Neutral Citation Number: [2022] EWCA Civ 1297

Case No: CA-2022-000709

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LONDON
CIRCUIT COMMERCIAL COURT
Ms Clare Ambrose (sitting as a Deputy High Court Judge)
[2022] EWHC 773 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 October 2022

Before :

LORD JUSTICE POPPLEWELL
LORD JUSTICE BIRSS
and
LORD JUSTICE SNOWDEN

- -

Between :

AMIR SOLEYMANI	**Claimant/ Appellant**
- and -	
NIFTY GATEWAY LLC	**Defendant/ Respondent**
- and -	
THE COMPETITION AND MARKETS AUTHORITY	**Intervener**

- -
- -

Graham Dunning QC, Angeline Welsh and Iain MacDonald (instructed by **Russells**) for the **Claimant/Appellant**
David Lewis QC and Andrew Feld (instructed by **Osborne Clarke**) for the **Defendant/Respondent**
Toby Riley-Smith QC (instructed by The Competition and Markets Authority) for the Intervener

Hearing dates : 27 and 28 July 2022

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Approved Judgment

This judgment was handed down remotely at 10 am on Thursday, 6 October 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

Lord Justice Popplewell :

Introduction

1. This appeal raises issues of general importance for consumers in respect of the jurisdictional protections afforded to them in respect of arbitration clauses under the Arbitration Act 1996 ("the AA"), the Consumer Rights Act 2015 ("the CRA") and the Civil Jurisdiction and Judgments Act 1982 ("the CJJA"), as amended by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 No 479 ("the EU Exit Regulations").

2. The Claimant, Mr Soleymani took part in an auction held on the Defendant's ("Nifty's") online platform between 30 April and 2 May 2021 placing a successful bid of US$650,000 for a blockchain based non-fungible token ("NFT") associated with an artwork by the artist known as Beeple called "Abundance". Nifty's terms of use, contained on the website, contain a New York governing law provision and an arbitration clause providing for arbitration in New York under the auspices of JAMS, a large and well-known private provider of alternative dispute resolution services based in the USA.

3. Nifty commenced an arbitration in New York against Mr Soleymani claiming the US$650,000 which he had bid. Mr Soleymani challenged the jurisdiction of the arbitrator, and brought proceedings in England against Nifty by a Claim Form and accompanying Particulars of Claim dated 9 September 2021. Three distinct claims are advanced:

   (1) a claim for a declaration that the arbitration clause is unfair and not binding upon him ("the Arbitration Claim"); the Particulars of Claim allege that Mr Soleymani is a consumer within the meaning of s. 2(3) CRA and 15E(1) CJJA, and that the Terms constitute a consumer contract within the meaning of s. 15E(1); that the Terms are assessable for fairness under s. 62(4) CRA because the contractual relationship had a close connection with the UK within the meaning of s. 74(1) CRA, in particular because, as Nifty knew, Mr Soleymani was habitually resident in the UK and because Nifty solicits business or otherwise directs its activities to the UK; and that the arbitration clause, either alone or in conjunction with the governing law clause, was unfair in that contrary to the requirement of good faith it caused a significant imbalance in the parties' rights and obligations to the detriment of Mr Soleymani.

   (2) a claim for a declaration that the governing law clause is unfair and not binding on him ("the Governing Law Claim"); the same statutory protection rights are relied on as for the Arbitration Claim;

   (3) a claim that the contract resulting from his bid, if it be a binding contract, was illegal *ab initio* as contrary to the Gambling Act 2005 ("the Gambling Act Claim").

4. Mr Soleymani sought to establish jurisdiction in relation to all three claims under section 15B of the CJJA. Nifty brought an application seeking to challenge jurisdiction by way of an application for:

(1) An order pursuant to CPR Part 11 for a declaration that the court has no jurisdiction or will not exercise its jurisdiction in relation to the Arbitration Claim; and/or

(2) An order staying the proceedings under CPR Part 3.1(2)(f) and/or section 9 AA.

5. Ms Ambrose, sitting as a deputy judge of the High Court ("the Judge") gave judgment on 24 March 2022 ("the Judgment"). She granted the declaration in respect of the Arbitration Claim and stayed the Governing Law Claim and Gambling Act Claim pursuant to s. 9 of the AA. Mr Soleymani appeals against both aspects of her order.

The Parties

6. Mr Soleymani is of Iranian origin and moved to the UK in 2011 in order to seek political asylum. He lives in Liverpool, which is the place of his domicile. He describes himself as a wealthy individual in part as a result of working in the technology sector, amassing significant crypto currency holdings, and in part as a result of substantial family inheritance, much of which is invested in real estate mainly in the United Arab Emirates, Turkey and the UK. He describes himself as an entrepreneur, activist and philanthropist. He collects fine art, and has collected NFTs associated with art for some time. He has a private gallery to display his art collection. For the purposes of the application under Part 11, Nifty accepts that he has the better of the argument that he is a consumer, and is accordingly to be treated as a consumer for the purposes of that application. Nifty does not, however, accept that he is in fact a consumer for the purposes of the CRA and CJJA, to the extent that that falls to be determined on the balance of probabilities in respect of the stay application or the substantive determination of the claims here or in the New York arbitration. He is not a typical consumer, if he be a consumer at all, and the transaction involving the purchase of an NFT for US$650,000 is not a typical consumer transaction, but nevertheless the arguments with which we are concerned must be tested by reference to the rights and protections afforded to consumers generally.

7. Nifty is a limited liability company incorporated in Delaware, USA and operating the digital platform from New York. The platform involves the display, sale and purchase of digital art which is sold or traded as NFTs. Such NFTs are traded by individual sales and purchases, or by auctions held by Nifty on the website.

The Auction

8. Prior to the auction which gave rise to the current dispute Mr Soleymani had purchased approximately a hundred NFTs through the platform with a combined value of over US$2.5m, and participated in some 24 auctions. Each of those auctions had been what might be described as a conventional auction, in which there was a single winning bid, the highest bid securing the relevant NFT. The auction which has given rise to the dispute was a "ranked" auction in which the 100 highest bidders were successful and each received NFTs associated with the artwork in question. They were in effect awarded a numbered edition of the artwork corresponding to the position of their respective highest bids. The effect was that Nifty/the artist was entitled to be paid the total sum of the 100 highest bids. Mr Soleymani says that he was unaware that the auction was in this form and it made little sense commercially for the bidder; editions which are not the "first edition" carry a significantly lower value, and yet all the bids

would have been submitted, he says, on the basis of seeking to obtain the "first edition". Mr Soleymani's bid of US$650,000 came third in the auction. Some time after his discovery that the auction was a ranked auction of the kind described, Mr Soleymani withdrew his cryptocurrency held on account on the website so as to avoid paying the amount of his bid in what he regarded as a deceptive and unfair transaction.

The Terms

9. Mr Soleymani had opened an account on the platform in February 2020 under the username "Mondoir". The "sign up for Nifty Gateway" page stated: "By signing up, you agree to the Terms and Conditions and Privacy Policy". On Nifty's case, the user of the platform accepted the terms by clicking "I Accept" or completing the website registration process or by using the website itself. When Mr Soleymani opened his account with Nifty, the relevant terms of use were those effective as of 4 February 2020. These were subsequently amended on 30 April 2021, but there was no difference in the new terms which is material to the current appeal. We will therefore refer to the February 2020 terms as "the Terms" and use the numbering of the clauses in those terms.

10. Paragraph 1 of the Terms drew attention to the fact that the Terms contained an arbitration clause and that by agreeing to the Terms the customer agreed to resolve all disputes through binding individual arbitration, which meant that the consumer waived any right to have the dispute decided by a judge or jury; and waived any right to participate in collective action whether that be a class action, class arbitration or representative action.

11. Clause 16 was the governing law clause which provided:

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

12. Clause 17 was headed "Disputes" and contained the arbitration clause in the following terms:

> "Please read the following agreement to arbitrate ("Arbitration Agreement") in its entirety. This clause requires you to arbitrate disputes with Nifty Gateway and limits the manner in which you can seek relief from us.
>
> You agree that any dispute or claim relating in any way to: your access, use, or attempted access or use of the Site; any products sold or distributed through the Site; or any aspect of your

> relationship with Nifty Gateway will be resolved by binding arbitration, except that (1) you may assert claims in small claims court if your claims qualify; and (2) you or Nifty Gateway may seek equitable relief in court for infringement of other misuse of intellectual property rights (such as trademarks, trade dress, domain names, trade secrets, copyright, or patent). You agree that any such arbitration shall be settled solely and exclusively by binding arbitration held in New York, New York, administered by JAMS and conducted in English, rather than in court.....
>
> The arbitrator shall have exclusive authority to (1) determine the scope and enforceability of this Arbitration Agreement; and (2) resolve any dispute related to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including but not limited to any claim that all of part of this Arbitration Agreement is void or voidable; (3) decide the rights and liabilities, if any, of you and Nifty Gateway; (4) grant motions dispositive of all or part of any claim; (5) award monetary damages and grant any non-monetary remedy or relief available to a party under applicable law, arbitration rules, and these Terms of Use (including the Arbitration Agreement). The arbitrator has the same authority to award relief on an individual basis that a judge in a court of law would have. The arbitrator shall issue a written award and statement of decision describing the essential findings and conclusions on which the award is based, including the calculation of any damages awarded. Such an award is final and binding upon you and us.
>
> You understand that by agreeing to this Arbitration Agreement, you and Nifty Gateway are each waiving their right to trial by jury and to participate in a class action or class arbitration.
>
> If any part of this Arbitration Agreement is found to be invalid or unenforceable, then such part shall be of no force and effect and shall be severed and the remainder of the Arbitration Agreement shall continue in full force and effect. This Arbitration Agreement shall survive the termination of your relationship with Nifty Gateway.
>
> ...."

The New York Arbitration

13. On 20 July 2021 Nifty commenced an arbitration in New York against Mr Soleymani, relying upon the arbitration clause in its Terms, claiming US$650,000 for breach of contract.

14. On 9 September 2021 Mr Soleymani filed a motion to stay the arbitration on the grounds that (1) there was no valid agreement to arbitrate; (2) the dispute was pending before the English High Court (the English proceedings having been commenced the

same day, 9 September 2021); (3) the arbitration clause contained terms which are contrary to English consumer rights and the JAMS Policy on Consumer Arbitration.

15. The JAMS Policy on Consumer Arbitration contains various provisions directed to providing minimum standards of fairness relating to pre-dispute arbitration clauses between companies and consumers. A consumer is defined essentially as an individual who seeks or acquires any goods or services, primarily for personal family or household purposes. Amongst other provisions, the Policy provides that if the company commences the arbitration then it must bear the costs; and consumers also have a right to an in-person hearing in their hometown area.

16. On 28 October 2021 the arbitrator, a retired judge, His Honour Theodore H. Katz, ordered the parties to lodge submissions addressing the question of whether the arbitration is appropriately subject to the JAMS Policy on Consumer Arbitrations and in particular on the question of whether Mr Soleymani meets the definition of a "consumer".

17. On 7 December 2021, having considered the parties' submissions, the arbitrator issued two decisions. First, he made a procedural order that the preliminary determination made by the JAMS national office, that the JAMS Policy on Consumer Arbitrations applied to the proceedings, should remain undisturbed "for present purposes". Whether or not it applies remains an issue to be decided in the arbitration.

18. On the same day the arbitrator also issued a ruling denying Mr Soleymani's motion to stay and indicating he would set out a briefing schedule to determine Mr Soleymani's jurisdictional objection. He set out his decision and reasoning in a 16 page document. At page 8 he held that whatever factual arguments Mr Soleymani raised about his knowledge of the Terms, their fairness, whether he effectively agreed to them, whether they are unconscionable or inconsistent with his rights under English law, and whether the auction rules were deceptive or unlawful, could not be resolved on the instant motion. His decision was, he said, not intended to reflect any conclusion on the merits of Mr Soleymani's "arbitrability arguments". "The only question to be resolved is whether the Arbitrator has jurisdiction to resolve those issues, and the answer to that question is clear that he does." He explained his reasoning for that conclusion in the following passages. In essence it was that under both Federal and New York Law, and the arbitration clause in the Terms, he had jurisdiction to determine his own jurisdiction (i.e. what in European jurisprudence is often labelled Kompetenz-Kompetenz). At page 13 he observed that "The only truly jurisdictional argument [Mr Soleymani] advances is that as a British Citizen, he has the right to have an English court determine, under English consumer laws, the issues in contention between the Parties. But he provides no legal support for his position." The arbitrator supported this view by referring to the fact that by agreeing to the Terms, which agreement had to be assumed for these purposes, Mr Soleymani had agreed to arbitration under New York law. At page 15 he concluded: "Virtually all of the other arguments raised by [Mr Soleymani] relating to the validity of the arbitration provision in the Terms of Use and whether he is bound by them, as well as whether the auction at issue was deceptive and violative of New York Law (or, if relevant, English law), cannot properly be resolved on the instant motion…". The significance of this decision for the present appeal is twofold. First it meant that jurisdictional issues in the arbitration, including questions of the validity of the arbitration agreement, would fall to be decided together with the determination of the merits of Nifty's substantive claim. Secondly it made clear that it was an open question

whether English law and consumer protection rights would be applied in determining the validity of the arbitration clause.

19. On 21 January 2022 Mr Soleymani issued a motion to dismiss the arbitration on the grounds that (1) Nifty lacks legal capacity to bring an action in New York; (2) the tribunal had no personal jurisdiction over Mr Soleymani in respect of the claim; (3) Nifty's claim was barred under the doctrine of payment and release; and (4) Nifty had failed to state a claim for breach of contract. Its relevance for present purposes is that it raised issues about the arbitration agreement which overlap with those which would arise in a consideration of unfairness under English consumer protection law, in particular in relation to the requirement that the term must be contrary to good faith. The motion was opposed and, as I understand it, the issues raised fall to be dealt with as part of the evidentiary hearing and post-hearing briefs.

20. Meanwhile on 7 February 2022 the arbitrator issued a procedural order making provision for pre-hearing disclosure and factual depositions, and listing an evidentiary hearing on 13-14 September 2022. We were told that the JAMS Rules provide that an award is required to be made within 30 days of the conclusion of the evidentiary hearing.

21. On 2 June 2022 Mr Soleymani applied to the arbitrator by letter seeking confirmation that English law, and specifically the CRA, CJJA and Gambling Act 2005, would be considered and applied. Nifty responded that such a determination was premature. On 9 July 2022 the arbitrator ruled that he agreed that the issue was premature and that it would be considered in the evidentiary hearing and post-hearing briefs, subject to the parties seeking to have it addressed in pre hearing briefs.

22. Mr Lewis QC confirmed to us during the course of the hearing that Nifty did not accept that English law consumer protection rights fell to be applied in the arbitration. This stance was qualified after the conclusion of the hearing. At the end of the hearing we indicated that we would reserve judgment but that, conscious of the 13/14 September hearing date in the arbitration, we would let the parties know the following day whether we were able to announce a decision on some or all of issues, with reasons to be contained in our judgments delivered later. We concluded that our decision on Ground 3 could be announced without waiting for the reasons to be drafted, and put in hand arrangements for it to be communicated to the parties first thing the following morning. In the morning, in an email received by my clerk, which arrived one minute before he sent our decision to the parties, Mr Lewis sent an undertaking offered to the Court by Nifty. That aspect is dealt with in the judgment of Birss LJ below.

The legal framework for consumer protection and arbitration

23. Before turning to the judgment under appeal and the rival arguments, I should set out the relevant statutory framework of consumer protection, and the jurisdictional framework for the issues which arise on the appeal.

Statutory consumer protection

24. Part 2 of the CRA provides protections for consumers against unfair terms in consumer contracts. A consumer contract is a contract between a consumer and a trader, save for contracts of employment or apprenticeship (s. 61(1) and (2)). By s. 2 a consumer is

defined as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession."

25. Section 74 provides that the protection in Part 2 applies despite a choice of foreign law if, but only if, the consumer contract has a close connection with the United Kingdom.

26. Section 62(1) provides that "An unfair term of a consumer contract is not binding on the consumer". Section 62(4) provides that "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." Section 63(1) provides that "Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this Part." Part 1 of Schedule 2 lists 20 terms, including at paragraph 20:

> "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,
>
> …"

27. Sections 71(2) and (3) provide that the court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it, unless the court considers that it does not have before it sufficient legal and factual material to enable it to do so.

28. Sections 89-91 of the AA also contain relevant provisions in respect of arbitration agreements with consumers. Section 89 provides:

> "(1) The following sections extend the application of Part 2 (unfair terms) of the Consumer Rights Act 2015 in relation to a term which constitutes an arbitration agreement.
>
> …
>
> (3) Those sections apply whatever the law applicable to the arbitration agreement."

29. The "following sections" referred to are sections 90 and 91. Section 90 applies the Part 2 CRA protection where the consumer is a legal person as it applies to an individual. Section 91 makes an arbitration clause automatically unfair for the purposes of Part 2 of CRA insofar as it relates to a claim for less than an amount specified by statutory instrument. This figure was set at £3,000 in 1996. At that time, s. 64 of the County Courts Act 1984 provided for the reference of small claims in the County Court to arbitration; and under Order 19 rule 3 of the County Court Rules then in force, claims were automatically referred to this statutory arbitration process if for less than £3,000 (or £1,000 in personal injury claims). The purpose of the provision therefore appears to have been to prevent contracting out of this statutory arbitration. In 1999 the amount was increased to £5,000 with effect from 1 January 2000. By then the Civil Procedure Rules had introduced the Small Claims track in Part 27 and the limit for such small

claims had been increased in April 1999 to £5,000 (£1,000 for the pain suffering and loss of amenity elements of claims for personal injuries). Since then the small claims limits have increased but there has been no change to the specified amount under s. 91 AA, which remains at £5,000.

30. Accordingly, for consumer claims under £5,000, arbitration clauses are automatically unfair and foreign law clauses are automatically disapplied. This seems to have its origins in a legislative intent to preserve a right to statutory arbitration in the County Court which no longer survives. For consumer claims over £5,000, foreign law clauses are to be disregarded if but only if the consumer contract has a close connection with the United Kingdom (s. 74 CRA), and in such cases the fairness protections in Part 2 of the CRA apply to arbitration clauses for legal persons under s. 90 AA and for natural persons under the terms of the CRA itself.

The jurisdictional framework

31. Prior to the UK's withdrawal from the European Union, jurisdiction was governed by the Recast Regulation (Parliament and Council Regulation (EU) 1215/2012 (OJ 2012 L351 p1)) (the "Recast Regulation"). Recital (12) was new, not being contained in the predecessor Brussels regime in the 1968 Brussels Convention (Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (OJ 1978 L304 p36)) and the Judgments Regulation (Council Regulation (EC) 44/2001 (OJ 2001 L12 p1)) (the "Judgments Regulation"). It provided:

> "(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
>
> A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
>
> On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on

> 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.
>
> This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award."

32. Chapter 1 of the Recast Regulation is headed "SCOPE AND DEFINITIONS". Article 1(2) provides:

> "2. This Regulation shall not apply to:
>
> > (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
> >
> > (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
> >
> > (c) social security;
> >
> > (d) arbitration;
> >
> > (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
> >
> > (f) wills and succession, including maintenance obligations arising by reason of death."

33. Section 4 is headed "Jurisdiction over consumer contracts". Article 17 defines its scope, which for present purposes can be treated as contracts between a consumer, defined as someone who contracts "for a purpose which can be regarded as being outside his trade or profession", and a counterparty who is a person "who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State." Its full terms are reproduced in s. 15E(1) CJJA which is quoted below.

34. Article 18 provides for allocation of jurisdiction in the following terms:

> "1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

> 2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
>
> 3. This Article shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending."

35. Article 19 addresses the ability to derogate from the allocation of jurisdiction in Article 18. It provides:

"The provisions of this Section may be departed from only by an agreement:

> (1) which is entered into after the dispute has arisen;
>
> (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
>
> (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State."

36. Upon the UK's withdrawal from the European Union, most of the Recast Regulation was not introduced into domestic law. However part of the Recast Regulation was retained and restated (and Mr Soleymani argues expanded) by an amendment to the CJJA, made by the EU Exit Regulations pursuant to the European Union (Withdrawal) Act 2018. Those Regulations inserted sections 15A to E of the CJJA in the following terms:

> "**15A Scope of sections 15B to 15E**
>
> (1) Sections 15B to 15E make provision about the jurisdiction of courts in the United Kingdom—
>
> (a) in matters relating to consumer contracts where the consumer is domiciled in the United Kingdom;
>
> (b) in matters relating to individual contracts of employment.
>
> (2) Sections 15B and 15C apply only if the subject-matter of the proceedings and the nature of the proceedings are within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation would have had effect before IP completion day in relation to the proceedings)."
>
> **15B Jurisdiction in relation to consumer contracts**

(1) This section applies in relation to proceedings whose subject-matter is a matter relating to a consumer contract where the consumer is domiciled in the United Kingdom.

(2) The consumer may bring proceedings against the other party to the consumer contract—

(a) where the other party to the consumer contract is domiciled in the United Kingdom, in the courts of the part of the United Kingdom in which the other party to the consumer contract is domiciled, or

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

…

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

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

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

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

15D Further provision as to jurisdiction

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

…

15E Interpretation

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

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

"consumer contract" means—

(a) a contract for the sale of goods on instalment credit terms,

(b) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or

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

(i) pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled, or

(ii) by any means, directs such activities to that part or to other parts of the United Kingdom including that part,

and which falls within the scope of such activities,

but it does not include a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation or a contract of insurance,

"defendant" includes defender.

(2) In determining any question as to the meaning or effect of any provision contained in sections 15A to 15D and this section—

(a) regard is to be had to any relevant principles laid down before IP completion day by the European Court in connection with Title II of the 1968 Convention or Chapter 2 of the Regulation and to any relevant decision of that court before IP completion day as to the meaning or effect of any provision of that Title or Chapter, and

(b) without prejudice to the generality of paragraph (a), the expert reports relating to the 1968 Convention may be considered and are, so far as relevant, to be given such weight as is appropriate in the circumstances."

37. Section 9 AA provides:

Stay of legal proceedings.

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

> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

The Judgment

38. The Judge identified the two key issues as being:

    (1) does the English court have jurisdiction under section 15B of the CJJA?

    (2) is Nifty entitled to a stay under section 9 of the AA and/or under the court's inherent jurisdiction?

39. The first question applied only to the Arbitration Claim. It was common ground that the Governing Law Claim and Gambling Act claim fell within section 15B of the CJJA so as to found jurisdiction.

40. The second issue applied to the Governing Law Claim and the Gambling Act Claim, and also, if the first issue were resolved in favour of Mr Soleymani, to the Arbitration Claim. The same considerations applied to both: because of the separability of the arbitration agreement (s. 7 AA), it was not contended that the allegation that the contract was void under the Gambling Act itself provided a ground of objection under s. 9.

41. The Judge's reasoning and conclusion on the first issue can be summarised as follows. The law of both the English courts and the Court of Justice of the European Union, formerly the European Court of Justice, (together "CJEU"), on the scope of the Recast Regulation was clear. It provided that by reason of article 1(2)(d), the Recast Regulation did not apply where the essential subject matter or the principal focus of the claim was arbitration. The principal focus and subject matter of Mr Soleymani's Arbitration Claim fell within that exception because it was solely concerned with whether he was legally obliged to arbitrate the dispute as to whether he should pay the US$650,000. Section 15A of the CJJA made clear that section 15B only applied if the subject matter of the proceedings and the nature of the proceedings were within the scope of the Recast Regulation. There was no basis on the wording of the CJJA, or its application by the authorities, to suggest that it gave a consumer domiciled in England an entitlement to have the validity of an arbitration agreement in a consumer contract decided in England, and nowhere else. Section 15D(1) cast no doubt on this, because it was obviously concerned with agreements about the jurisdiction of a court, not arbitration agreements. Accordingly the jurisdiction application succeeded and the court had no jurisdiction over the Arbitration Claim.

42. On the second issue the Judge's essential reasoning and conclusion were as follows. The correct approach under section 9 was that identified in *Aeroflot v Berezovsky* [2013] EWCA Civ 784 [2013] 2 Lloyd's Rep. 242 and *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* (*The "Barito")* [2013] EWHC (Comm) 1240 [2013] 2 All ER (Comm) 1025. There were factual issues as to whether this was a consumer contract, which depended on whether Nifty was directing its activities at the UK, and as to whether the arbitration clause and governing law clause were unfair within the meaning of the CRA. Mr Soleymani's evidence on those matters was not conclusive. The Court had a discretion as to whether to have those issued determined by the English court or leave them to be determined by the arbitrator who has *Kompetenz-Kompetenz* to determine his own jurisdiction. That balance fell in favour of leaving the matter to be determined in the New York arbitration because:

(1) factual issues going to the unfairness of the arbitration agreement and the governing law clause were closely linked to the underlying factual issues relevant to whether Mr Soleymani was bound by the terms of the auction and was liable to pay the sum claimed in the arbitration;

(2) the arbitration was currently subject to the JAMS policy on consumer arbitration, which included questions as to whether the arbitration clause met "minimum standards of fairness"; there was a real risk of an overlap between the factual assertions in dispute in the arbitration and in the inquiry under section 9;

(3) it was not inevitable that questions going to fairness of the arbitration agreement and the governing law clause would have to be decided by the English Court in any event on enforcement or otherwise; Mr Soleymani's evidence was that he has cryptoassets and interest in real property outside the jurisdiction;

(4) although the section 9 issues raised by Mr Soleymani are issues of English consumer law which an English court would be better placed to decide than a US arbitrator, the questions were ones of fairness rather than technical questions of English law such that an English judge could not be said to be significantly better placed than a US judge or arbitrator to decide the questions of fairness raised;

(5) the Judge said that she took into account that on Mr Soleymani's case he would have to argue those points in what his counsel described as "an unfair arbitration"; however "there was no evidence to suggest any legitimate concern as to the quality of the arbitral tribunal or the arbitral process in New York or the supervision of the New York courts, or indeed the applicable New York law or its ability to protect consumers, or its ability to address questions of English law including matters of public policy";

(6) as to cost and convenience, it was far from clear that there was any imbalance arising out of the cost of disputing the claim in New York as compared to London; and there was no evidence that there would be greater delay and cost in the New York arbitration;

(7) there was no evidence of "an unfair arbitration" or even procedural imbalance; in the arbitration Mr Soleymani appeared to have been given a very full

opportunity to raise his arguments on jurisdiction including the fairness of the arbitration agreement; the jurisdictional issues had not been determined and "there was no evidence to suggest that the arguments could not be raised in the arbitration";

(8) *forum conveniens* type factors were not sufficient to favour the English Court: the only connection between England and the dispute on the section 9(4) issues was that Mr Soleymani is resident in England, he has the better of the argument on Nifty directing its activities to England, amongst 49 other jurisdictions named in its borderless business, and that he was invoking English legislation;

(9) English judges and arbitrators are appropriately asked to decide questions of foreign law and trusted to do so, and conversely the questions of consumer protection raised by Mr Soleymani are not matters which can only be adjudicated upon by an English court;

(10) there was an express choice of New York law, and New York as the seat of the arbitration; English law recognises that the starting point is that an agreement as to the seat of an arbitration is an exclusive jurisdiction clause in favour of the courts of the seat; that principle together with the approach under section 9 and the English application of *Komeptenz-Kompetenz* meant that the existence of English law issues raised by Mr Soleymani did not tip the balance in favour of the English Court deciding those issues;

(11) in all the circumstances a stay would be granted under section 9 of the Governing Law Claim and the Gambling Act Claim.

The grounds of appeal

43. Mr Soleymani was granted permission to advance three grounds of appeal.

44. Ground 1 is that that the Court had jurisdiction under s. 15B CJJA because the exception for arbitration under Article 1(2)(d) of the Recast Regulation did not apply to the Arbitration Claim. Rather Mr Soleymani was invoking the jurisdiction of the English Court as a consumer under a consumer contract, and as such his claim fell within Articles 17 to 19 of the Recast Regulation. It was his English law consumer protection rights which were the "nature of the rights to be protected", the "principal focus" or "essential subject matter" of the claim. In the way the ground was formulated, no distinction was drawn between the scope of s. 15B and the scope of articles 17 to 19 of the Recast Regulation. In written and oral argument on the appeal, however, it was argued that if the Recast Regulation did not have the effect contended for, s. 15B did.

45. Ground 2, as formulated, was that having correctly determined that the Court had jurisdiction over the Governing Law Claim and the Gambling Act Claim under section 15B of the CJJA, and there being no dispute that the arbitration agreement did not meet the requirements of section 15B(6), the Judge erred in concluding that section 15D(1) of the CJJA did not apply to those claims.

46. Ground 3 was that the Judge erred in staying the proceedings under section 9 of the AA without determining the fairness question or directing a trial before the English Court of the issues raised by that objection.

Ground 1

The rival submissions in outline

47. Mr Dunning QC adopted the three formulations of the test whether a claim fell within the arbitration exception in Article 1(2)(d) of the Recast Regulation which were identified by this court in *The London Steamship Owners Mutual Insurance Association Ltd v The Kingdom of Spain and the Republic of France (The Prestige Nos 3 & 4)* [2021] EWCA Civ 1589 [2022] 1 WLR 3434 at [74]:

> "74. Accordingly the question is whether a principal focus of the proceedings is arbitration, the essential subject matter of the claim concerns arbitration, or the relief sought can be said to be ancillary to the arbitration process, these being alternative ways of expressing the same idea."

48. I add for clarification purposes, that the third of these (whether the relief sought in the action is ancillary to the arbitration process) was taken from a passage in the judgment of Clarke LJ in *Through Transport Mutual Insurance association (Eurasia) Ltd v New India Assurance Association Co Ltd* [2004] EWCA Civ 1598 [2005] 1 All ER 715 ("*Through Transport No 1*") in which he used that expression in contradistinction to a claim where the relief sought can be said to be integral to the arbitration process. The paragraph was therefore intended to convey that the case law establishes that the arbitration exception will apply if a principal focus of the proceedings is arbitration, the essential subject matter of the claim concerns arbitration, or the relief sought can be said to be integral rather than ancillary to the arbitration process, these being alternative ways of expressing the same idea.

49. Mr Dunning's submission was that the application of all these formulations led to the conclusion that the Arbitration Claim was outside the arbitration exception because its principal focus and essential subject matter was vindication of Mr Soleymani's consumer rights, and the relief sought was at most ancillary to the arbitration process. The fact that one of those consumer rights happened to be related to an arbitration clause did not change the essential nature of the rights being pursued.

50. In the alternative he submitted that the effect of the introduction of sections 15A to E of the CJJA was to free the court from the application of that jurisprudence, and to enable it to treat the claim as within s. 15B CJJA as a matter of interpretation of the statute. This was in effect an argument that Parliament intended by the wording of the CJJA to expand jurisdictional protection beyond that afforded under the Recast Regulation.

51. He identified nine features of what he described as the mandatory consumer protection rights:

    (1) the consumer has a right to sue in the courts of the part of the United Kingdom in which the consumer is domiciled: section 15B(2) CJJA;

    (2) the consumer has a right to be sued in the part of the UK in which the consumer is domiciled: section 15B(3) CJJA;

(3) section 15B(6) CJJA provides that the right to sue and be sued at the place of domicile reflected in sections 15B(2) and (3) may be departed from only by certain types of agreement; and in particular it does not allow departure by an arbitration agreement which is a pre-dispute agreement prohibited by section 15B(6)(a); this reflects Article 19.1 of the Recast Regulation;

(4) section 15D(1) CJJA makes explicit that agreements which are contrary to section 15B(6) have no legal force;

(5) sections 61 to 67 CRA provide protection against unfair terms in consumer contracts, and Part 1 of Schedule 2 paragraph 20(a) provides that arbitration agreements are presumptively not binding because they are unfair;

(6) section 89 of the AA makes clear that the consumer protections against unfair terms in the CRA apply to an arbitration agreement, whatever the law applicable to the arbitration agreement; and by section 91(1) that arbitration agreements are automatically unfair for the purposes of those protections where the claim is for less than £5,000;

(7) there is a statutory right to have the question of the fairness of a term determined by the English Court because section 71(2) CRA makes it mandatory for the Court to consider that question provided it has before it sufficient legal and factual material to enable it to do so;

(8) the consumer has a right to have an express choice of law which would disapply the CRA protection ignored by the English Court; that arises under section 89(3) of AA and under section 74 CRA;

(9) Rome I (Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations) provides by Article 6.1 that a consumer contract is to be governed by the law of the place of residence and that any derogation is to be ignored.

52. In support of his argument Mr Dunning argued that the effect of the Judge's decision was to negate these important consumer protections which Parliament intended to be in place as a matter of social policy, in the common circumstance of purchases of goods or services on the internet from foreign suppliers. The latter could simply circumvent them by including arbitration clauses in their standard terms. The Competition and Markets Authority, which is an independent non-ministerial department with responsibility for enforcing consumer protection law and promoting competition for the benefit of consumers, intervened in the appeal because it was concerned about the Judgment having the effect of undermining consumer rights, although it confined its submissions largely to the question of fairness of arbitration agreements under Ground 3.

53. Mr Lewis argued that sections 15A-E CJJA did not expand the scope of consumer protection beyond that afforded under the Recast Regulation, and that the Judge had been right to apply the well-established formulations in the case law, binding on this Court, to conclude that the essential subject matter of the Arbitration Claim was arbitration: it was a claim whose essential subject matter and principal focus was to have the arbitration clause declared invalid. He contended that Mr Dunning's

formulation of the domestic consumer protection rights was in a number of respects either wrong or overstated. Sections 15B(6) and 15D(1) were concerned with court jurisdiction agreements, not arbitration clauses. He submitted that the adverse consequences of the decision for consumers generally were also overstated, and that consumers purchasing goods or services on the internet would usually be able to vindicate their protection rights even if the result for Mr Soleymani, an atypical consumer if consumer at all, was that he could not pursue his Arbitration Claim here. If there were any gap for deserving cases, that would be a matter to be addressed by expansion of the Civil Procedure Rules gateways or other provision, which would be a matter for the policy of the legislature.

Analysis on Ground 1

54. I find it convenient to start with Mr Dunning's argument that sections 15A-E CJJA can be interpreted as extending the scope of the Recast Regulation in relation to consumers and consumer contracts. I am unable to accept it for the following reasons.

55. The EU Exit Regulations which inserted sections 15A-E into the CJJA were an exercise of ministerial powers conferred by the European Union (Withdrawal) Act 2018, under which a draft of the statutory instrument had to be laid before Parliament; and a ministerial statement made explaining why there were good reasons for the instrument, and why it did no more than was appropriate: see ss. 8, 9 and 23 and paragraph 28 of Schedule 7. This gave rise to a written explanatory memorandum prepared by the Ministry of Justice and laid before Parliament ("the Explanatory Memorandum"). The Explanatory Memorandum says in no fewer than six places that the instrument is intended to "adopt", "retain" or "restate" the protections afforded to consumers (and employees) in the Recast Regulation: paragraphs 2.6, 7.1 sixth bullet point, 7.2, 7.10, 7.19 (twice). It is clear beyond dispute that the intention expressed in the Explanatory Memorandum was one of restatement and retention in domestic law of the consumer protection in the Recast Regulation, following withdrawal, not its extension or expansion.

56. This is consistent with the clear language of the sections. Section 15A(2) defines the scope of application of s. 15B (for consumers) and 15C (for employees) to proceedings whose "subject matter" and "nature" are within the scope of the Recast Regulation as determined by Article 1. Section 15B only applies if the proceedings would have fallen within the Recast Regulation in accordance with the scope of that Regulation as defined in Article 1. Section 15E(1) defines the scope of consumer contracts to which the jurisdictional protection is afforded in the same language as Article 17. Section 15B describes the allocation of jurisdiction which affords that protection by the same language used in Article 18. Section 15B(6) identifies the extent of permissible derogation from that allocation by adopting the same language as Article 19.

57. Mr Dunning relied on two linguistic points to support his argument. First, he pointed out that s. 15A referred not only to the subject matter of the proceedings being within the scope of the Recast Regulation as determined by Article 1, but also the nature of the proceedings. It seems to me that the most probable explanation is that whilst some of the exclusions in Article 1 describe "matters", such as arbitration in 1(2)(d), so that the appropriate epithet is "subject-matter of the proceedings", others describe types of proceedings, to which the epithet "nature of the proceedings" is more appropriate; and that "and" is used disjunctively to mean "or", with one or other of the epithets being

the appropriate one depending on which exception in Article 1(2) is in play. But however that may be, I do not see how the addition of a further condition to the applicability of s. 15B can have widened rather than narrowed its scope of application.

58. Mr Dunning's second point was that s. 15E(2)(a), which is concerned with the extent to which regard is to be had to CJEU decisions prior to IP Completion day, provides that those "in connection with" Chapter 2 of the Recast Regulation are to be taken into account as to the meaning and effect of that chapter, not, he emphasises, Chapter 1 in which Article 1(2) is situated. However CJEU decisions on Article 1(2) are decisions "in connection with" Chapter 2 as to its "effect", because they determine in a given case whether those provisions in Chapter 2 apply so as to have effect, or are excluded so as to have no effect. Subparagraph (b) supports this interpretation. It is not expressed to be confined to Chapter 2 and so applies to the whole of the Brussels Convention including Article 1. It allows the court to take into account the Schlosser and Jenard reports which underpin so much of the CJEU jurisprudence in this area, including on Article 1. It is unlikely that the drafter intended to exclude consideration of CJEU decisions on Article 1 but permit recourse to the reports which inform them. In any event I would regard the language of a provision aimed at the use of previous EU case law as a slight and improbable basis for suggesting that the drafter intended to expand the scope of protection beyond the scope of the Recast Regulation; and indeed we know from the Explanatory Memorandum that the Minister responsible for the instrument, exercising the delegated legislative powers, had no such intention. For completeness I should add that it would not help Mr Soleymani's case if he were right on there being a restriction on the scope of CJEU case law implicit in subparagraph (a) because the relevant jurisprudence on Article 1(2)(d) is not only that of the CJEU but its adoption and interpretation as part of our domestic law by authorities which include two cases in the Court of Appeal.

59. It follows from these conclusions that Mr Soleymani's first ground of appeal can succeed only if jurisdiction could have been established under the Recast Regulation. That raises two interrelated questions, namely the scope of the arbitration exclusion in article 1(2)(d); and the hierarchy between Articles 17-19 on the one hand and the exclusion of arbitration in Article 1(2)(d) on the other. Both fall to be examined by reference to the Recast Regulation.

Scope of article 1(2)(d) and hierarchy

60. The starting point is that the language of Chapter 1 suggests that it comes first in the hierarchy. It is headed scope and definitions. Article 1 is concerned with scope, and Articles 2 and 3 with definitions. Article 1 identifies matters to which the Recast Regulation "shall apply" or "shall not apply". This is not conclusive in an instrument to which the CJEU has repeatedly applied a purposive approach to interpretation, but it is a starting point.

61. Next comes the statement in paragraph 64 of Professor Schlosser's Report of 9 October 1978, at the time of the accession of Denmark, Ireland and the UK to the Brussels Convention, that:

> "The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of the arbitration, the extension of the time limit for making

> awards or the obtaining of a ruling on questions of substance…*In the same way a judgment determining whether an arbitration agreement is valid or not, or, because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention*." (my emphasis).

62. This suggests two consequences of importance to the current dispute. First, if a judgment as to whether an arbitration agreement is valid or invalid falls outside the scope of the Recast Regulation, it would logically follow that so too must proceedings essentially concerned with that question. Secondly, the arbitration exception is treated as coming first in the hierarchy, ahead of the provisions in Chapter 2: if the arbitration exception applies to proceedings they are "not covered" by the Recast Regulation and its predecessors. This second principle is reflected also in the Report of Dr Jenard at p.13 and the report of Messrs Evrigenis and Keramaus on the accession of Greece at p. 10.

63. *Marc Rich & Co AG v Societa Italiana Impianti PA* [1991] ECR 3855 [1992] 1 Lloyd's Rep 342 was concerned with English proceedings to appoint an arbitrator. Although the proceedings were not closely analogous to those in the current dispute, the case is of importance for its identification of two principles, and the detailed analysis of the rationale for them conducted by the Advocate-General. The Court held, first, that the international conventions on arbitration, particularly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"), lay down rules on arbitration which must be respected by the courts of contracting states to that convention, which include EU member states; the New York Convention includes rules on arbitration agreements as well as awards. It followed that the contracting parties to the Brussels Convention "intended to exclude arbitration in its entirety" ([8]). Secondly, in order to determine whether the dispute falls within the scope of the Convention, reference must be made solely to "the subject-matter of the dispute" ([26]).

64. The CJEU expressed no disapproval of the reasoning and analysis in the opinion of Advocate-General Darmon which supported these conclusions. His analysis and opinion was expressly approved and adopted by Aikens J in *Navigation Maritime Bulgare v Rustal Trading Ltd (The "Ivan Zagubanski")* [2002] 1 Lloyd's Rep 106, which was in turn expressly approved by this Court in *Through Transport No 1.* In *The Ivan Zagubanski* shipowners brought a claim in England for an anti-suit injunction to restrain cargo interests from pursuing a claim for cargo damage against the owners in court proceedings in Marseille, on the grounds that they were bound by a London arbitration clause incorporated into the bills of lading from the charterparty. The claim also sought a declaration that the arbitration clause had been incorporated from the charterparty into the bill of lading and that the relevant defendants, who were insurers of the cargo, were bound by it (see [27(1)]). Cargo interests contended that the Brussels/Lugano Convention applied and they had to be sued at their place of domicile. The shipowners contended that their claim was within the arbitration exception in Article 1(2)(d), leaving the English Court to assume jurisdiction under CPR 6.20(5). Aikens J decided this issue in favour of the owners.

65. The reasoning of Advocate-General Darmon in the *Marc Rich* case for arbitration proceedings falling entirely outside the scope of the Brussels Convention was two-fold. First, as the CJEU held in its judgment, it was because arbitration awards and proceedings were governed by the New York Convention imposing other obligations

on contracting parties to that Convention in respect of the recognition and enforcement of judgments concerning the existence and validity of arbitration agreements. This reasoning was subsequently reflected in Recital (12) to the Recast Regulation which confirms that the New York Convention "takes precedence" over the Recast Regulation. Secondly, the Brussels Convention would undermine international arbitration if it applied to such proceedings because arbitration requires the assistance of the court of the state in which it has its seat to aid the arbitration process itself, and to apply the Brussels Convention would or might deprive the court of the seat of jurisdiction.

66. At paragraph 71 (which was expressly approved by this Court in *Through Transport No 1* at [44]) Aikens J said:

> "In my respectful view, the opinion of Mr Advocate General Darmon is comprehensive and his analysis compelling. The theme and overall conclusion of it is that the Brussels Convention does not apply to any Court Proceedings or judgments in which the principal focus of the matter is "arbitration". That includes proceedings concerning the validity or existence of an arbitration agreement…."

67. Accordingly he concluded that the claim in that case for a declaration that the arbitration clause bound the cargo insurers fell within the arbitration exception because its principal focus or essential subject matter was arbitration: paras [72] and [100(1)].

68. In *Through Transport No 1* the relevant issue was similar to that in *The Ivan Zagubanski*: the claimants sought a declaration that the defendants were bound by an arbitration clause and an anti-suit injunction to restrain Finnish proceedings. This Court upheld Moore-Bick J's decision that both claims were within the arbitration exception such that the lis pendens provisions of the Convention, which would have favoured Finnish jurisdiction as the court first seised, did not apply. In addition to approving the decision and reasoning of Aikens J in *The Ivan Zagubanski*, Clarke LJ, giving the leading judgment, also concluded that the arbitration exception took precedence in the hierarchy over the lis pendens provisions, such that it was for the court in which the question whether the arbitration exception arose to decide it, because, if it decided that the exception applied, the proceedings were outside the scope of the Brussels Convention altogether: see [37].

69. Mr Dunning referred to paragraphs [56] and [57] of the judgment, in which Clarke LJ referred to the need to characterise the substance of the claim by identifying its true issues or the true question at issue. Those passages were not, however, concerned with whether the claims came within the scope of the arbitration exception, but rather another aspect of the dispute, namely whether the underlying claim arose contractually or as a statutory claim under Finnish legislation.

70. In *A v B* [2006] EWHC 2006 (Comm) [2007] 1 Lloyd's Rep 237 A had entered into an arbitration agreement with B and others for B to act as arbitrator, B being at the time his solicitor. A brought claims against B which included a claim for a declaration that the arbitration agreement was void for a wide variety of reasons including misrepresentation, fraud, deception, unconscionable behaviour, mistake and duress; and the setting aside of orders made by B in his capacity as arbitrator (see [58], [61], [89]). Colman J considered paragraph 64 of the Schlosser report, *The Ivan Zagubanski* and *Through Transport No 1*, and concluded at [96]:

> "…. I have no doubt that the claims in the present proceedings have as their object the avoidance of the arbitration agreement and the setting aside of the orders already made by B in his capacity as arbitrator and that looked at as a whole they are claims the principal object or focus of which is arbitration in the sense that they are designed to impugn the validity or existence of the arbitration agreement and the jurisdiction of the arbitrator."

71. Mr Dunning submitted that the case was wrongly decided or should not be followed. I have little hesitation in concluding that it was rightly decided. It is entirely orthodox and in accordance with the principles established by the authorities cited and the subsequent decision of this Court in *The Prestige Nos 3 & 4*.

72. In *The Prestige No 3 & 4* this Court took the opportunity at [71]-[74] to review and restate the principles applicable to whether proceedings fall within the arbitration exception. The conclusive paragraph has been set out above. The issue arose in the context of whether the exception applied to (a) claims on an arbitration award (b) claims on an English Judgment which had itself been entered in terms of an arbitration award pursuant to s. 66 AA. This Court upheld the decision of Butcher J that the award claims came within the exception but the judgment claim did not. The significance of the finding in relation to the award claims was that the insurance provisions in Section 3 of the Judgments Regulation could not apply. In para [80] the Court said:

> "However, before any question as to the effect of section 3 can arise, a necessary prior question is whether the Regulation applies at all. As arbitration in its entirety is excluded from the Regulation, there can be no question of Section 3 having any effect in a case to which the "arbitration" exception in Article 1.2(d) applies. Section 3 can only apply to matters within the scope of the Regulation and does not apply to arbitration which is excluded from the Regulation by the exception. Whereas exclusive jurisdiction clauses are within the scope of the Regulation, arbitration clauses are not."

73. Mr Dunning referred to and relied upon the CJEU decision in *West Tankers v Allianz Spa* (Case C-185/07) [2009] 1 AC 1138. In that case the charterers of a vessel owned a jetty in Italy which it was alleged had been damaged by the owners. The charterers' insurers brought proceedings in Italy for damages. The owners brought proceedings in England for an anti-suit injunction relying on a London arbitration clause in the charterparty. The House of Lords concluded that the claim for an anti-suit injunction was within the arbitration exception, but referred to the CJEU the question whether nevertheless the grant of one was incompatible with the Judgments Regulation. The CJEU agreed that the claim for an anti-suit injunction was within the scope of the arbitration exception: paragraph [23]. It went on to hold that nevertheless the grant of an anti-suit injunction was incompatible with the Judgments Regulation because it would strip the Italian Court of the jurisdiction which it possessed to determine an objection that it should not decide the case by reason of an arbitration clause, and in doing so itself address the validity of the arbitration clause. This was the reasoning in the passages at paragraphs 25 to 27 upon which Mr Dunning relied:

> "25 It is therefore appropriate to consider whether the proceedings brought by the defendants against the claimant before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and

then to ascertain the effects of the anti-suit injunction on those proceedings.

26 In that regard, the court finds, as noted by the Advocate General in paras 53 and 54 of her opinion, that if, because of the subject matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by para 35 of the report on the Accession of the Hellenic Republic to the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, presented by Messrs Evrigenis and Kerameus (OJ 1986 C298, p 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

27 It follows that the objection of lack of jurisdiction raised by the claimant before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001, and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to articles 1(2)(d) and 5(3) of the Regulation."

74. Mr Dunning submitted that this showed that a court on whom jurisdiction was conferred under the Recast Regulation always had jurisdiction to decide the applicability of an arbitration clause; and accordingly that Mr Soleymani's right to sue here under Article 18/s.15B gave this Court jurisdiction to decide his Arbitration Claim as to the validity of the arbitration clause in the Terms. This is to misread the decision and the European jurisprudence which is reflected in what was subsequently included in Recital (12) to the Recast Regulation when it replaced the Judgments Regulation. In particular Recital (12) makes clear that: "Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from … examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law."

75. The principle is that where a member state court is seised of jurisdiction because the essential subject matter of the proceedings engages one of the provisions of the Recast Regulation allocating jurisdiction, such as contract or tort, the question whether there is an arbitration agreement which is a valid objection to the exercise of the jurisdiction is a matter for that court, notwithstanding Article 1(2)(d). Where, however, the principal focus or essential subject matter of proceedings is arbitration, Article 1(2)(d) excludes the operation of the jurisdictional rules in the Recast Regulation. *West Tankers* was a case of the former: the Italian Court was seised of the claim for damages to the jetty, which was the subject matter of the claim being referred to in paragraph 26, and hence was the appropriate court to determine the validity of the arbitration clause

as an objection to the exercise of its jurisdiction, as the CJEU said at paragraph 27. I agree with the analysis of Males J, as he then was, to this effect in *Nori Holding Ltd v Public Joint Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) [2018] 2 All ER (Comm) 1009 at [74]-[76]. Section 9 AA performed that function in our domestic law, permitting the court to stay proceedings in favour of arbitration where the substantive proceedings fell within a Recast Regulation allocation of jurisdiction. These passages in *West Tankers* therefore support, rather than undermine, the principle that the first question in the hierarchy is whether the essential subject matter of the proceedings is arbitration; if it is not, the Recast Regulation applies and the court properly seised under the Recast Regulation must determine the applicability of an arbitration agreement as a preliminary issue; if the essential subject matter of the agreement is arbitration, on the other hand, the Recast Regulation does not apply.

76. Mr Dunning also suggested, albeit tentatively, that a fourth formulation of the arbitration exception test could be derived from paragraph 15 of the *West Tankers* decision, which in turn referred to the CJEU decision in *Van Uden maritime BV v Kommanditgesellschaft in Firma Deco-Line* (Case C-391/95) [1999] QB 1225, that the subject matter of proceedings is arbitration where they serve to protect the right to determine the dispute in arbitration. I would not myself adopt that formulation because I can see no principled distinction to be drawn between claims whose principal subject matter or principal focus is to establish the validity of an arbitration agreement and those where it is to establish its invalidity; and such a distinction is not consistent with the authority considered above, including *A v B*. The subject matter or principal focus is the same in each case, namely the validity or otherwise of the arbitration agreement. It was not a formulation which was part of the determinative reasoning in *West Tankers* or *Van Uden*, and was not adopted by this court in *The Prestige (Nos 3 & 4)*. Indeed in this last case this court said at [92] that the CJEU in *West Tankers* was not to be understood to be propounding a new test for when arbitration is the subject matter of proceedings by reference to the purpose of the proceedings; but rather the test remained dependent on the character of the proceedings in question.

77. Pausing there, the authorities seem clearly to establish three relevant principles:

(1) a claim falls within Article 1(2)(d) if a principal focus of the proceedings is arbitration, the essential subject matter of the claim concerns arbitration or the relief sought can be said to be integral rather than ancillary to the arbitration process, these being alternative ways of expressing the same idea;

(2) a claim seeking to have an arbitration agreement declared invalid or inapplicable is such a claim; and

(3) a claim falling within the arbitration exception falls wholly outside the scope of the Recast Regulation and none of the provisions in Part 2 can therefore apply to it.

78. However, none of the authorities to which I have referred was specifically concerned with the consumer rights which are the subject matter of Section 4 of Chapter 2 of the Recast Regulation. We were not referred to any authority addressing arbitration in the context of such consumer rights. There remains a question, therefore, whether the

general hierarchy in the Recast Regulation which I have identified is reversed in the case of such consumer rights.

79. I am not persuaded that there is any room for a different hierarchy in the case of consumer rights under Section 4 for a number of reasons.

80. First, there is nothing in the wording of Section 4 which suggests that it is to take a higher place in the hierarchy; indeed if anything, the contrary is the case.

81. Mr Dunning relied on s. 15D(1) of the CJJA. This finds its counterpart in the language of Article 25.4 of the Recast Regulation which provides:

> "Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Article[s]…19….."

82. Article 25.4 is found in section 7 dealing with prorogation of jurisdiction, in which it is clearly concerned with agreements conferring jurisdiction on courts, as appears from Article 25.1. It is not concerned with arbitration agreements.

83. That of itself indicates that Article 19 is concerned also with derogation from jurisdiction by agreements to confer jurisdiction on courts, not with arbitration agreements. Article 19, and s. 15B(6) which replicates it, does not, as Mr Lewis pointed out, ban any pre-dispute agreement; sub paragraph (b) permits agreements, even pre-dispute, which "allow the consumer to bring proceedings in courts other than those indicated in this Section". If the article and section are to provide the jurisdictional protection which was clearly intended, this must mean an agreement which confers an additional right on a consumer as to the courts where he may bring a claim, not an agreement which confines his right to sue to the courts of a state other than at the place of his domicile. What it illustrates, however, is that the whole article is concerned with agreements about the jurisdiction of other courts, not arbitration. Were it otherwise one would expect (b) to permit an agreement conferring an additional option on the consumer to arbitrate elsewhere, but its wording does not extend to such an agreement.

84. This conclusion is reinforced by one of Mr Dunning's own submissions on s. 15B(6). He contended that once a consumer is within the s. 15B(2) jurisdictional gateway, any arbitration agreement is necessarily and automatically invalidated by s. 15B(6) as a pre-dispute agreement which is prohibited by that section (and section 15D(1)). If that were correct it would have the surprising and illogical consequence that a consumer would be entitled to ignore an arbitration agreement even when it would not be regarded as unfair under the consumer protection regime in Part 2 of the CRA. Such an unlikely consequence is a further indication that s. 15B(6), and Article 19 on which it is based, are not concerned with arbitration agreements.

85. Secondly, the twofold rationale for the exclusion of arbitration from the scope of the Recast Regulation (New York Convention, and supervisory role of the courts of the seat), which was articulated in the opinion of the Advocate General in the *Marc Rich* case and the materials he relied on, applies as much to consumer claims as to others. This is not simply a point that had it been thought that the arbitration exception did not come first in the hierarchy in some cases, it is surprising that its effect has been stated to do so in unqualified terms in the authoritative reports and the case law; and that the text books treat the hierarchy as applicable to all sections of Chapter 2 (see e.g. Briggs

Civil Jurisdiction and Judgments 7th Edn para 4.02). The rationale for the hierarchy positively supports the view that it should apply as much to consumer claims under Section 4 of Chapter 2 as to other sections of Chapter 2.

86. International arbitration of consumer claims is not per se outlawed or unfair. For reasons I have explained, it is not the case that any international arbitration agreement is invalid under Article 19 or s.15B(6). In our domestic law an arbitration agreement governed by a foreign law clause is only subjected to a fairness assessment under Part 2 of the CRA if the contract has a close connection with the UK (s. 74(2)). Even then it is not automatically unfair, and the Part 2 assessment may or may not render it unfair to require the consumer to arbitrate abroad. Those remain issues in this very case. If international arbitration is contemplated as a possibility in some consumer cases, it would be inconsistent with the New York Convention regime for member states to be required to follow the jurisdictional provisions of the Recast Regulation, just as it is in non-consumer cases.

87. Moreover a reversal of the hierarchy would interfere with the ability of the courts of the seat of such arbitration to act in aid of the arbitration process. Mr Soleymani would, on his argument, be vindicating his Article 18/s. 15B(2) right as a consumer to sue at the place of his domicile in any proceedings here which would normally fall within the supervisory jurisdiction of the courts of the seat of the arbitration. It would permit him, for example, to apply in England to remove the arbitrator, or challenge the procedural conduct of the arbitration process, even if he were wrong about the arbitration agreement being invalid for unfairness and he were bound to arbitrate in New York. His argument would characterise his claim in such an application as being essentially to vindicate his consumer rights to be protected from an unfair arbitration under an unfair arbitration clause. Further, if Mr Soleymani wished to rely on the arbitration agreement because, for example he perceived that in his case New York law was more favourable in relation to the substantive dispute, it would enable him to treat the English Court as the supervisory court for all procedural aspects of the arbitration process. Suppose that at the outset he had brought an application in England for the appointment of an arbitrator, a paradigm case of an application within the arbitration exception determined in the *Marc Rich* case. If the hierarchy is reversed from the normal position to favour Section 4 over Article 1(2)(d) he is permitted to do so by Article 18/s. 15B(2).

88. Thirdly, the vulnerability of consumers is not itself sufficient to alter the hierarchy, as is clear from the insurance provisions in Section 3. Assureds under contracts of insurance are often in an equivalently vulnerable position to consumers under consumer contracts, and Recital (18) of the Recast Regulation recognises that the more favourable jurisdictional rules are given to insurance, consumer and employment contracts to protect the weaker party. In insurance contracts Section 3 protects them by giving a right to sue and be sued in their place of domicile (Articles 11(1) and 14), and is subject to restrictions from derogation in Article 15 which mirror those for consumers in Article 19. Nevertheless the arbitration exception applies to exclude the applicability of the section where the essential subject matter or principal focus is arbitration, as this Court held in *The Prestige 3 & 4* at [80], quoted above.

89. It is right to say that some doubt might be cast on this last point by the very recent decision of the CJEU in *The Prestige* dispute of 20 June 2022 (Case C-700/20) ("The CJEU Prestige Judgment"). Butcher J was concerned with competing judgments, one

being a determination in Spain that the shipowners' P & I Club were liable for the consequences of the pollution caused by the casualty, which Spain sought to register for recognition and enforcement here; the other was a judgment of the English Court under s. 66 AA in terms of an arbitration award declaring the shipowners not to be liable. The issue referred was whether the English s. 66 judgment was a judgment which qualified under the Judgments Regulation Article 34(3) as an inconsistent judgment preventing recognition and enforcement of the Spanish judgment, notwithstanding that it had not itself considered the merits of the claim but merely given effect to an arbitration award. The Court held that a claim to enforce an award was caught by the arbitration exception, but that did not of itself prevent it being a judgment within the meaning of Article 34(3) of the Regulation. However the Court concluded that the s. 66 Judgment could not qualify under Article 34(3) because the judge giving judgment in terms of the award (Hamblen J) had not considered two reasons why judgment should not have been entered. One was that the Spanish Judgment was by a court first seised so that the lis pendens provisions applied. The second, which is relevant to the present dispute, is reflected in paragraphs 59 to 62:

> "59. In the present case, it should be noted that the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of Regulation No 44/2001 without infringing two fundamental rules of that regulation concerning, first, the relative effect of an arbitration clause included in an insurance contract and, secondly, *lis pendens*.
>
> 60. As regards, first, the relative effect of an arbitration clause included in an insurance contract, it is apparent from the case-law of the Court that a jurisdiction clause agreed between an insurer and an insured party cannot be invoked against a victim of insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or before the courts for the place where the victim is domiciled (see, to that effect, judgment of 13 July 2017, *Assens Havn*, C-368/16, EU:C:2017:546, paragraphs 31 and 40 and the case-law cited).
>
> 61. It follows that, to avoid that right of the victim being undermined, a court other than that already seised of that direct action should not declare itself to have jurisdiction on the basis of such an arbitration clause, the aim being to guarantee the objective pursued by Regulation No 44/2001, namely the protection of injured parties vis-à-vis the insurer concerned (see, to that effect, judgment of 13 July 2017, *Assens Havn*, C-368/16, EU:C:2017:546, paragraphs 36 and 41).
>
> 62. That objective of protecting injured parties would be compromised if a judgment entered in the terms of an arbitral award by which an arbitral tribunal declared itself to have jurisdiction on the basis of such an arbitration clause, included in the insurance contract concerned, could be regarded as a 'judgment given in a dispute between the same parties in the Member State in which recognition is sought', within the meaning of Article 34(3) of Regulation No 44/2001."

90. The CJEU Prestige Judgment did not adopt the contrary conclusion of the Advocate General, and its reasoning has been heavily criticised by Professor Briggs (in an article entitled "Humpty Dumpty, Arbitration, and the Brussels Regulation" posted on the website of the European Association of Private International Law on 23 June 2022). If paragraph 60 is to be read as assimilating arbitration clauses with exclusive jurisdiction clauses, a similar argument was advanced to this Court in *The Prestige Nos 3 & 4*. It was rejected for the detailed reasons set out at [76] to [84]. The CJEU judgment does not address the difficulties with the reasoning identified in *The Prestige Nos 3 & 4.* Following IP Completion day we are not bound by this decision (European Union (Withdrawal) Act 2018 s. 6). On the other hand we are bound by the decision of this court in *The Prestige Nos 3 & 4*, whose reasoning and conclusion on this point I, in any event, prefer. I do not therefore treat the CJEU Prestige Judgment as undermining the conclusions I have reached.

91. None of the other cases to which Mr Dunning referred us provide any support for a different hierarchy in consumer cases. He relied on the decision of this Court in *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723 [2007] 2 All ER (Comm) 813. It was there held that where employees invoked their right to sue and be sued here under Section 5 of the Judgments Regulation, the existence of a foreign jurisdiction clause was invalid under Article 21 (the equivalent of Article 23 in the Recast Regulation and s. 15C(6) of the CJJA), having been made prior to the dispute. The case is of no assistance. Exclusive jurisdiction clauses come within the ban on prorogation, arbitration clauses do not. A distinction is drawn between them, as this Court emphasised in *The Prestige Nos 3 & 4* at [80]: exclusive jurisdiction clauses are within the scope of the Recast Regulation; arbitration clauses are not.

92. Mr Dunning also relied on the decision of the German District Court in *Zellner v Phillip Alexander Securities and Futures Ltd* [1997] I.L.Pr 716. However that case was a conventional application of the principle reflected in Recital (12) of the Recast Regulation and in *West Tankers*. The German Court was seised of the substantive dispute under Article 5 of the Brussels Convention. It therefore had jurisdiction to determine the preliminary question of whether the arbitration agreement was unfair and invalid under German domestic consumer protection legislation in its application to that dispute. What the German court was doing was no different in principle from the s. 9 AA exercise this court must perform in relation to the Governing Law Claim and Gambling Act Claim in Mr Soleymani's case. The decision provides no support for the suggestion that the Recast Regulation conferred jurisdiction over his Arbitration Claim.

93. Finally, I am not persuaded that the ramifications of this conclusion, for consumers generally, dictate a different conclusion. In the case of a typical consumer who buys goods or services on an international platform on standard terms containing an arbitration clause, there will usually be no difficulty in their having the English Court determine that they are not bound to arbitrate because the agreement is unfair (if it is). They can sue here in the place of their domicile for defects in the goods or services, or damage caused thereby, or return of the price. They can bring a claim for a declaration of non-liability. None of those claims would be caught by the arbitration exception and all would pass through the s. 15B gateway. In many cases they would no doubt pass through other gateways such as those in Practice Direction 6B 3.1 paragraphs (6) (7) or (9). In all such cases the foreign counterparty will have to seek a stay under s. 9 AA if it is to avoid an English judgment. If it does so, the question of the fairness of the

arbitration clause will be determined in accordance with s. 9, which for the reasons given by Birss LJ on Ground 3, will normally involve an English Court applying the protections in the CRA where applicable. If the foreign counterparty chooses to contest the proceedings here, he would no doubt be precluded from simultaneously pursuing an arbitration. Should he ignore the claim here and pursue the arbitration abroad, he would not be able to enforce any award here under the New York Convention. The typical consumer without any assets abroad is fully protected. If he is a more sophisticated consumer with assets abroad, it is perhaps not unreasonable to expect him to be able to protect his position by registering his English judgment in the place where they are held.

94. Moreover, where a UK consumer purchases goods or services on the internet by the click of a mouse within the UK, a claim that an arbitration agreement included in the terms of such purchase is invalidated by the consumer protections in the CRA, as a sole and freestanding claim, will be permitted under the CPR 6B PD 3.1 gateways following their amendment with effect from 1 October 2022. Paragraph (6) (a) currently includes claims in respect of a contract where the contract is made within the jurisdiction. Paragraph (8) includes claims for a declaration that no contract exists where, if the contract were found to exist, it would comply with the conditions in paragraph (6). As the Practice Direction currently stands, a consumer who orders goods or services by clicking the mouse within the jurisdiction would have difficulty establishing that the contract was made within the jurisdiction, as a result of the unsatisfactory principles governing the place of acceptance of offers which were criticised by Lord Sumption in *Brownlie v Four Seasons Holdings Inc.* [2017] UKSC 80 [2018] 1 WLR 192 at [16]. Paragraph (6)(a) is to be amended, however, by the 149th Update on Amendments to Practice Directions of 11 July 2022, to take effect on 1 October 2022. Paragraph (6) will then include within the gateway, in addition to contracts made within the jurisdiction, contracts concluded by the acceptance of an offer, which offer was received within the jurisdiction. UK customers buying goods and services on the internet from the UK will come within the scope of this gateway, not only in respect of the matrix contract, but also in respect of the arbitration agreement which is contained in its terms as a separate contract. Paragraph (8) permits a claim for a declaration that such arbitration agreement is invalid because the arbitration agreement itself falls within the new paragraph (6)(a). Further, by an amendment to paragraph (4A), also to take effect from 1 October 2022, a claimant will be able to bring a claim which arises out of the same or closely connected facts as a claim which may be brought under CPR rule 6.33; accordingly if a consumer brings any of the kind of substantive claims I have identified in paragraph 93 above they will not be dependent on the counterparty issuing a s. 9 application; they will be able to add their claim for a declaration as to the invalidity of the arbitration clause. After 1 October 2022, Mr Soleymani would be able to found jurisdiction for his Arbitration Claim both under paragraph (6)(a) and (8); and also under paragraph (4A) by reason of the fact that jurisdiction for the Governing Law Claim falls within CPR 6.33, and perhaps also by reference to the Gambling Act Claim which also does so.

95. This would seem to meet the concerns about the consequences of the Judgment, raised by Mr Dunning, and shared by the CMA, not just for Mr Soleymani, but for the whole cohort of consumers seeking to rely on the consumer protections in the CRA in relation to goods and services bought on the internet from the UK. If it be thought that there remains a gap of any practical significance which prevents a consumer from having his

CRA protections adjudicated upon by the English Court, it would be a policy question for the Civil Procedure Rules Committee to consider whether it should be filled. It would not, in my view, be a reason for giving the Recast Regulation or sections 15A to 15E CJJA a meaning they do not bear.

The principles applied to Ground 1

96. Against this background, it is clear that Mr Soleymani's Arbitration Claim is excluded from the scope of the Recast Regulation by Article 1(2)(d); and that by reason of s. 15A(2) CJJA, s. 15B(2) cannot be relied on to found jurisdiction. The essential subject matter and principal focus of Mr Soleymani's Arbitration Claim is the alleged invalidity of the arbitration agreement in the Terms. The only relief claimed is a declaration that the arbitration agreement in the Terms is "unfair and not binding upon" Mr Soleymani. The grounds for the relief are that the arbitration agreement is invalid. The relief claimed is integral, not merely incidental, to the arbitration process. It falls squarely within the scope of the arbitration exception in accordance with the principles enunciated in the EU and English authorities and recently reaffirmed in this Court in *The Prestige Nos 3 & 4*.

97. Mr Dunning seeks to escape this conclusion by characterising the claim as one to enforce consumer rights. In his reply submissions he summarised those rights as essentially threefold:

    (1) Mr Soleymani's right to sue and be sued at his place of domicile under s. 15B(2) and (3); in fact we are only concerned with his right to sue under s. 15B(2), since we are concerned with his claim; moreover because the CJJA provisions do no more than reflect rights under the Recast Regulation, the argument must establish that he had a right to sue in his place of domicile under Article 18 of the Recast Regulation;

    (2) his right not to have that right removed by a "pre-dispute agreement" under s. 15B(6); again the argument depends upon on the non-derogation rights existing under Article 19 of the Recast Regulation;

    (3) his right to have the arbitration clause declared unfair under the CRA.

98. There are, to my mind, two fatal flaws in this reasoning. First, there is a logical incoherence in the submission, if I am right that the hierarchy of the Recast Regulation is that Article 1(2)(d) is first to be applied to determine whether the provisions of Chapter 2 apply to the claim. As to the first of Mr Soleymani's "rights", it is not sufficient to talk of a "right to sue" generally without asking, " a right to sue for what"? Had Mr Soleymani sued for a declaration of non-liability to pay the $650,000, there is no doubt that his claim would have fallen within the jurisdictional gateway of s.15B/Article 18 and would not have been met with any objection that the arbitration exception applies. There is no such objection to the Governing Law Claim or the Gambling Act Claim, which it is common ground pass through the gateway conferred by s.15B/Article 18. His Arbitration Claim, however, is confined to a claim in relation to the validity of the arbitration clause, which falls within the scope of the arbitration exception under well-established principles of EU and English law. If the hierarchy of the Recast Regulation favours article 1(2)(d) above Articles 17 to 19, such that those jurisdictional provisions of Chapter 2 simply do not apply where article 1(2)(d) in

Chapter 1 treats them as outside the scope of the Regulation, Mr Soleymani's so called "right" to bring *this claim* in the place of his domicile does not exist. Mr Dunning's second "right" suffers from the same difficulty. There is no right under Article 19 not to be deprived of the right under Article 18 if, by virtue of the arbitration exception taking precedence in the hierarchy, those rights never arise in relation to this claim. Mr Dunning's third "right" is not a right under the Recast Regulation (or the CJJA) at all in relation to the Arbitration Claim. It is a right to the benefit of provisions of English law, if, but only if, the Court has jurisdiction. Again it is incoherent to argue that the Court must have jurisdiction because such rights are invoked by the claim.

99. The second flaw is that the consumer rights relied on in this particular Arbitration Claim are not consumer rights in general, but rather rights or grounds relied on as to why the arbitration agreement in the Terms is invalid and not binding on Mr Soleymani. The fact that he relies on provisions of English consumer protection law against unfair terms as the reason for this invalidity does not alter the essential subject matter or principal focus of the claim, which remains the validity or invalidity of the arbitration agreement The reasons A relied on in *A v B* for contending that the arbitration agreement in that case was invalid were misrepresentation, fraud, duress etc, but that did not make the right not to be subjected to misrepresentation, fraud, duress etc the essential subject matter of those proceedings. No more do the consumer protection rights raised in this case as the grounds for the arbitration agreement being invalid.

100. Mr Dunning submitted that in the domestic context a consumer would be able to seek from the court a freestanding declaration that they were not bound by an arbitration clause, and it would therefore be surprising if the same remedy were not available in an international context, where the protection is required all the more. The answer is that it causes no surprise when the availability of relief in the international context involves subjecting a foreign defendant to the jurisdiction of this court, and the jurisdictional framework which is to be applied is to be found in a Regulation reflecting the product of international agreement.

Conclusions on Ground 1

101. I would therefore dismiss the appeal on Ground 1 for reasons which are not in substance different from those of the Judge.

102. I should record that during his reply submissions Mr Dunning gave an undertaking to the court on behalf of Mr Soleymani that if on the s. 9 application the court determined that there should be no stay or ordered the trial of the s. 9(4) issue (i.e. if Mr Soleymani won on Ground 3), he would within 21 days apply to amend his claim to seek relief in respect of the substantive claim being advanced in the New York Arbitration, including in relation to his liability to pay the $650,000. However this has no bearing on the issue we have to decide on Ground 1, which is whether there is jurisdiction for the Arbitration Claim as presently advanced.

Ground 2

103. Ground 2, as formulated in the grounds of appeal for which leave was given, depends upon s. 15D(1) being construed as invalidating the arbitration clause. For the reasons I have given it does not do so. In his written and oral argument Mr Dunning expanded the argument under this ground to ask the court to determine summarily the unfairness

of the arbitration clause. Such an argument belongs to Ground 3, where it is addressed and rejected for the reasons given by Birss LJ. Accordingly I would also dismiss the appeal on Ground 2.

Ground 3

104. At the conclusion of the hearing we announced our decision to allow the appeal on Ground 3 and direct a trial of the s. 9(4) AA issue before the Commercial Court. I agree with the judgment of Birss LJ giving the reasons for making and maintaining that decision.

Lord Justice Birss :

105. I agree with the judgment of Popplewell LJ.

106. My task is to address Ground 3 of the appeal. That is the aspect of the case arising under s9(4) of the Arbitration Act 1996. As Popplewell LJ explains, at the conclusion of the hearing we announced our decision to allow the appeal on Ground 3 and directed a trial of the s9(4) issue. These are the reasons why.

107. My Lord's judgment sets out and fully explains the background and relevant legislation. There is no need to repeat it, but I will recap very briefly and expand on aspects relevant to Ground 3.

Introduction

108. In addition to the application by Nifty for orders under CPR Part 11 concerning jurisdiction, Nifty also applied for a stay of proceedings under s9(4). In fact the stay was also put on a wider basis by reference to CPR 3.1(2)(f) but nothing now turns on that.

109. Mr Soleymani's claim consisted of claims for three distinct declarations: (i) a declaration that the arbitration clause was unfair and not binding, (ii) a declaration that the governing law clause was unfair and not binding, and (iii) a declaration that the contract formed in the auction was illegal under the Gambling Act 2005. The first two claims were put on the same basis. The relevant clauses were said not to be binding pursuant to s62(1) of the Consumer Rights Act 2015 (the CRA) because they were unfair terms, or were inconsistent with s15B(2),(3) and (6) of the Civil Jurisdiction and Judgments Act 1992 (the CJJA) and therefore ineffective and not binding.

110. The jurisdiction issues under Grounds 1 and 2 of the appeal relate only to the first of these three, the arbitration clause claim. The judge decided that the Arbitration Claim was within the arbitration exception which now forms part of the CJJA (and had its origin in the Brussels Convention and the later Recast Regulation). Like Popplewell LJ, I would dismiss the appeal from that decision. The judge also decided (at paragraph 62) that the other two claims, that is the Governing Law Claim and the Gambling Act Claim were not clearly within the arbitration exception. Therefore they were at least capable of falling within the jurisdiction gateway provided for in s15B(2)(b) CJJA 1982. For that section to apply Mr Soleymani would have to be a "consumer" and the relevant contract would have to be a "consumer contract". Both terms are defined in s15E(1).

111. By s15E(1) a "consumer" is a person who "concludes a contract for a purpose which can be regarded as being outside the person's trade or profession". For present purposes Mr Soleymani has a properly arguable case that he satisfies that definition and is a consumer. Although for the purposes of the application under Part 11, Nifty accepted that Mr Soleymani had the better of the argument that he is a consumer, Nifty does not accept that he is in fact a consumer for the purposes of the CRA and CJJA.

112. The relevant aspect of the definition of "consumer contract" in s15E(1) is that the person with whom the consumer contracts directs their commercial or professional activities to the United Kingdom. Nifty did not accept that before the Judge and the matter was addressed in evidence from both sides. In a careful analysis (paragraphs 63-79) the Judge decided that Mr Soleymani had the better of the argument that Nifty was indeed directing commercial activities to this country and that he had a good arguable case for the application of the s15B(2)(b) jurisdiction gateway to the second and third heads of claim.

113. There is no appeal from that conclusion. In any event, in my judgment, the Judge was plainly right. Therefore the court had before it two claims which were within a jurisdiction gateway. Nifty's case was that these claims were each in respect of a matter which, under the arbitration clause, is to be referred to arbitration, and so they should be stayed under s9 of the Arbitration Act or the inherent jurisdiction. The Judge granted the stay and Ground 3 of the appeal is Mr Soleymani's challenge to that decision.

114. There is no need to set out section 9 of the Arbitration Act, which is in Popplewell LJ's judgment above. From now on I will refer to the arbitration clause as an arbitration agreement because that is what s9 and the authorities refer to. The distinction does not matter in the present case. Under the doctrine of separability, an arbitration clause in a contract can be treated as a separate agreement from the contact in which it is found.

115. In terms of authority, the proper approach to the court's exercise of the power to direct such a stay is set out fully in the judgment of Aikens LJ in ***Aeroflot v Berezovsky*** [2013] EWCA Civ 784, especially in paragraphs 72-79 and which also approved of the judgment of Popplewell J in ***The Barito (Golden Ocean Group Ltd V Humpuss Intermoda Transportasi Tbk Ltd)*** [2013] EWHC (Comm) 1240 (see in particular the summary in paragraph 59). There is no need to set out these passages.

116. The essential point arising from the authorities is as follows. Assuming, as here, the Court is satisfied that the defendant (Nifty) has brought itself within s9(1) – because there is an arbitration agreement to which it is a party and the claims are matters which under the agreement are to be referred to arbitration – then the question turns to s9(4). Under that section the court shall (my emphasis) grant a stay unless satisfied the arbitration agreement is "null and void, inoperative or incapable of being performed". I will use "null and void (etc.)" to refer to that expression. To resist such a stay it is for the claimant (Mr Soleymani) to satisfy the court that the arbitration agreement is indeed null and void (etc.). If that is not clear on the evidence before the court then the court may order a trial of the issue but is not bound to do so. In considering whether to order such a trial, the court will consider all the circumstances of the case. This is the s9(4) issue.

117. The concept of *Kompetenz-Kompetenz* plays a role here. A suitably drafted arbitration agreement will confer on the arbitral tribunal the authority to decide on the scope of its

own authority, in other words it will confer *Kompetenz-Kompetenz* on the arbitral tribunal. In the present case there is no dispute that the arbitration agreement is drafted that way. It matters in the context of stays because it means that the arbitral tribunal itself has authority to rule on the dispute about whether the arbitration agreement is null and void (etc.), and that may well be the best forum in which to undertake that task, especially if it involves issues which overlap with questions the arbitral tribunal is going to address anyway. As Aikens LJ explained in para 79 of ***Aeroflot***,

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

The Judgment on s9(4)

118. The Judge correctly identified the applicable law derived from ***Aeroflot*** and ***The Barito*** at paragraphs 83-86. She summarised the parties' arguments accurately at paragraphs 87-95 and reached her conclusions on the issue of a stay at paragraphs 99-118, deciding to grant a stay of all parts of the claim.

119. The Judge identified the essential starting point as follows. There was a concluded arbitration agreement and the two disputes, about the governing law and under the Gambling Act, while directed to the auction contract, did not impugn the arbitration agreement itself. They were matters within the arbitration agreement. Therefore s9(4) applies. There are triable factual issues, about whether Nifty directs its business to the UK and whether the arbitration agreement and governing law clause are unfair within the CRA 2015. There were some strong arguments that the inclusion of the arbitration agreement in the auction contract was unfair under consumer legislation albeit not so strong as to mean there was no triable issue. There were also factual issues about Mr Soleymani's own status as a consumer and other consumer law questions such as whether sufficient care had been taken to bring the relevant terms to the consumer's attention. There was no evidence of procedural imbalance in favour of Mr Soleymani, such as might arise from the cost of disputing a claim in New York as compared to London.

120. The important factors which led to granting the stay are in paragraphs 107-116. At paragraph 107 the Judge identified an overlap between the court and the arbitration on the question of fairness, putting it this way:

> 107. *[…]* factual issues going to the unfairness of the arbitration agreement and the governing law clause [*are*] closely linked to underlying factual issues relevant to whether he is bound by the terms of the Auction, and liable to pay the sum claimed in the NY arbitration. The arbitration is currently subject to the JAMS Policy on Consumer Arbitration, and this includes questions as to whether the arbitration clause meets "minimum standards of fairness" . There is a real risk that the court's enquiry would overlap with that enquiry and the Claimant's existing case that he is not liable to pay. The enquiry into fairness may not require a very lengthy trial but both sides are entitled to challenge the factual assertions put forward by the other and wished to do so.

121. At paragraph 108 the Judge noted that since Mr Soleymani has assets outside the jurisdiction, it was not inevitable that questions going to fairness of the arbitration agreement and governing law clause would come back to be decided here e.g. on enforcement. This is relevant because if the matter is likely to arise before the domestic court on enforcement of the arbitral award that can be a powerful factor against a stay (***The Barito*** paragraph 59(7)(a)).

122. At paragraphs 109 and 110 the Judge addressed the point raised by Mr Soleymani that the issues were matters of our domestic consumer law, best decided here. The judge held:

> 109. I take into account that the issues raised by the Claimant are issues of English consumer law, and that an English court would be better placed to decide them than a US arbitrator. I also take into account that on his case he would have to argue those points in what counsel described as "an unfair arbitration". However, the questions were ones of fairness rather than technical questions of English law. In the context of transactions that were acknowledged to be "fundamentally de-centralised and borderless" an English judge could not be said to be significantly better placed than a US judge or arbitrator to decide the questions of fairness raised.
>
> 110. Significantly, there was no evidence to suggest any legitimate concern as to the quality of the arbitral tribunal or the arbitral process in New York or the supervision of the New York courts, or indeed the applicable New York law or its ability to protect consumers, or its ability to address questions of English law including matters of public policy.

123. At paragraph 111-112 the judge held that factors such as the cost to Mr Soleymani of having to litigate in New York do not weigh in favour of a stay. Then at paragraph 113, concluding on these "*forum non-conveniens* factors" (as the judgment puts it), the Judge held:

> [113] *[…]* The only connection between England and the dispute on section 9(4) issues is that the Claimant is resident in England, he has the better of the argument on the Defendant directing its

> activities to England (among 49 other jurisdictions named in its borderless business) and he invokes English legislation.

124. Finally, paragraphs 114-116 conclude the analysis as follows:

> 114. The Claimant accepted that any contract was concluded on terms expressly providing for choice of New York law and arbitration with a New York seat. It is open to him to challenge the fairness and enforceability of that choice of law (and forum) and argue that principles of English law are applicable. Consumer law may mean that the express agreement is unenforceable. However, at this interim stage the matters put forward did not justify using that as the starting point prevailing over the express choice, or assuming that the English court was best placed to decide these issues. Mr Soleymani has not yet explained why English gambling legislation would apply if any contract were subject to New York law so there is similarly little basis for assuming that English law applies to underlying issues of illegality at this interim stage.
>
> 115. Here there was an express choice of New York law (and seat) and the Claimant's evidence is not conclusive on the factual issues. Accordingly, the relevance of English law remains highly disputed. In these circumstances the balance is in favour of leaving the US arbitrator and the New York court to decide issues going to the validity of the arbitration clause (especially since they are linked to the underlying merits of the debt claim), and supervise the arbitration. English judges and arbitrators are frequently asked to decide questions of foreign law, and trusted to do so, including on matters based on social policy where foreign law may be quite different from English law standards. This typically happens where there is a dispute as to whether the parties have chosen London as a forum but also applies where the English jurisdiction is entirely non-consensual. English or foreign consumer law does not fall outside this approach. The questions of consumer protection raised by the Claimant are not matters that can only be adjudicated upon by an English court.
>
> 116. English law also recognises that the starting point is that an agreement as to the seat of an arbitration is an exclusive jurisdiction clause in favour of the courts of the seat (*Enka Insaat v OOO Insurance Co Chubb* [2020] UKSC 38). This principle, together with the approach under section 9 and the English application of *Kompetenz-Kompetenz*, means that the existence of English law issues raised by the Claimant do not tip the balance in favour of the English court deciding those issues.

125. Thus the stay was granted.

The arguments on appeal

126. Mr Soleymani's case on appeal is that the Judge fundamentally failed to take into account the nature of domestic consumer rights protection, which includes jurisdictional protection. Section 89 of the Arbitration Act applies the unfairness provisions to terms which constitute arbitration agreements whatever the applicable law of the arbitration agreement is. The refusal of the stay means that the consumer, Mr Soleymani, has been forced to arbitrate in a jurisdiction which, while it may have its own consumer protections, will not automatically recognise the UK law consumer rights (and may not recognise them at all). Contrary to the judgment, in fact the domestic court is better placed than a New York arbitration to apply the unfairness test in our consumer law and the judgment is in error in equating the ability of the two tribunals to carry out this task. The fact that fairness arises under New York law or the JAMS Policy on Consumer Arbitration is no answer to that. Included within this submission is the point that under s71 CRA 2015, assuming the CRA applies and subject to an irrelevant exception, the domestic court is obliged to consider whether a contract term is fair even if neither party raises it.

127. Finally Mr Soleymani also contended that there would be no need for a factual enquiry to decide the relevant issues, however it is clear that that argument is wrong. There would be a number of factual disputes to be resolved and I will consider this appeal on that basis. It follows that the issue is whether the Judge's grant of the stay should be upheld, or whether there should be directed a trial of the issue whether the arbitration agreement is null and void (etc.) in respect of the Governing Law and Gambling Act Claims.

128. Nifty's submissions to the contrary were these. First Nifty reminded the Court of the limited basis on which an appellate court will interfere with an exercise of discretion (***G v G*** [1985] 1 WLR 647 at 652D-E). The Judge's conclusion was right or, at its lowest, within the range of reasonable responses available and so this Court should not interfere. Nifty also noted that the choice before the Judge (and in this Court) was between a trial of the objections in this jurisdiction or a stay. The option of summary determination was not realistic. Nifty also contended that the Judge correctly identified an overlap between the issues to be addressed in this jurisdiction and the substantive issues in the arbitration – one example being whether the Terms of Use were properly drawn to Mr Soleymani's attention. There are other examples.

129. Second Nifty submitted that the Judge was right to determine that the proper forum for questions as to the validity of an arbitration agreement is normally the place of the seat of the arbitration absent strong reasons to the contrary (which are absent), citing ***The Barito*** paragraph 59(7)(g). Third the Judge correctly held that there was no substantial connection with this country other than the fact Mr Soleymani lives here. The proper law of the issues of the validity and scope of the arbitration clause is New York law.

130. Fourth the discretion under s9 should be exercised in a coherent fashion consistent with the law generally, and in that respect Parliament has provided that domestic courts have no necessary jurisdiction over all claims under the consumer rights provisions of the CRA and the CJJA (see Ground 1 of the appeal). Similar points to this were taken in Nifty's Respondent's Notice (para 3), submitting (a) that absent exceptional factors the court should not exercise its discretion in favour of determining under s9(4) a claim which the court has no jurisdiction to determine; and (b) that the public policy relating to the vindication of consumer rights before the domestic court instead of in the arbitration had no or little weight when Parliament had identified in s15 CRA those

cases in which that public policy was engaged and the arbitration claim in this case was not one of them.

131. Nifty's fifth and sixth submissions were that in fact the Judge did take into account the public policy relating to the vindication of Mr Soleymani's alleged consumer rights, it is just that in doing so the Judge held that the New York arbitration was an available and proper forum for the resolution of these issues. Also, and in answer to a point made by the Competition and Markets Authority, Nifty submitted that s71 CRA 2015 does not in this case impose on the court a positive and non-delegable duty to try the validity of the arbitration agreement itself because that provision only applies when the court is seized of a substantive consumer dispute. The section does not confer jurisdiction on a court to determine such a claim which it would not otherwise have jurisdiction to try.

132. Nifty's final four submissions were as follows. Seventh, the Judge was right that there was no evidence of any doubts about the quality integrity or availability to Mr Soleymani of the arbitral tribunal or the New York court as the supervisory seat. Also the arbitrator has indicated an ability and willingness to apply English consumer law if that law is applicable (which he will be determining), and even if it does not apply the arbitrator is able to assess fairness of the arbitration clause under the applicable law and the JAMS Consumer Policy. Eighth the Judge was right at para 108 that there may not be any enforcement in England and so the issue would not inevitably have to be addressed here. Ninth, the Judge was right that Mr Soleymani's case was not so strong that the court should grasp the nettle immediately even without a mini trial. Tenth, there is a risk of duplication precisely because Mr Soleymani has engaged with the arbitration both on the substance and the question of validity of the arbitration agreement. He should not be in a better position than he would be if this was a domestic arbitration, to which s72 of the Arbitration Act would apply. Section 72 provides that a party may seek a declaration from the court that there is no valid arbitration agreement where it has not taken any part in the arbitral proceedings. Reliance on s72 is in my view misplaced and I will deal with that now:

    (1) There is no evidence that an equivalent right to seek a declaration from the New York Court exists where the arbitration agreement confers Kompetenz Kompetenz on an arbitrator. In its absence, Mr Soleymani had no option but to engage with the arbitration, maintaining throughout that the arbitrator lacked jurisdiction. It is therefore wrong to equate the position with a domestic arbitration, in respect of which s72 relief is available.

    (2) Exercising the discretion under s9(4) to refuse a stay is not equivalent to granting a declaration under s72. A declaration granted under s72, in a domestic arbitration, would be a declaration that there is no valid arbitration agreement in respect of the claims brought by Nifty. What a refusal of a stay under s9(4) is concerned with is whether there is a valid arbitration agreement in respect of the claims made by Mr Soleymani, specifically the Governing Law Claim and Gambling Act Claim.

133. Nifty's Respondent's Notice took one further point, that the arbitration agreement does not fall within paragraph 20(a) of Schedule 2 of the CRA 2015 because the agreement does not require the consumer to take disputes to "arbitration not covered by legal

provisions". It is not clear whether that last point was pressed, but it does not support a conclusion in Nifty's favour on Ground 3 in any event because the issue can always be argued if need be at a s9(4) trial.

134. The CMA's written submissions were addressed essentially to this aspect of the appeal (i.e. Ground 3). The CMA asked the Court to consider the manner and forum in which a UK consumer can challenge the fairness of a compulsory clause in an online consumer contract which (a) waives their right of access to the UK courts and (b) requires any dispute to be arbitrated abroad in accordance with foreign law. The CMA was concerned that while UK law affords a high level of protection to consumers, the decision of the court below could erode that protection in relation to such clauses. The CMA's written submissions were focussed on two points. First a submission on the principles governing the fairness of arbitration clauses: that in a consumer context compulsory clauses, particularly those which specify a foreign seat, are generally unfair and not binding. Second a submission that in consumer cases the English court should itself determine the issue of arbitrability and should not leave that issue to an arbitrator, particularly one with a foreign seat. In this context the CMA relied on s71 of the CRA 2015. Overall the CMA submitted that in applying s9 of the Arbitration Act relating to arbitration clauses in consumer contracts, the court is under a positive and non-delegable duty (originally formulated by the CJEU and now enshrined in statute in s71) to consider, investigate and determine the fairness of such clauses and that the consumer should not bear the burden of proving the unfairness of the term.

135. Finally, before turning to decide Ground 3, it is worth noting that although the judgment below does not grapple with s71 neither side criticised the Judge in that respect because, while it was mentioned, it was not elaborated upon below in the way it now is. No party on appeal suggested we should not take it into account.

Assessment

136. In my judgment the starting point is that this is a case about commerce on the internet in which the trader in question has traded via a website which is – at least well arguably - directed to the UK. That matters because in a number of areas of law, the problem of which laws apply to activities on the internet, is addressed by the question whether the activities are directed to or targeted at this country (directed and targeted mean the same thing.). That is true in intellectual property law (see e.g. ***Warner Music v Tune In Radio*** [2021] EWCA 441 at paragraphs 60-61) and it is true in relation to our domestic consumer legislation by means of the definition of s15E(1) of a consumer contract (derived from EU law).

137. As I mentioned above, there is no appeal from the Judge's finding that Mr Soleymani has the better of the argument about directing commercial activities to this country. The case therefore falls to be analysed on that footing. Therefore Mr Soleymani has the better of the argument that the auction contract is a consumer contract under the CRA. This is a critical feature because no matter how global, borderless or decentralised a trader would say its internet business is, if the trader has directed its relevant commercial activities to this country then its dealings with consumers here are subject to our consumer law.

138. The next important point is that one of the underlying claims (the attack on the governing law clause in the auction contract as unfair), and also the basis for Mr

Soleymani's contention under s9(4) that the arbitration agreement is null and void (etc.), are an attempt to enforce a consumer's rights. It is true that Mr Soleymani himself could be seen as an unusual sort of consumer, bidding much more than the value of the average British home on a non-fungible token in an online auction, but the argument that he is indeed a consumer in domestic law is properly arguable. The application falls to be considered on that basis, albeit recognising he might turn out not to be.

139. Next, under the relevant legislation, the fairness provisions in Part 2 of the CRA apply despite a choice of foreign law clause, as long as the consumer contract has a close connection with the UK (s74 CRA). Again, it is (at least) properly arguable that this contract, assuming it is a consumer contract, does have such a close connection. The commercial activities were directed to this country and the bidder in the auction was here when he entered into the contract and made his bid. Thus, as a matter of domestic law, the fact the contract has a New York law clause does not insulate its terms from the fairness test under the CRA.

140. Moreover in a consumer context arbitration clauses are expressly identified as being clauses which may be regarded as unfair because they have the object or effect of excluding or hindering the consumer's right to take legal action or exercise a legal remedy (paragraph 20 of Part 1 Schedule 2 of the CRA, quoted in the judgment of Popplewell LJ above). As my Lord explained (at paragraphs 29-30), under s89-91 of the Arbitration Act, for consumer claims under £5,000, arbitration clauses are automatically unfair and foreign law clauses automatically disapplied. Whereas for consumer claims above £5,000, assuming the close connection provision in s74 applies, the clause is subject to the fairness provisions of the CRA irrespective of a choice of foreign law clause.

141. Given all these provisions, one might think it was odd that, as my Lord has explained, a free standing claim to declare the arbitration agreement unfair and unenforceable is not one which falls within the extant jurisdiction gateways, including in particular the gateways in s15B CJJA which relate expressly to consumer rights. In different ways Nifty places significant weight on this point (see Nifty's fourth submission above). I agree with my Lord that that is the state of affairs at the relevant the date for this case, albeit the expansions to the gateways in CPR Part 6B in October 2022 are likely to mean that in most cases a consumer could bring such a claim within a gateway in future. However irrespective of the position on jurisdictional gateways, there is a complete and simple answer to this point. The answer is that the court's authority under s9 of the Arbitration Act to rule on whether the arbitration agreement is null and void (etc.) – in relation to considering a stay of a case which *is* within the court's subject matter jurisdiction such as the second and third claims in this case – exists independently of any jurisdictional gateway which may or may not exist relating to the validity of the arbitration agreement itself. This ability of a court to rule on such an issue in those circumstances is inherent in the relevant provisions of the New York Convention and is also recognised in Recital 12 of the Recast Regulation, which is the successor to the Brussels Convention. As my Lord did (at paragraph 92 above), I would also explain the decision of the Krefeld Landesgericht in Germany in ***Zellner v Phillip Alexander Securities and Futures Ltd*** (Case 6 O 186/95) [1997] I.L.Pr 716 as an example of the application of the same principle.

142. ***Aeroflot*** and ***The Barito*** were not cases about consumer rights or about the impact of express provisions of domestic consumer law which have something to say about arbitration agreements. I agree with them as they apply outside that context. However in a case like this one, provided it is properly arguable that there is a consumer contract with a close connection with the UK and a consumer seeking to rely on their rights under domestic law, then in my judgment the vindication of those consumer's rights in that context is best decided by a domestic court. That applies directly to the submission under s9(4) that the arbitration agreement is null and void (etc.) because it is unfair under domestic law. That is because the domestic court is better placed to undertake the fairness assessment under domestic law than a foreign arbitrator would be applying that law.

143. Accordingly in a case in which a claimant seeking to avoid a stay under s9 is relying on their rights under domestic law as (arguably) a consumer to contend that the arbitration clause is null and void (etc.) then that feature would be a powerful factor in favour of the court deciding the issue rather than leaving it in the first instance to the arbitral tribunal, despite any overlapping issues. I put the matter this way as a deliberate echo of paragraph 59(7)(a) of ***The Barito*** which recognises that if the arbitrability issue is likely to come before the court in any event under enforcement, then that is a powerful factor in favour of the court deciding the issue rather than leaving it to the arbitration despite the arbitration agreement giving *Kompetenz -Kompetenz* to the arbitrator.

144. I reach this conclusion irrespective of s71 of the CRA, however it provides further strong support for the principle identified above. I do not accept that this provision operates so as to confer on the court a subject matter jurisdiction that it would not otherwise have (and so I do not see s71 as relevant to Ground 1 of the appeal) but that does not mean it does not come into play when the court is deciding whether to conduct a trial under s9 of a question whether an arbitration agreement is enforceable. If it is arguable that there is a consumer contract with a close connection with the UK and a consumer seeking to rely on their rights under domestic law, then as a consequence s71 itself will also arguably apply as part and parcel of that characterisation of the contract.

145. In a commercial context arbitration, both international and domestic, is a hugely valuable way of resolving disputes. However one of the recognised characteristics of arbitration, which often has important value in a commercial context, is that it is private. Transposed into a consumer context, the privacy of arbitration is not such an advantage from a public policy standpoint. Part of the purpose of s71 itself is so that decisions on consumer rights are made in public. They may have precedential value. The decisions are not only for the benefit of the individual consumer in the instant case but for the benefit of the consumers as a class (see ***Oceano Grupo Editorial v Murciano Quintero*** CJEU 27th June 2000, Joined cases C-240.98 to C-244.98 [2000] ECR I-4941 at paragraph 28). This publicity feature is a further reason why the principle articulated in the previous paragraphs should apply in the consumer context. Decisions about consumers' rights should normally be made in public, in a court.

146. With these points in mind I turn to the judgment. I have well in mind the limited basis on which an appellate court can review an exercise of discretion of this kind, however the judgment cannot stand since the matter was not approached on the correct basis. In this case, despite the overlapping issues, there is a powerful factor in favour of the court deciding the issue rather than leaving it to the arbitrator.

147. Moreover paragraph 113 underplays important features of the circumstances in that it describes as "the only connection" between England and the dispute on section 9(4) issues as the facts that: (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. However these are the three key features which any consumer based in England would rely on to give them domestic law consumer rights in the first place – which include jurisdiction protections relating to arbitration agreements. They are significant factors.

148. Considering the matter afresh: there are a number of factors, as the Judge identified, which weigh in favour of granting a stay of the s9(4) issues. One important one is the existence of some overlap between the issues relating to fairness which will arise under New York law (and under the JAMS Consumer Policy) as compared to the issues under UK law, albeit I do not believe the overlap is as substantial as Nifty makes out. Another is the likelihood that there will be no enforcement of any arbitral award in the UK because Mr Soleymani has assets outside the jurisdiction.

149. These are not at all sufficient, in my judgment, to overcome the powerful factor in favour of refusing a stay arising from the fact that the challenge to the arbitration agreement under s9(4) is based on a vindication of a claimant's arguable consumer rights.

150. Save for one further aspect, in my judgment this would be a clear case to refuse a stay. The strongest reason why a court might grant a stay on the facts of this case arises from Mr Soleymani's unusual position as a consumer. While no doubt he would rather not, he clearly has the resources to defend himself in the New York arbitration – irrespective of where it takes place (there was a suggestion of it happening here as a result of the hometown provision in the JAMS Consumer Policy). Overall, at a practical level, there is no obvious imbalance in an ability to litigate between Nifty and Mr Soleymani. Put bluntly, in this case Mr Soleymani can look after himself so why does he need the court's help?

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 s9(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 prejudges 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.

154. I would therefore allow the appeal on Ground 3. There should be directed a trial of the issue whether the arbitration agreement is null and void (etc.) in respect of the Governing Law and Gambling Act Claims.

Reconsideration

155. At the conclusion of the hearing we decided that we would allow the appeal on Ground 3 with reasons to follow. This judgment represents those reasons. Moments before that decision was to be communicated to the parties the court received an unsolicited undertaking from Nifty, which I will explain in more detail below. We had not seen the undertaking when we made our decision and the decision was communicated to the parties before we had seen it. Nifty then formally requested the Court to reconsider its decision in the light of that undertaking, pursuant to the ***Re Barrell Enterprises*** [1973] 1 WLR 19 jurisdiction, and bearing in mind the Supreme Court's decision in ***Re L (Children)*** [2013] UKSC 8 [2013] 1 WLR 634 at [19] and [27]. We informed the parties that we declined to reconsider our decision, with reasons to follow in the judgment to be handed down.

156. In substance Nifty's undertaking was that in the event the appeal on Ground 3 was dismissed (and irrespective of Grounds 1 and 2), so that the stay under s9 was maintained, then they would promptly agree with Mr Soleymani a submission to the arbitrator providing that the arbitrator must hear and decide the questions of (i) Mr Soleymani's status as a consumer under the CRA 2015, (ii) the contract's close connection with the UK, also under the CRA 2015 , and (iii) the fairness of the arbitration agreement under the CRA 2015. Question (iii) would only arise if Mr Soleymani won on questions (i) and (ii). And if Mr Soleymani won on all three questions the submission required the arbitral tribunal to declare, find and award that it had no jurisdiction.

157. One of the points made in argument during the appeal hearing was that as matters stood there was no guarantee the arbitrator would even consider the fairness issue and the threshold points (i) and (ii) under the CRA 2015 because the auction contract contains a New York governing law clause and the arbitrator might rule that that meant the CRA had no application. Moreover at that time Nifty were at least not conceding that the CRA should be applied by the arbitral tribunal at all. The problem canvassed at the hearing of the appeal was that this meant that given the stay under s9 by the High Court, Mr Soleymani's domestic law consumer rights might never be decided upon at all. The purpose of this undertaking is to take away that concern and ensure that Mr Soleymani's domestic law rights would be considered by the arbitral tribunal come what may.

158. In ***AIC v Federal Airports Authority*** [2022] UKSC 16 15 June 2022 the Supreme Court has recently addressed the principles applicable when a court is asked to decide whether to reconsider a decision. A significant feature of that decision (see paragraph 33) is to make clear that there is no rule of law or practice that an application to reconsider must always be addressed by a two-stage process. The two stage process (which the Court of Appeal had held was the right approach) had a first stage at which the court was to consider whether in principle the re-consideration application should be entertained at all. However the Supreme Court was also at pains to point out that in a proper case:

> "32 *[…]* It may be a perfectly appropriate judicial response just to refuse the [*reconsideration*] application *in limine* after it has been received and read, if there is no real prospect that the application could succeed. Judges should not re-open proceedings just to allow debate on the point if it is already clear that the judgment or order should not be re-opened. That would defeat the Overriding Objective in the CPR that cases be decided "justly" and "at proportionate cost"."

159. In my judgment, leaving aside the lateness of the undertaking, there is in any event no real prospect that the reconsideration application could succeed in this case. The undertaking offered does not make any material difference to the decision to allow the appeal on Ground 3. The crucial factors I have identified in paragraphs 151 to 153 apply even if the arbitral tribunal was inevitably going to consider Mr Soleymani's status as a consumer and the other aspects of his unfairness claim under domestic law.

Lord Justice Snowden :

160. I agree with both judgments of my Lords and have nothing to add.