal wealth (rather than her husband's ability to provide for her). However, even if she had performed this calculation, she perforce would also have been conscious of her husband's shareholdings. These were 593,148,000 shares owned beneficially, and 3,250,260,000 owned via First Pay: a total of 3,843,308,000, which dwarfed her 90,000,000.
85. I have no doubt Mrs Zhang would have entered into the Personal Guarantee even if she had held no shares at all in her own name. Her essential reason for doing so was because of her husband's involvement in the company. The effect of her own shareholding on her decision-making could only ever have been marginal.

#### E5: Conclusion on "consumer"

86. I reject Eternity Sky's case that Mrs Zhang entered into the Personal Guarantee because of a functional link with Chong Sing. I accept Mrs Zhang's case that she did so as a consumer, within the meaning of the Consumer Rights Act 2015.

#### **F: Does the PG have a "close connection" with the UK?**

##### F1: The test under s. 74(1) CRA 2015 and its effect

87. The Consumer Rights Act 2015 deals with choice of law clauses in s. 74:

**“74 Contracts applying law of non-EEA State**

(1) If—

(a) the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a consumer contract, but

(b) the consumer contract has a close connection with the United Kingdom, this Part applies despite that choice.

(2) For cases where the law applicable has not been chosen or the law of an EEA State is chosen, see Regulation [\(EC\) No. 593/2008](#) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.”

88. As I noted in *Payward Inc. v Chechetkin* at [112], s. 74 was enacted in part to reflect ss. 66 and 27 of the Unfair Contract Terms Act 1977, but also (and more immediately) to enact Article 6(2) of the UTCCD, drawing upon and replacing regulation 9 of the UTCCRs. Article 6(2) of the UTCCD provides:

“Article 6

...

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

89. Where it applies, s. 74 does not invalidate the choice of law clause. However, if the text in s. 74(1)(b) of a “close connection” with the UK is satisfied, then the Consumer Rights Act 2015 applies as well as the applicable law.
90. In this case, for example, if cl. 74(1)(b) were to apply, this would not change the applicable law from Hong Kong (being the law chosen in cl. 17.1). The law of Hong Kong therefore would still be the relevant system of law by which to assess (for example) the issues in respect of contract formation, undue influence and unconscionability. Those issues were in fact considered by the arbitrator on the basis of Hong Kong law. In itself, s. 74(1) of the Consumer Rights Act 2015 does not provide any basis for an argument that he was wrong to have done so.
91. However, if the Personal Guarantee were shown to have been closely connected with the UK, its terms as a whole would fall to be assessed for fairness under the Consumer Rights Act 2015. This includes the terms in cl. 17.1, providing for Hong Kong law. If it could be shown that cl. 17.1 was substantively unfair, then it would not be binding.
92. This was the effect in *Payward Inc. v Chechetkin*, where the choice of the law of California was unfair for several reasons but principally because (together with the requirement to arbitrate in San Francisco) it deprived Mr Chechetkin of the right to bring a claim under the Financial Services and Markets Act 2000 – which he would have had under English law, which would have applied but for the contractual choice of law clause.

## F2: The relationship between s. 74 CRA and Rome I

93. I repeat that the test in s. 74(1) is whether the consumer contract has “a close connection” with the UK. This phrase contains echoes of, but is not the same as, the questions that often arise in relation to the law applicable to contracts.
94. The test in s. 74(1)(b) is not that the contract be “manifestly more connected” with the UK than with (i) the country whose law has been chosen or (ii) any other country – cf. the language of what is now Article 4(3) of the EC regulation identified in s. 74(2), i.e., EC Regulation No. 593/2008 (“Rome I”). Nor is it that the contract be “most closely connected” or “more closely connected” with the UK – cf. Articles 4(3) and 4(5) of the Convention that preceded Rome I (“the Rome Convention”), which was in force when the UTCCD was published, under the Contracts (Applicable Law) Act 1990.
95. This difference in language is potentially significant, because there could be cases where a contract has a close connection with the UK, even though it is more closely connected, or manifestly more closely connected, or most closely connected, with another country.
96. It is nevertheless obviously of interest to consider the relationship between s. 74(1) and either the Rome Convention or Rome I, for two reasons.
- i) First, because there is a considerable body of jurisprudence under the Rome Convention and under Rome I on the kind of factors that might be identified as constituting a connection between a contract and a country. This includes jurisprudence in relation to guarantees: for example, *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019; *Commercial Marine Piling Ltd v Pierse Contract Ltd* [2009] EWHC 2241 (TCC); *Emeraldian v Ltd Partnership v Wellmix Shipping Ltd* [2010] EWHC 1411 (Comm).
- ii) Second, because s. 74(2), while not relevant to this case, suggests that this point in the preceding paragraph, or one close to it, may have occurred to the statutory draftsman. Where there is no choice of law clause, Rome I applies. In the consumer context, this means that one starts with Article 6 and, in some cases, one then proceeds to Article 4. The relevant provisions are as follows:

### “Article 4

#### **Applicable law in the absence of choice**

...

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.”

*“Article 6*

**Consumer contracts**

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
  - (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
  - (b) by any means, directs such activities to that country or to several countries including that country,and the contract falls within the scope of such activities.
2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.”

97. Accordingly, if the Personal Guarantee had not contained an express choice of law provision in cl. 17.1 (and if it could not be said that there was an implied choice of law such as Rome I would recognise), these provisions would apply as follows:
- i) The first question, arising under Article 6.1 would have been whether Eternity Sky had pursued its activities in the UK or directed its activities to the UK. The answer to that being “No”, attention then would have turned to Art. 4 (pursuant to Article 6.3).
  - ii) The next question would have been whether the contract falls within any of Article 4.1 (a) to (h). The answer being “No”, attention would then have turned to Article 4.2.
  - iii) The next question, arising under Article 4.2, would have been who provided “characteristic performance” and in what country they had their habitual residence. The answers being “Mrs Zhang” and “England”, attention would then have turned to Article 4.3.
  - iv) The final question, arising under Article 4.3, therefore would have been whether the Personal Guarantee was “manifestly more closely connected” with a country other than England.
98. At the outset of the hearing, I raised with the parties it might be useful to consider the law under the Rome Convention and Rome I. They urged caution in applying in the context of the Consumer Rights Act 2015 cases that were decided under a different regime. I of course accept the need to take great care, but consider it slightly artificial to treat Rome I as entirely separate from the Consumer Rights Act 2015, in the light of s. 74(2).

99. The result was that, with one very small exception, Mr Kirk KC and Mr Lewis KC both declined to address me on cases such as *Samcrete*. It therefore might be unfair to the parties if I were draw significantly on that line of authority in this judgment. I therefore do not do so, in spite of my instinct that some of those decisions may say things are useful in the present context.

#### F3: The meaning of “close connection”

100. In *Commission v Kingdom of Spain (C-70/03)* the CJEU described the term “close connection” as “deliberately vague”:

“As regards ties with the Community, Article 6(2) of the directive merely states that the contract is to have 'a close connection with the territory of the Member States'. That general expression seeks to make it possible to take account of various ties depending on the circumstances of the case. Although concrete effect may be given to the deliberately vague term 'close connection' chosen by the Community legislature by means of presumptions, it cannot, on the other hand, be circumscribed by a combination of predetermined criteria for ties such as the cumulative conditions as to residence and conclusion of the contract referred to in Article 5 of the Rome Convention.”

101. It follows that it is necessary to look at all the circumstances of the individual case.
102. Article 5 of the Rome Convention was the provision that was the equivalent of Article 6 of Rome I, and was to similar effect. Thus, the significance of the CJEU’s reference to “residence and conclusion of the contract” not being treated as predetermined criteria appears to be that the residence of the consumer cannot be treated as automatically satisfying the test of close connection.

#### F4: The time as at which connection to the UK should considered

103. Mr Kirk KC submitted that this question has to be considered not (or not merely) at the time the contract was concluded, but at the point when the court has to make its assessment. He said that developments subsequent to the contract, which affect and (potentially) change the connections the consumer contract may have with any relevant country, should be taken into account. Accordingly, a close connection that they did not exist when the contract was concluded might develop later; or vice versa.
104. I am sceptical about that submission. However, I do not need to decide the point because it does not arise on the facts before me. The only relevant change here Zhang was that Mrs Zhang became a British national in 2019, having been a Chinese national in 2016. I do not consider that nationality can have any bearing on the application of the Consumer Rights Act 2015 or the connection between the Personal Guarantee and the UK. On the contrary, I consider that it would be obviously wrong to discriminate on the basis of nationality. It therefore makes no difference whether I test the connection of the Personal Guarantee to the UK as it was on 18 May 2016 or as it is today

## F5: The facts

105. The fact that Mrs Zhang was resident in the London is an obvious connection between the Personal Guarantee and this country. Unsurprisingly, this was heavily relied on by Mr Kirk KC.
106. In submissions, Mr Kirk KC also noted that the Personal Guarantee records her address in London, that Mrs Zhang owned substantial assets in this country (her principal assets were said to be residential properties in London), that she held bank accounts in London (although there were also bank accounts in other places), and that her assets were controlled from London (there was no direct evidence of this but I accept it is likely given that she spent most of her time in London). He also emphasised her ties to this country, as the place where she has made her home and her daughter attends school.
107. I did not feel these additional points really moved things on. They essentially all follow from the fact that Mrs Zhang was and is resident in London. Furthermore, they are connections between Mrs Zhang and this country, not between the Personal Guarantee and this country. The test under s. 74(1) is concerned with the latter.
108. Mr Lewis KC relied on connections between the Personal Guarantee and Hong Kong. Like most guarantees, it relates to a main contract – here, the Subscription Agreement. Its subject-matter consists of the obligations of Chong Sing under the Subscription Agreement. The provision of the Personal Guarantee was a condition precedent to Eternity Sky’s payment under the Subscription Agreement; and that in turn constituted the consideration for the Personal Guarantee: as its terms expressly state.
109. The Subscription Agreement involved (in reality) two Hong Kong companies, and both the payment by Eternity Sky (i.e., the consideration for the Personal Guarantee) and the counter-obligations owed by Chong Sing to Eternity Sky fell to be performed in Hong Kong, in HK\$.
110. Mr Lewis therefore pointed to the fact that the Personal Guarantee was issued in support of the Subscription Agreement. I also have in mind that the Personal Guarantee was issued, more broadly, in support of the bonds issue, which was regulated under the SEHK’s GEM Listing Rules. The Personal Guarantee was in reality an integral part of that broader transaction, hence the reference to it in the SEHK public announcement: this will have been a regulatory requirement.
111. Mr Lewis said that the reason why cl. 17 provided for Hong Kong law and arbitration was that the underlying transaction was itself fundamentally associated with Hong Kong, and it was salutary for the Personal Guarantee to have compatible applicable law and dispute resolution provisions. I would go further: I would suggest that it was necessary for the Personal Guarantee to be subject to Hong Kong law and arbitration, certainly for commercial reasons and quite possibly for regulatory reasons. Either way, this will have been something that the due diligence imperatives of all those putting the transaction together in Hong Kong would have made non-negotiable.
112. Mr Lewis also relied on the fact that Mrs Zhang was in Spain when she signed the Personal Guarantee (although there was also evidence that she sent the hard copy originals to Hong Kong by courier to Chong Sing only after she had returned from holiday and was back in London); and on the fact that the Personal Guarantee did not

require Mrs Zhang to maintain assets in England. I did not regard these additional points as compelling. They added nothing to Mr Lewis's principal points, i.e., the undeniably powerful connections between the Personal Guarantee and Hong Kong.

#### F6: Analysis

113. It is obvious that the fact of Mrs Zhang's residence in London is a connection between the Personal Guarantee and the UK. It is also obvious that the Personal Guarantee is much more closely connected to Hong Kong – where the transaction was centred, devised and regulated, and where performance by Mrs Zhang would take place (i.e., payment to Eternity Sky).
114. Mr Kirk KC suggested that, in a consumer contract, the place of residence of the consumer should be given great weight. He did not go so far as to say that this must always be treated as constituting a close connection, but he came close to doing so. That would certainly be inconsistent with the judgment of the CJEU in *Commission v Kingdom of Spain*. Ultimately, his position was that this might be a case which was more closely connected to Hong Kong, but that did not mean that there was not also a close connection with the UK.
115. Mr Lewis KC acknowledged the possibility of a consumer contract having its closest connection with another country, but still having a close connection with the UK. However, he said that this could seldom arise in practice and did not arise here.
116. I have come to the conclusion that the connections between the Personal Guarantee and Hong Kong are so overwhelming that the fact of Mrs Zhang's residence in London has to be treated as a connection to the UK, but not a close connection.
117. In reaching that conclusion, I have found it helpful to consider what the position would have been if there had not been a choice of law provision in clause 17.1 of the Personal Guarantee. Doing so has led me to consider the putative application of Rome I, via s. 74(2) of the Consumer Rights Act 2015. I have proceeded down this path with, I hope, as much caution as the parties' warnings made appropriate.
118. Absent clause 17.1, the determination of the applicable law would have proceeded as I have already outlined in section F2 above: first, the conclusion that the requirements of Article 6.1 were not satisfied, then consideration of Articles 4.2 and 4.3. Mr Kirk KC in fact drew upon Article 4.2 at one point of his submissions, making a fleeting reference to the judgment of Ramsey J in *Commercial Marine Piling Ltd v Pierson Contract Ltd* in order to observe that characteristic performance was by Mrs Zhang. He relied on this as supporting the existence of a close connection.
119. The problem with that approach is that, if it is treated as axiomatic that, even where the trader does not pursue commercial activities in the consumer's country of residence or direct its activities to that country (within Article 6.1 of Rome I), the fact that the consumer is resident in a country is sufficient to establish a close connection to that country, this would create the paradox that it is positively disadvantageous to include a choice of law provision. The reasoning would be as follows:
  - i) If there is a choice of law provision (say, Hong Kong law) but the consumer is resident in the UK and that is treated as sufficient to constitute a close

connection, then that is the end of the inquiry. It does not matter if the connection to Hong Kong is closer, or even manifestly closer. Under s. 74(1) of the Consumer Rights Act 2015, when a close connection with the UK has been established, that is the end of the inquiry.

- ii) By contrast, if there is no choice of law clause, s. 74(2) Consumer Rights Act 2015 applies, not s. 74(1). The inquiry will proceed as previously outlined. This means progressing to Article 4.2 and duly taking account of the fact that the consumer is habitually resident in the UK, and thus reaching the provisional conclusion that English law is applicable. However, on this hypothesis, the inquiry does not stop at this point – because of Article 4.3, which will prevail where the contract is manifestly more closely connected with Hong Kong.
  - iii) Thus, if the contract has a close connection with the UK but is manifestly more closely connected with Hong Kong and the parties have consensually agreed to Hong Kong law, they will not get the result they agreed on: they will be stuck with English law, or at least with the Consumer Rights Act 2015. But if they have held back from including a choice of Hong Kong law clause, the Consumer Rights Act 2015 will not apply and Hong Kong law is what they will get – even though it was not in fact expressly stipulated.
120. This cannot be right. However, it is precisely this bind that Mr Kirk KC is in. If there were no choice of law provision in cl. 17.1, I would unquestionably have arrived at the conclusion that the applicable law was that of Hong Kong, having followed the path that I have outlined. I find it difficult to accept that the result must be different, merely because the parties wanted to spell out to each other, and to any court that might have to consider the point later, which system of law they thought the most appropriate; especially when Rome I says that they chose correctly.
121. Three answers occur to me, all confirming that the fact that the consumer is resident in England will not necessarily constitute a close connection, even where it is the consumer that will make characteristic performance.
122. The first is that, looking at the case in the round, so as to take account of all the relevant circumstances (as suggested by *Commission v Kingdom of Spain*), does not merely mean looking to see what connections there are with the UK. It means also looking to see what connections there are with other countries. Testing the closeness of whatever connections there may be with the UK will or at least may best be done by comparing them with the connections to other countries. This is because a closeness is an inherently relative concept. That means that such a comparative exercise is legitimate even under s. 74(1) of the Consumer Rights Act 2015, as well as under Article 4.3 of Rome I.
123. The second is that it is important to keep in mind the purpose of s. 74 and the mischief it is intended to prevent. It is intended to prevent the situation where the trader's terms impose a choice of foreign law in order to evade the Consumer Rights Act 2015 (or its equivalent in EU countries). However, the corollary of this is that it is not obvious why s. 74(1) should result in the application of the Consumer Rights Act 2015 in circumstances where it would not apply if there were no choice of law provision. In such a case, the trader is not attempting to evade the Consumer Rights Act 2015, so there is no mischief for s. 74(1) to address.

124. The third is that most consumer contracts involve goods, services or digital content being sold or provided to consumers (as reflected by Part I). They typically come about in circumstances where a trader in such goods, services or digital content pursue its activities in respect of such goods, services or digital content in the UK or directs such activities to the UK, as envisaged under Article 6.1 of Rome I.
125. This Personal Guarantee is not a normal consumer contract. Its subject matter and the circumstances giving rise to it are entirely atypical in the consumer context. That does not mean that the Consumer Rights Act 2015 does not apply, but it does mean that the Personal Guarantee has to be approached differently from the typical consumer contract.
126. In a typical consumer contract, the consumer's country of residence may well be important, even critical, in assessing whether the contract has a close connection with the UK. This is especially likely to be the case where the contract has come about because the consumer is resident in the UK, the UK being a country in which the trader actively seeks consumer customers. In that situation, it is entirely right to attach significance to the consumer's country of residence, in order to make the Consumer Rights Act 2015 effective and to stamp out the mischief that s. 74(1) exists to curtail. *Payward Inc. v Chechetkin* happens to be a good example.
127. Drawing these points together:
- i) The powerful connections that the Personal Guarantee has with Hong Kong are present because, in functional terms, the Personal Guarantee originates from Hong Kong, where its existence was required and where it would be performed (if necessary).
  - ii) By contrast, its one connection with the UK is essentially incidental. Unlike the position in many consumer contracts, Eternity Sky conducts no business in the UK, does not seek customers or guarantors here and did not contract with Mrs Zhang because she happened to be resident in the UK. It contracted with her for an entirely non-UK related reason: namely, because she was married to Mr Zhang.
  - iii) Placing limited significance on the fact that Mrs Zhang was and is resident in London, on the unusual facts of this case, will not render the Consumer Rights Act 2015 ineffective, because Eternity Sky was not indulging in mischief by contracting on terms including cl. 17.1.

#### F7: Conclusion on "close connection" with the UK

128. The Personal Guarantee's connections to Hong Kong were so great as to be overwhelming. It undoubtedly was also connected to the UK, but whether that connection to the UK is assessed relative to the connections to Hong Kong, or purposively, or by comparison to the typical consumer contract, it cannot be characterised as "close" within the meaning of s. 74(1) of the Consumer Rights Act 2015.
129. It follows that the Consumer Rights Act 2015 does not apply. I nevertheless go on to deal with the other questions that arise under the Consumer Rights Act 2015.

## **G: Substantive unfairness under s. 62 CRA 2015**

### **G1: The general requirement of fairness under s. 62 CRA 2015**

130. The general requirement of fairness under s. 62 of the Consumer Rights Act 2015 is provided in the following terms:

#### **“62 Requirement for contract terms and notices to be fair**

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

131. However, s. 64 qualifies the circumstances in which fairness can be assessed in respect of what are frequently called “core terms”:

#### **“64 Exclusion from assessment of fairness**

- (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
  - (a) it specifies the main subject matter of the contract, or
  - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
- (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.
- (3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.
- (4) A term is prominent for the purposes of this section if it is brought to the consumer’s attention in such a way that an average consumer would be aware of the term.
- (5) In subsection (4) “average consumer” means a consumer who is reasonably well-informed, observant and circumspect.”

132. It was common ground that cl. 2 of the Personal Guarantee is its core term, i.e., it fell within s. 64(1)(a), so that its assessment for fairness could only arise if it was not transparent or prominent. By contrast, the provisions in respect of choice of law and Hong Kong arbitration in cl. 17 are not core terms.

133. In submissions, Mr Kirk KC and Mr Lewis KC both dealt with the substantive fairness/unfairness of cl. 17 first, and cl. 2 only after that. I find it more helpful to deal with cl. 2 first, because of the significance of the consequence of a conclusion that cl. 2 was unfair.

134. This means that it is necessary to begin by considering cl. 2's transparency and prominence under s. 64(2) of the Consumer Rights Act 2015. That in turn means that it is necessary to consider the "average consumer" under s. 64(5).
135. Further, while the structure of the Consumer Rights Act 2015 might suggest that the concepts and legal principles applicable under s. 64 are different from those applicable to s. 62 (with the "average consumer" and the requirements of transparency and prominence being more important in the context of s. 64 than under s. 62, and good faith being more prominent in the latter context), they in fact overlap very significantly.

G2: Legal principles re "average consumer", transparency, prominence and good faith

136. As well as the bare terms of the statute and the case-law (both English and European) and academic commentary, in this context there is also assistance in the form of guidance published by the Competition & Markets Authority, 'Unfair Contract Terms Guidance – Guidance on the unfair terms provisions in the Consumer Rights Act 2015' (30 July 2015) ("CMA Guidance").
137. It is helpful to begin with the "average consumer", because the standard of prominence applicable to any given contract must reflect this concept under s. 64(5), and because transparency also seems to take it into account: see *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzágbank Zrt* (Case C-26/13), CJEU at [75] (as well as the CMA Guidance at §2.63 and the further authorities referred to below). The CMA Guidance states at §3.21:

"It is objective in character, but variable to the extent that the average consumer's level of attention is likely to vary according to the nature and context of the transaction involved."

138. One of the examples cited in support is *OFT v Ashbourne Management Services Ltd* [2011] 1237 (Ch), which concerned the terms of a gym membership. Kitchin J said at [155]:

"The question whether a particular term is expressed in plain intelligible language must be considered from the perspective of an average consumer. Here such a consumer is a member of the public interested in using a gym club which is not a high end facility and who may be attracted by the relatively low monthly subscriptions."

139. Turning to transparency, Mr Kirk KC took me to *BNP Personal Finance SA v VE* (Case C-609/10); this was a post-Brexit case, but the CJEU reasons were founded on pre-Brexit authority and Mr Lewis KC did not demur from Mr Kirk KC's proposition that it is, at the lowest, helpful even if not binding. The CJEU said at [43] that transparency:

"... must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations (*Gómez del Moral Guasch* EU:C:2020:138 at [51] and the case law

cited).”

140. The CMA Guidance likewise suggests at §2.63 that the average consumer is also relevant to transparency (citing *Árpád Kásler*) and states at §2.64 that average consumer’s level of attention is likely to vary according to the category of goods or services in question. This must mean that the assessment of the intelligibility of the language under s. 64(3) must take “the category of goods or services” (or, more broadly, the nature and context of the contract) into account.
141. The CMA Guidance then gives the example of the CJEU decision in *Van Hove v CNP Assurances SA* (Case C-96/14), which involved an insurance contract entered into in conjunction with two loans. In that case, the CJEU said at [47] that the question to be considered for transparency was:

“...whether, having regard to all the relevant information, including the promotional material and information provided by the insurer in the negotiation of the insurance contract and, more generally, of the contractual framework, an average consumer, who is reasonably well informed and reasonably observant and circumspect...”

would be aware of the relevant feature of the consumer contract.

142. Turning next to prominence, it is in this specific context that the CMA Guidance makes the observations at §3.21, which I have already noted, regarding the significance of the nature and context of the transaction (citing *OFT v Ashbourne*).
143. One further authority dealt with prominently in the submissions before me was *Director General of Fair Trading v First National Bank* [2001] UKHL 52. The direct subject-matter of most of the dicta cited to me concerned the meaning of “significant imbalance” and the requirement of good faith, and so were of more direct relevance to the assessment of substantive fairness rather than the threshold questions that arise under s. 64(2), in relation to a core term. However, these passages also seem to me to inform as to transparency and prominence (with obvious adjustments to reflect that that the Regulations referred to are now reflected in the Consumer Rights Act 2015).

- i) Per Lord Bingham at [17]:

“The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed

pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote.”

ii) Per Lord Millett at [54]:

“It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate.”

144. I was also taken to *Aziz v Caixa d'Estalvis de Catalunya* (Case C-415/11), per the CJEU at [69], suggesting (to similar effect as the dictum above from Lord Millett) that good faith depends on:

“... whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.”

### G3: Analysis

145. It follows from *OFT v Ashbourne* that I should not have in mind the average consumer who might enter into any typical consumer contract (i.e., any member of the public). What I should have in mind is the average consumer who might enter into a consumer contract of this particular type. I must do so bearing in mind both the nature of the transaction (a personal guarantee for obligations under a Subscription Agreement for a very substantial bonds issue) and the context (which was essentially corporate, involving a company listed in Hong Kong and the major subscriber to the Hong Kong bonds issue). It is not only different from a typical consumer contract, in that the consumer is providing a guarantee, rather than contracting to obtain goods, services or digital content; it is even different from a typical personal guarantee, because of the corporate, Hong Kong context.

146. I would expect the relevant average consumer, i.e., one within the unusual and narrow class of persons likely to enter into a contract of this type, to have a good understanding of what a personal guarantee is and of what a bonds issue is. It is therefore heartening (even if not strictly relevant to the “average consumer”) to note from the Award that Mrs Zhang had this understanding.
147. Furthermore, the hypothetical average consumer is required to be well-informed observant and circumspect. This suggests someone who is not negligent.
148. Circumspection does not necessarily require the average consumer to read the contract terms, or at least all of them. The CMA Guidance notes at §2.25 that economic research indicates that “most consumers do not read standard written contracts thoroughly before making a purchase.” However, this too must depend on context.
149. At one end of the spectrum is a consumer making a modest purchase online who ticks a box confirming agreement to terms in order to move to the next screen, without having scrutinised all or any of those terms. It would be difficult to characterise such a consumer as negligent.
150. However, a case like the present is at the opposite end of that spectrum, because of its context and because of the unusual kind of average consumer that the court is obliged to posit – including such a consumer’s presumed familiarity with guarantees and with bonds issues.
151. The arbitrator has found Mrs Zhang to have been negligent. Her submission to his jurisdiction means that I am bound by that finding (subject to my assessment of the fairness of the contract terms providing for Hong Kong arbitration). Be that as it may, it is my own view that it was less than circumspect to sign this Personal Guarantee in the manner that Mrs Zhang did, without even asking to see the other pages beyond the signature page, because of the nature and context of this particular Personal Guarantee.
152. This is highly material to both transparency and prominence. The only page of the Personal Guarantee that Mrs Zhang actually saw was the signature page. The word “Guarantor” featured (in my judgment) prominently, and it is common ground that she was aware of the general context, i.e., that she was being asked to sign a Personal Guarantee for a bonds issue. However, Mr Kirk KC relied on the fact that Mrs Zhang did not receive a copy of, and so could not be informed by, the terms of cl. 2 or indeed any of the other terms. He said that it was the responsibility of Eternity Sky as the trader to bring all these terms to her attention, and that Eternity Sky could not rely on Chong Sing to do this, nor could it count on Mrs Zhang’s own initiative.
153. In many consumer contracts, those submissions might well be appropriate. In this one, I do not think they are. The nature, context and overall circumstances of this Personal Guarantee made it incumbent on the relevant average consumer (using that phrase in the manner already explained) to take the trouble to read the terms, rather than not doing so as might be normal for a more typical average consumer in a more typical consumer context.
154. In so far as that would have required Mrs Zhang to ask Mr Zhang’s PA to provide the terms, that is what she should have done, as the arbitrator held.

155. If she had done so, it is inevitable that she would have found and read cl. 2 (i.e., it was sufficiently prominent).
156. She would not have been surprised by the content of cl. 2, which she would have found normal for a guarantee of this type and which, with or without the benefit of legal advice, she would not have found surprising or objectionable (cf. Lord Millett’s test in *Director General of Fair Trading v First National Bank*, and the similar test of the CJEU in *Aziz*). If she was to provide any kind of guarantee at all, it had to contain a provision to this general effect, i.e., the operative guarantee clause.
157. Mr Kirk KC said that cl. 2 should not be regarded as transparent because it refers to the other “Transaction Documents” and cannot be fully understood without sight of those documents and without taking the trouble to understand them. He also said that this was not really possible without legal advice. The implication was that the obligations being guaranteed should have been explained in the body of the Personal Guarantee.
158. Because guarantees in general, and guarantees of corporate transactions in particular, usually relate to the obligations assumed by a third party under a separate contract (or set of contracts), it is inevitable that they refer to that separate contract. Furthermore, the corporate context makes it difficult to summarise the guaranteed obligations in the manner that Mr Kirk KC said was always essential for every consumer contract without (i) doing so at great length (also a vice in the consumer context) or (ii) over-simplifying.
159. The reality of a transaction for the very significant amounts involved here is that most people entering into such a guarantee would not do so without taking legal advice. The best course for a trader in the position of Eternity Sky therefore must be to ensure that the contract terms make it clear to the guarantor that he/she should obtain legal advice.
160. This Personal Guarantee does not contain (for example) contain a warning in large bold capitals to take legal advice. However, I have already referred briefly to cl. 4.1(c) and to cl. 18.

i) Cl. 4.1(c) provided as follows:

**“REPRESENTATIONS AND WARRANTIES**

4.1 The Guarantor hereby represents and warrants to the Subscriber that:

...

(c) she is of full age and sound mind, fully understands the contents of this Guarantee and has obtained independent legal advice with respect to this Guarantee and the transactions contemplated hereby prior to her execution and delivery of this Guarantee”

ii) Cl. 18 provided as follows:

**“18. INDEPENDENT LEGAL ADVICE**

The Guarantor agrees and acknowledges that (a) she was afforded sufficient opportunity to obtain independent legal advice regarding this Guarantee and the transactions contemplated under the other Transaction Documents; and (b) she fully understands all of the terms, conditions, restrictions and provisions set forth in this Guarantee and the other Transaction Documents and the obligations and liabilities thereof, and that each such term, condition, restriction and

provision is fair and reasonable with respect to the subject matter thereof.”

161. In a typical consumer contract, this might well not be sufficient. However, in the very special circumstances of this case, I regard these provisions – which were themselves reasonably prominent, perhaps especially cl. 18 – as significant. I consider it an “average consumer” with the knowledge and awareness necessary to fall within that class of persons in the context of this case, who is also “reasonably well-informed, observant and circumspect”, would read those provisions and then immediately contact a lawyer.
162. In any event, while the details of the obligations being guaranteed might be obscure without access to further documents and legal advice, their broad effect was not.
- i) It was obvious from the circumstances that the guarantee was for a major bonds issue (and Mrs Zhang was specifically told this). I note the arbitrator’s finding that Mrs Zhang was aware of what she was signing and its purpose. The hypothetical average consumer within the relevant class in this case would have shared that awareness.
  - ii) While the potential amounts at stake under the Personal Guarantee are not set out within its four corners, it would have been obvious to anyone with Mrs Zhang’s awareness (or that of the relevant average consumer) that she could potentially be asked to pay the sum subscribed by Eternity Sky, plus interest. This is precisely what has happened.
  - iii) It was not necessary to consider any further documents, nor to take legal advice, in order to appreciate that this was a possible outcome.
163. In all the circumstances, the essence of cl. 2 was intelligible to the relevant average consumer.

#### G4: Conclusion on cl. 2

164. In my judgment, cl. 2 was both transparent and prominent. In any event, it was not unfair, especially applying the test of Lord Millett in *Director General of Fair Trading v First National Bank* /the CJEU in *Aziz*.

#### G5: Fairness of cl. 17.1 (HK law)

165. Mr Kirk KC suggested that the effect of my judgment in *Payward Inc. v Chechetkin* was that any foreign award which only applied foreign law, in circumstances where an English tribunal would have applied the Consumer Rights Act 2015 pursuant to s. 74(1), is contrary to English public policy.
166. That is not my understanding of my judgment in that case. The arbitrator’s failure to apply the Consumer Rights Act 2015 in *Payward* caused unfairness to Mr Chechetkin, because it meant that she failed to assess the substantive fairness of Payward’s terms under s. 62. If she had, she would have rejected them as substantively unfair.
167. The disapplication of the Consumer Rights Act 2015 in *Payward Inc. v Chechetkin* therefore was, itself, substantively unfair, because the arbitrator in that case did not take account of the consumer rights protections that the Consumer Rights Act 2015 says

must be considered (where the Act applies, including by reason of s. 74(1)). Furthermore, one of the provisions that the arbitrator would have rejected as substantively unfair in *Payward*, if she had assessed its fairness under the Consumer Rights Act 2015, would have been the choice of California law: primarily because this effectively excluded the claim Mr Chechetkin would have had under English law under the Financial Services and Markets Act 2000, which could have resulted in Mr Chechetkin winning against Payward, rather than losing.

168. In short, in *Payward Inc. v Chechetkin*, the choice of California law made real differences, which were substantially to Mr Chechetkin's disadvantage and which he could have been expected to find objectionable. It therefore was unfair under s. 62 of the Consumer Rights Act 2015.
169. In this case, the choice of Hong Kong law in cl. 17.1 would only be unfair under s. 62 of the Consumer Rights Act 2015 if it gave rise to a significant imbalance. This means an imbalance that would not otherwise exist. It follows, among other things, that it is necessary to consider whether the application of Hong Kong law has actually made a difference; just as I did in *Payward Inc. v Chechetkin*.
170. Mr Kirk KC could not identify any relevant difference, save for the fact that the application of Hong Kong law means that the Consumer Rights Act 2015 is not applicable under s. 74(1). However, I am now proceeding on the assumption that, contrary to my conclusion in Section F above, the Consumer Rights Act 2015 does apply, because the test of close connection under s. 74(1)(a) is satisfied; with the result that the Consumer Rights Act 2015 applies, but Hong Kong law otherwise remains applicable as the proper law. I therefore have to consider whether the outcome would or at least might have been different if cl. 17(1) had not existed and if the Personal Guarantee had not provided for Hong Kong law. I understood from Mr Kirk KC's point about characteristic performance that his position was that, if Hong Kong law had not applied, English law would have.
171. It is well-known that the content of Hong Kong law is in general very similar to that of English law. Mr Kirk KC did not suggest that there was any material difference relevant to the issues decided by the arbitrator. It follows that I must proceed on the assumption (which I anyway consider realistic) that the outcome of the issues referred to arbitration would have been the same if they had been decided under English law, rather than under the law of Hong Kong.
172. Otherwise, the only difference was that the choice of Hong Kong law meant (along with the provision for Hong Kong arbitration) that Mrs Zhang had to engage Hong Kong lawyers. In many consumer cases, the fact that the consumer has to engage foreign lawyers is a significant factor: see *Payward Inc. v Chechetkin* at [144]. However, it was not significant for or unfair to Mrs Zhang, not merely because of her means (although it is right to say that neither in Mrs Zhang's evidence to me and nor in the submissions on her behalf was there a complaint about the cost of using Hong Kong lawyers), but because of her established connections in Hong Kong.
173. Above all, the choice of Hong Kong law was neither surprising nor objectionable in the context of the overall transaction, with its substantial links to Hong Kong and, especially, the fact that the Subscription Agreement was itself subject to Hong Kong law. As I have already explained, if there had not been a choice of law provision in cl.

17.1, and if (pursuant to s. 74(2) of the Consumer Rights Act 2015) I had had to decide the applicable law under Rome I, the application of Article 6, Article 4.2 and Article 4.3 would have led me to the conclusion that the applicable law was that of Hong Kong.

174. Mr Kirk KC's final argument in relation to substantive unfairness in relation to cl. 17.1 was based on the decision of the CJEU in *Verein für Konsumenteninformation v Amazon EU Sarl* (Case C-191/15). This case related to e-commerce activities, direct by Amazon to consumers in Austria. Amazon's terms provided for the law of Luxembourg. Article 6.2 of Rome I had the mandatory effect that this did not deprive Austrian consumers of consumer protection, which would have been the applicable law under Article 6.1, if there had not been a choice of law clause. The CJEU accepted this argument at [69] to [71]:

“69 Furthermore, where the effects of a term are specified by mandatory statutory provisions, it is essential that the seller or supplier informs the consumer of those provisions: the *Nemzeti Fogyasztóvédelmi* case, para 29 [i.e., Case C-472/10]. That is the case of article 6(2) of the Rome I Regulation, which provides that the choice of applicable law must not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which would have been applicable in the absence of choice.

70 Having regard to the mandatory nature of the requirement in article 6(2) of the Rome I Regulation, the court faced with a choice-of-applicable-law term will, where a consumer with his principal residence in Austria is involved, have to apply those Austrian statutory provisions which, under Austrian law, cannot be derogated from by agreement. It will be for the referring court to identify those provisions if need be.

71 The answer to question (4)(a) is therefore that article 3(1) of Directive 93/13 must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the member state in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that member state applies to the contract, without informing him that under article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances.”

175. Mr Kirk KC submitted that it follows that the terms of the Personal Guarantee were unfair because they did not alert Mrs Zhang or any consumer who troubled to read them of their rights under s. 74(1) of the Consumer Rights Act 2015.
176. However, it was critical to the CJEU's conclusion in *Verein* that Amazon's sales to consumers in Austria fell within Article 6.1 of Rome I. That is what gave rise to the mandatory right under Article 6.2 of Rome I. Here, by contrast, neither Article 6.1 nor Article 6.2 of Rome I is applicable. If there were no choice of law clause, the applicable law would have been the law of Hong Kong, pursuant to Article 4.3 of Rome I.

177. This takes me back to the paradox that I have already identified, and which I find unacceptable. If Mr Kirk KC is right that cl. 17.1 is substantively unfair under s. 62, the result is that it is not binding. But, if the Personal Guarantee has to be approached as if there were no choice of law provision (because cl. 17.1 is not binding), the effect of s. 74(2) of the Consumer Rights Act 2015 would be that the Consumer Rights Act 2015 is not applicable at all. I am not persuaded that the CJEU in *Verein* had this situation in mind.
178. Furthermore, Mr Kirk KC's argument still faces the difficulty that the application of Hong Kong law makes no real difference to Mrs Zhang's rights under the Personal Guarantee. On this argument, Mrs Zhang's complaint is that it was not brought to her attention that she would have had a right under English law to rely on the Consumer Rights Act 2015. However, if she had proceeded so as to assert her rights under the Consumer Rights Act 2015 (presumably by commencing her proceedings in court in England, rather than in arbitration in Hong Kong), this would have made no difference to the outcome of the issues that she referred to arbitration. It therefore is not obvious that she has been caused any real unfairness. Once again, I am not persuaded that the CJEU in *Verein* had this situation in mind.
179. I therefore conclude that cl. 17.1 was not unfair under the Consumer Rights Act 2015.

G6: Fairness of cl. 17.2-3 (HK arbitration)

180. The terms of cl. 17.2 and cl. 17.4, providing for Hong Kong arbitration, raise similar issues to those in relation to Hong Kong law, but there are some fresh features.
181. Schedule 2 to the Consumer Rights Act 2015 sets out sample consumer contract terms that may be regarded as unfair – sometimes referred as “the Grey List”. Paragraph 20 refers to:
- “20. A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by... (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions...”
182. The mere fact that a consumer contract provides for disputes to be resolved in arbitration does not make it unfair. The decision of the CJEU in *Mostaza Claro v Centro Movil Milenium SL* (Case C-168/05) establishes that this is a question for the national court to decide in every case.
183. The Court of Appeal had to consider the unfairness under the Consumer Rights Act 2015 of a clause providing for arbitration in New York, in *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297. The context was different: the issue was not whether a foreign award should be enforced under s. 101 of the Arbitration Act 1996, but whether the English proceedings should be stayed under s. 9. The Court of Appeal decided the English proceedings should not be stayed, this aspect being dealt with in the judgment of Birss LJ. At [147] he identified three primary reasons for this decision, which he described as were “the three key features which any consumer based in England would rely on to give them domestic law consumer rights” and as “significant factors”:
- “(i) the claimant is resident in England, (ii) he has the better of the argument that Nifty directed its activities to England, (iii) and he invokes English jurisdiction.”

184. I regard it as telling that Birss LJ said that “any consumer based in England” would rely on these points. The points in question bear out some of the suggestions I have made above about the typical consumer contracts that the Consumer Rights Act 2015 has in its sights. They also highlight how different this case is:

- i) The first of these factors is present here: Mrs Zhang is resident in England.
- ii) It is not argued by her that Eternity Sky directed its activities to England. It manifestly did not.
- iii) Mrs Zhang did not invoke English jurisdiction. Unlike Mr Soleymani, who did not want to arbitrate in New York, Mrs Zhang actually commenced the arbitration proceedings in Hong Kong.

185. A little later in his judgment, Birss LJ gave three further reasons why a stay was not appropriate, by way of answers to an argument in that case to the effect that it would not be a hardship to Mr Soleymani to arbitrate in New York, because he was a very wealthy individual:

“[151] There are in my view three answers. The first comes back to the public importance of decisions vindicating (or not) consumers’ rights. The case Mr Soleymani is seeking to make has implications for consumers in general in this jurisdiction and it is important that they are considered and ruled upon in public in a court. Therefore, the s 9(4) issues should be decided at a trial and not left to be decided in the arbitral tribunal.

[152] The second answer is that the consumer protection rights under our law involve domestic concepts which our court is far better placed to adjudicate upon than a New York arbitrator. Even if it were certain that the New York Tribunal would apply UK law (as to which see the effect of the proffered undertaking addressed below), it engages principles which are the subject matter of our domestic jurisprudence, not simply some general notion of fairness.

[153] The third answer is that the suggested approach prejudices the issue, which is not suitable for summary determination, as to whether the arbitration agreement does in fact operate unfairly on Mr Soleymani. If the invalidity argument is good, the very reasons which make it good, namely that it places an unfair burden on Mr Soleymani, weigh against allowing the tribunal to decide the issue under its Kompetenz-Kompetenz jurisdiction. The Judge’s finding that there would be nothing unfair about leaving it to the arbitrator to decide that issue is inconsistent with her recognition that there was a triable issue whether this was an unfair arbitration agreement.”

186. Taking these points in turn:

- i) The first was relevant to the discretionary exercise before the Court of Appeal in that case. The issue I have to consider at this stage is not discretionary and is different in nature. I have to decide whether arbitration in Hong Kong was unfair to Mrs Zhang. The fact that the arbitration took place in private and could

not create rulings that might have informed the public in England or create decisions of precedential value (see also per Birss LJ at [145]) may have caused disappointment in England among the general public and among legal scholars, but it has not caused injustice to Mrs Zhang.

- ii) I am sceptical about the second being applicable here. Arbitrators in Hong Kong are very adept at applying English law, which they have to do with regularity. This is especially the case when, as happened in the arbitration in this case, they receive submissions from English leading counsel. In any event, unless I am wrong in my conclusion that cl. 2 and cl. 17.1 did not cause substantial injustice to Mrs Zhang, the provision for Hong Kong arbitration made no difference in this regard. In particular, if the application of the Consumer Rights Act 2015 does not result in cl. 17.1 being treated as not binding under s. 62(1), then Hong Kong law was the applicable law no matter whether the forum was in Hong Kong or not. Even if Mrs Zhang had brought her claims in court in England, rather than in Hong Kong, the three issues that she raised in the arbitration as to the formation and effectiveness of the Personal Guarantee would still have fallen to be determined under the law of Hong Kong. In any event, they would have been decided the same way if they had been determined under the law of England.
- iii) The third point does not arise, because of Mrs Zhang's express submission to the jurisdiction of the Hong Kong arbitrator, including the jurisdiction to decide his own jurisdiction.

187. Mr Lewis KC submitted that the fact that Mrs Zhang commenced arbitration proceedings in Hong Kong had a still more profound significance. He said that, by positively invoking cl. 17(2) and (3) when she commenced the Hong Kong arbitration, she had waived the right to argue that those provisions were unfair, citing s.62(3) of the Consumer Rights Act 2015.

188. In this regard, Mr Lewis KC referred me to 'Chitty on Contracts' (34<sup>th</sup> ed.) at 40-407, which uses the term "waiver". However, it does so in the context of a case involving a fresh agreement between the parties by which the consumer was said to have agreed to waive its rights: *XZ v Ibercaja Banco SA* (Case C-452/18). In that case, this gave rise to issues about the fairness of that agreement and questions about the circumstances in which it was concluded and the information and legal understanding that the consumer had at that time.

189. Here, there was no fresh agreement regarding Hong Kong arbitration. Mr Lewis KC's argument therefore is not that Mrs Zhang is contractually bound not to invoke her rights under the Consumer Rights Act 2015. It is (I think) an argument founded in waiver by estoppel, or possibly waiver by election. The point arose late, and the legal underpinning was not fully explained to me (which, I stress, I note only by way of observation, not criticism). Nevertheless, whatever its doctrinal foundation, I think it must be necessary for Eternity Sky to satisfy me that it responded to the request for arbitration in Hong Kong in the reasonable belief that Mrs Zhang had commenced the arbitration with knowledge of her rights under the Consumer Rights Act 2015. When I asked Mr Lewis KC whether it could be assumed that Mrs Zhang had been advised by her lawyers about her rights under the Consumer Rights Act 2015 before she commenced arbitration proceedings, he said that there could be no assumption either

way. It may be that I am not doing full justice to Mr Lewis KC's point, but it does not seem to me to have been made out.

190. I therefore still have to decide whether the Hong Kong arbitration provisions were unfair under s. 62 of the Consumer Rights Act 2015, bearing in mind paragraph 20 of the Grey List, but conscious that there is no easy answer yielded by *Soleymani* or by Mr Lewis KC's waiver point.
191. I have previously noted that Lord Millett in *Director General of Fair Trading v First National Bank* and the CJEU in *Aziz* both suggest that a useful way of assessing fairness may be to consider whether the relevant term is one that a properly informed consumer with a competent lawyer acting on his or her behalf might reasonably be expected to agree to, or to seek to have deleted.
192. Bearing in mind that the provisions relating to arbitration in Hong Kong did not in themselves have any bearing on applicable law or (therefore) Mrs Zhang's consumer rights, I am not sure why Mrs Zhang would have been expected to have sought to have the provisions deleted. With no arbitration clause, but with the Personal Guarantee still incorporating cl. 17.1, Mrs Zhang might well have found it difficult to commence proceedings against Eternity Sky in England (bearing in mind that she was in Spain when she communicated her agreement). By contrast, I suspect she would at least potentially have been amenable to the jurisdiction of the courts in Hong Kong, if Eternity Sky had wished to commence proceedings against her there. Opting for arbitration in the natural venue of the HKIAC was a sensible way of avoiding such jurisdictional problems.
193. More pertinently, her Personal Guarantee was merely one part of the overall transaction, all the others being contracts that appear to have been subject to Hong Kong law and arbitration. I have not seen the terms of the equivalent guarantee entered into by Mr Zhang, but I assume that it, too, provided for Hong Kong law and arbitration. In the event, that guarantee has not attracted much attention, because of Mr Zhang's unfortunate death. However, when the contracts were concluded on 8 May 2016, I suspect it would have seemed sensible for both guarantees to be subject to similar provisions in relation to law and jurisdiction, so that any disputes under them could be pursued in parallel.
194. Furthermore, while I have received evidence in the form of statements from Mrs Zhang, it is significant that they were prepared in Chinese and signed by her in that language. She has explained that her command of English is still limited, despite having been resident here for some years. Her oral evidence in the arbitration was given in Mandarin. Arbitrating in Hong Kong meant that she could use lawyers with whom she could communicate more readily than with English lawyers based solely in London.
195. Bearing in mind these points, and given her familiarity with Hong Kong and the fact that it was a place with which she still had established connections (not least, her husband), it is not obvious that she would have been expected to object to arbitration in Hong Kong. If there were factors that should have made it apparent to Eternity Sky that she could have been expected to object, if properly advised, they have not been identified in her evidence or in the submissions to me.

196. The only factor raised with me is the familiar point that arbitrating in Hong Kong prevented her from relying on the Consumer Rights Act 2015. However, as already noted, that is the consequence of the application of Hong Kong law, not Hong Kong arbitration; and in my judgment it has made no difference.
197. I therefore conclude that the terms providing for Hong Kong arbitration were not unfair under the Consumer Rights Act 2015.

### **H: Refusal of enforcement under s. 103(3)**

198. The Claimants emphasized before me that this Court generally seeks to give effect to arbitration awards, as required under the New York Convention. I naturally accept this, and of course recognize that this preference is effectively enshrined in the provisions of ss. 101 to 103 of the Arbitration Act 1996.
199. It was common ground that the formal requirements of s. 102 were satisfied. Thus, everything turned on s. 103, in particular s. 103(3):

#### **“103 Refusal of recognition or enforcement.**

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

...

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.”

200. In *Payward Inc. v Chechetkin*, I took some care to demonstrate that the relevant provisions in the Consumer Rights Act 2015 are public policy for the purposes of s. 103(3). Mr Lewis KC did not challenge this, but submitted that the public policy imperatives underlying s. 101 of the Arbitration Act 1996 are more urgent and should, or at least may, prevail over those underlying the Consumer Rights Act 2015.
201. As a general proposition, I do not accept this. Nothing in s. 103(3) suggests that there should be a bias in favour of enforcement even though enforcement would be contrary to public policy. Furthermore, the decision of the CJEU in *Mostaza Claro v Centro Movil Milenium SL* (Case C-168/05) is categorical in saying that the public policy considerations embodied in the Consumer Rights Act 2015 are “essential”: see at [37]. That would have been my view, in any event. I do not accept that the public policy embodied in the Consumer Rights Act 2015 is somehow merely second-tier, with s. 101 of the Arbitration Act 1996 reigning above it.
202. Furthermore, in this discretionary context, the observations made by Birss LJ in *Soleymani* at [151] are much more relevant (see also at [145]).
203. There may be cases where the circumstances are such that a New York Convention award should be enforced, notwithstanding a conflict between the award and the rights of the consumer under the Consumer Rights Act 2015. It may be, for example, that there could be some purely technical breach, where the real unfairness to the consumer is minor. However, such cases are likely to arise infrequently.

204. As Mr Kirk KC has not succeeded under the Consumer Rights Act 2015, this issue has not arisen, and it is not one that can be addressed satisfactorily on an abstract counterfactual basis. All I can say is that I cannot readily conceive how, even if I had decided some of the points differently, this would have been a case where I might have concluded that there had been an infringement of Mrs Zhang's rights under the Consumer Rights Act 2015, but the Award should nevertheless be enforced.

### **I: Overall conclusion under CRA 2015**

205. The application to set aside the Enforcement Order on the basis of grounds said to arise under the Consumer Rights Act 2015 is dismissed.

### **J: Mrs Zhang's alternative applications**

206. This part of the judgment relates to the points advanced for Mrs Zhang by Mr Marshall KC.

#### **J1: Further disclosure required to decide fairness under the CRA 2015**

207. Mr Marshall KC explained that the first would arise if I were to conclude that the Consumer Rights Act 2015 applies (or, possibly, might apply), but I were to decide that I did not have enough information or evidence to decide substantive fairness. In this situation, Mr Marshall KC said that I should require further disclosure to be provided.
208. Mr Marshall KC acknowledged that coming to this conclusion would require me to disagree with both Mr Lewis KC and Mr Kirk KC, both of whom said that I was able to decide substantive fairness, and should do so. In the event, I have concluded that the Consumer Rights Act 2015 does not apply, so the problem identified by Mr Marshall KC was not capable of arising. Furthermore, I have nevertheless considered substantive fairness and found myself able to decide it, without requiring more information or evidence.

#### **J2: Adjournment to enable Mrs Zhang to investigate illegality**

209. Next, Mr Marshall KC said that, if Mrs Zhang were to lose on the points under the Consumer Rights Act 2015, I should adjourn her application, so that she could investigate whether the transaction which gave rise to the Personal Guarantee was affected by illegality.
210. Mr Marshall did not feel able to give any fixed limit on the adjournment he asked for. He suggested that I should give directions for disclosure, then witness statements, then a case management conference, at which the court would decide what should happen next.
211. When questioned by me, he said the directions should also provide for pleadings; and that he could not say whether there might also be a need for expert evidence. Mr Marshall KC suggested that it might be possible to have a trial of the merits of the putative illegality points in spring 2024.
212. It is important not to lose sight of the fact that this hearing is to determine Mrs Zhang's own application, seeking relief from the court under s. 103(3) of the Arbitration Act 1996. She issued it on 14 November 2022, but the fact that she was likely to be

contesting the enforceability of the Hong Kong Award must have been obvious as soon as it was issued, on 26 September 2022.

213. The only grounds positively advanced in her application notice as reasons not to enforce the Award all relate to the Consumer Rights Act 2015. That is still the position. Mr Marshall KC candidly accepted that he could not say and did not say that Mrs Zhang has a serious issue to be contested on illegality. However, Mrs Zhang hopes – it is no more than this – that, given more time, a pleadable case may become apparent.
214. I received submissions from both sides as to whether Mrs Zhang could or should have commenced her investigations into illegality earlier than she did in the context of these proceedings (February 2023, when she commenced Norwich Pharmacal proceedings against Chong Sing in the Cayman Islands). In my judgment, that was certainly too late.
215. I also received submissions on the question whether any illegality points should have been investigated and run in the arbitration in Hong Kong, and whether the principle of *Henderson v Henderson* (1834) 3 Hare 100 means that it is too late for her to seek to raise them now, for the reasons discussed by Cockerill J in *Alexander Bros Ltd (Hong Kong (SAR) v Alstom Transport SA* [2020] EWHC 1583 (Comm), in the passage culminating at [150]. In fact, Mrs Zhang’s legal team in the arbitration commenced Norwich Pharmacal proceedings in Hong Kong, in the hope of obtaining materials for use in the arbitration, which can only have been with a view to investigating fundamentally the same points that Mr Marshall KC now says are essential. Those Norwich Pharmacal proceedings were not pursued, apparently because to do so was not considered financially worthwhile. In my judgment, this is not a case where there was any good reason why the points could not have been taken in the arbitration in Hong Kong.
216. The time used at the hearing for the submissions outlined above was not inconsiderable, but I find this a simple question of case management. Mrs Zhang having issued her application on 14 November 2022, the dates for the hearing were fixed on 19 January 2023. It was up to her and her lawyers to get ready in time and (in Foxton J’s phrase) to ensure that they could set out a non-demurrable case. No non-demurrable case in relation to illegality has emerged in the meantime. I am not prepared to postpone enforcement on the off-chance that one may emerge at some unknown date in the future.
217. I therefore will not adjourn the matter but will determine it.

### **K: Overall conclusion**

218. Mrs Zhang’s application that the Recognition Order be set aside is dismissed. Her other applications are also dismissed (in so far as there are other applications before me.)