

Inside arbitration: cyber disputes – are there borders in the blockchain?

By Simon Chapman and Troy Song

With the cyber economy fast emerging, courts are struggling with drawing borders in a decentralised world. One recent case hints at the path ahead

In the 1997 book *Sovereign Individual*, the authors envisioned a global cyber economy where individuals base themselves wherever they desired. Over two decades later, a blockchain economy is emerging, partially realising that vision. In this new world, transactions and services are conducted in a borderless, decentralised manner. This poses fundamental questions for legal systems designed for conventional businesses with connections to physical locations. One recent case gives some indication on how the English courts are responding in a dispute about trading blockchain-based non-fungible tokens (NFTs) between a trading platform and its user ([Soleymani v Nifty Gateway LLC \[2022\] EWHC 773 \(Comm\)](#)). In essence, the court attempted to draw jurisdictional markers in this borderless dispute.

100 winners of one NFT auction

Mr S, an art collector in Liverpool, was an active user of US-based NFT trading platform Nifty. In April and May 2021, Mr S participated in an auction of digital art held by Nifty, placing a bid for an NFT associated with an artwork by Beeple titled "Abundance". His US\$650,000 bid was the third highest. Nifty informed Mr S he was a winner in the auction and had to pay the amount of his bid. According to Nifty's rules, the highest 100 bidders were winners of a numbered edition of the artwork corresponding to the position of their respective bids.

Accordingly, Nifty claimed that Mr S was obliged to pay for the third edition of Abundance. Upon learning of Nifty's rules, Mr S refused to pay.





Arbitration in New York

Nifty commenced arbitration in New York against Mr S, relying on its terms and conditions, which it alleged Mr S agreed to after opening his account in February 2021. The terms require the parties to submit their disputes to JAMS, an arbitration service provider in New York.

Under the JAMS policy, in a consumer arbitration, additional standards of fairness are applied to the proceedings. The arbitrator determined Mr S met the definition of a consumer. Mr S applied to dismiss the arbitration, arguing Nifty's terms had not been properly brought to his attention. The arbitrator ordered an evidentiary hearing in September 2022.

English Court proceedings

While contesting Nifty's claims in the New York arbitration, Mr S launched proceedings in the English courts, arguing the New York governing law clause and the arbitration clause in Nifty's terms were unfair and should not be binding on him. Mr S relied on the Civil Jurisdiction and Judgments Act 1982 (CJJA), which states consumers are entitled to resolve disputes in their domestic courts. This mirrors the Recast Brussels Regulation (EU) No. 1215/2012 (Brussels Regulation), which regulates the recognition and enforcement of civil and commercial judgments in the European Union.

Nifty contested the English court's jurisdiction and applied for a stay of the court proceedings. Nifty argued the CJJA does not apply to arbitration-related claims. Despite acknowledging its business had global reach, Nifty also alleged it did not direct any marketing activity toward the UK. Thus, Mr S could not establish jurisdiction under the CJJA.

In light of the New York arbitration, the court had to decide on two issues:

1. Did the English court have jurisdiction under the CJJA?
2. Could Nifty stay the English court proceedings under the English Arbitration Act 1996?

Jurisdiction under the CJJA

The court considered that the CJJA provisions did not apply to Mr S's claim that the arbitration clause was unfair, because those provisions do not apply to arbitration. However, the arbitration exception did not apply to Mr S's other claims. Accordingly, the court needed to decide whether there was a consumer contract for the purposes of the CJJA. In particular, it had to rule on whether Nifty directed commercial activities in the UK.

Considering the parties' arguments, the court discussed the following factors in finding for Mr S:

1. The court disagreed with Nifty's argument that its business was "New York-centric" as some of its activities were directed at the UK. Applying the approach in *Bitar v Banque Libano-Francaise* [2021] EWHC 2787 (QB), this also shows gaining business in the UK was not entirely incidental or unimportant to Nifty's marketing strategy
2. Other activities were specifically directed at the UK. For example, Nifty had promoted an NFT-related webinar hosted by a group based in London. Nifty's founders had also featured in an interview published in the UK newspaper, *The Times*.
3. In light of the features of the NFT market (which was accepted by Nifty as borderless and global), some US-related factors were of limited weight. The evidence did not suggest Nifty's business activities were directed to US customers, as opposed to customers elsewhere.
4. The relevant case law (*Pammer v Reederei Karl Schluter GmbH & Co KG* [2011] 2 All ER (Comm) 888) related to businesses that provided services relating to a specific location. The factors explored in *Pammer* were not directed at businesses that are borderless and decentralised by nature. Accordingly, *Pammer* does not mean the CJA must be construed as providing no protection to consumers of a global borderless business.

In these circumstances, the court found Mr S supplied plausible evidence to establish a jurisdictional gateway under the CJA for his claims on the governing law clause and the English Gambling Act.

Stay in favour of arbitration

Under the Arbitration Act, the English courts must stay their proceedings where the dispute is subject to an arbitration clause, "unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed". Mr S accepted he was a party to the arbitration clause but disputed its enforceability. Nevertheless, the court concluded that Mr S's claims should be stayed:

1. The arbitration clause covered validity and enforceability issues, even if the issues raised were ones of consumer protection based on English law.
2. A number of factual issues were raised. Mr S

- acknowledged the blockchain technology underlying the transaction gave rise to several novel points which required a careful factual investigation. Mr S did not have a strong case on these questions of fact or arbitrability which justified summary determination by the court.
3. Ultimately, the matters in dispute concerned points of fairness, rather than technical questions of English law. In the context of decentralised and borderless transactions, an English judge was not significantly better placed than a US judge or arbitrator to decide fairness.
4. There was no evidence to suggest any legitimate concern as to the tribunal's quality, the arbitral process, the supervision of the New York courts, the ability of New York law to protect consumers, or its ability to address English law questions.

"In the context of transactions that were acknowledged to be 'fundamentally decentralised 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."

MS CLARE AMBROSE QC, THE DEPUTY HIGH COURT JUDGE

Significance

Despite being fact-specific, this case sheds light on the English courts' position on issues arising from blockchain-related transactions. For internet companies, especially those providing blockchain-related services (sometimes called Web3 companies), the following questions are worth considering:

Where is the business directed?

Although many Web3 companies offer services globally, the English courts may consider their commercial activities to be directed in one particular jurisdiction. Relevant factors include the service provider's statement on its geographical coverage, accessibility of the services, and any business campaign that has close connections with a certain jurisdiction, such as the NFT London webinar and *The Times* article in this case.

Who are your users?

Internet companies are often less clear about this. This is particularly the case for blockchain enterprises, where parties are often interacting with each other on a pseudo-anonymous basis.

Such transactions are pseudo-anonymous because a public blockchain address may be traced back to a personal identity. Accordingly, many businesses set out eligibility requirements for users in their standard terms. If users are considered consumers, relevant domestic law may afford them additional protections.

Who has jurisdiction?

The questions above are relevant to considering jurisdiction. While many Web3 institutions put arbitration clauses in their terms, users may still bring actions in their home courts. This is not the first time when the user relies on consumer protection laws to seek a more favourable forum. In *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm), a user of a cryptocurrency platform relied on the Brussels Regulation, asking the English court to disregard the platform's standard terms that gave Cypriot courts exclusive jurisdiction. The court in that case concluded the user was a consumer under the Brussels Regulation and entitled to bring her claim in England.

Ultimately, we anticipate seeing more conflicts between the dispute resolution clause in Web3 companies' contracts and the local laws of their users' domiciles.

What do blockchain and cryptocurrency mean for arbitration?

The court in this case recognised the distinctive features of blockchain transactions and agreed many existing authorities on conventional contracts are not wholly helpful.

Accordingly, legal professionals and arbitrators should be prepared to deal with novel issues arising from this area. Examples include:

- Determining the governing law of on-chain activities where there is no express agreement.
- Deciding the relationship between an NFT (being an on-chain token) and its associated artwork. In Nifty's auction, one piece of artwork was linked to 100 NFTs.
- Considering whether a crypto-platform or blockchain protocol is centralised or decentralised. This leads to questions about whether liability can be attributed to certain individuals or entities.

New issues bring new opportunities. Many

institutions in the cyber sector have adopted arbitration as their dispute resolution mechanism of choice. The usual advantages of the arbitration, including ease of enforcement, neutrality, and participating in choosing the tribunal, apply equally to the blockchain economy as to the traditional economy. Arbitration looks likely to become the most popular gateway to justice in this borderless world.

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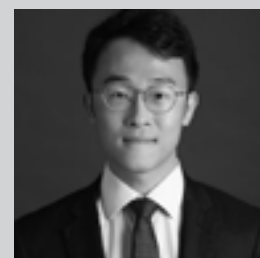
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