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HOW CRYPTO EXCHANGE DISPUTES ARE SHAPING THE FUTURE OF CONSUMER ARBITRATION AGREEMENTS: A GLOBAL PERSPECTIVE

As cryptocurrencies and non-fungible tokens (NFTs) gain in popularity and adoption globally, it is inevitable that we will see a corresponding increase in disputes arising between consumers, and major exchanges facilitating the sale and purchase of cryptocurrencies and NFTs. Cryptocurrency and NFT exchanges (collectively, Exchanges) are largely unregulated in many jurisdictions. These Exchanges do not solely offer services to a limited group of sophisticated investors but make their services available to retail consumers (Consumers) from multiple global jurisdictions – often with very limited, or no, "Know Your Customer" due diligence.

Exchanges commonly adopt arbitration agreements in their standard terms to protect their interests, not least in order to avoid the potential for class actions against them, by groups of Consumers who allege they have suffered similar losses arising out of the same cause of action. Many Exchanges go further, specifically adopting institutional arbitration rules which make no concessions for Consumers.

The use of arbitration agreements in these circumstances has resulted in challenges for courts, regulators, and the Exchanges. For the courts and regulators in jurisdictions concerned with maintaining an "arbitration-friendly" reputation, there is tension between holding parties to their bargain by enforcing such arbitration agreements, and ensuring that Consumers, who are often less resourced and experienced than Exchanges, are not unduly disadvantaged in the arbitrations. For Exchanges, the advantages of adopting arbitration as an enforceable, predictable, expeditious and confidential means of resolving disputes with Consumers must be balanced against the risk: (i) that the agreements may be held by regulators and courts to be void and of no legal effect; (ii) of facing expensive and time-consuming satellite litigation concerning the validity of their arbitration agreements; and (iii) the bad publicity resulting from the enforcement of these agreements against Consumers.

In this article, we examine the criticisms associated with using arbitration agreements in contracts between businesses and Consumers, which are based on the business' standard terms, including those of various Exchanges (B2C Arbitration Agreements); and the measures that regulators, arbitral institutions, as well as the Exchanges have taken to address these criticisms. We also examine the effectiveness of these measures, recent developments, and the road ahead.

The role of cryptocurrency and NFT exchanges

Cryptocurrency exchanges generally fall within one of two categories:
a) centralised exchanges (**CEXs**), which permit consumers to on-ramp and exchange fiat currency (e.g., US dollars or British Pounds Sterling) for a range of cryptocurrencies, which are held by the exchange until withdrawn to a private 'wallet' – well-known examples being Binance and Coinbase; or
b) decentralised exchanges (**DEXs**) - essentially, smart contract protocols that permit parties to exchange one cryptocurrency for another directly, via decentralised applications (**DAPPs**) linked to private cryptocurrency 'wallets'. These smart contracts are commonly accessed via a recognised front-end user interface, an example being the DEX user interface operated by Uniswap Labs.

NTFs are commonly traded via NFT trading platforms, such as those operated by OpenSea[1], which allows consumers to browse and trade NFTs via an online marketplace – essentially a user interface which permits interaction with smart contracts on the relevant blockchains.

The services offered by all such Exchanges are often subject to specific geographical restrictions and, particularly in the context of CEXs, relevant "Know Your Client" regulations. However, many Exchanges (and particularly DEXs) are generally available to, and accessible by, Consumers irrespective of location and domicile. Many of the major Exchanges publish their standard terms of use on their website and/or during an enrolment process where Consumers are deemed to have agreed to by using the services offered by these Exchanges.

Common criticisms of arbitration agreements in consumer contracts

The use of B2C Arbitration Agreements pre-dates the existence of Exchanges, for example. B2C Arbitration Agreements have been present in the securities industry in the United States since the 1990s, and more recently, in the standard terms of various Web2 service providers such as DoorDash, Amazon, and Uber.[2]

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a) Awareness of consent: consumers are often unaware that they have consented to binding arbitration. B2C Arbitration Agreements are frequently found in lengthy standard terms, which consumers will not generally read or understand before using the services provided. For example, consumers who used wayfair.com, an online housewares vendor, were deemed to have consented to arbitration by simply accessing the wayfair.com website, each page of which contained a link to the arbitration agreement that was "*two-thirds of the way through* [the] *4,600 word-long terms of use*".[3]
b) Arbitration is typically more expensive for Consumers than equivalent proceedings in court. Under various institutional rules that make no concessions or differentiations for Consumers, consumers are liable for paying not only their legal fees, but also the costs of arbitration which include filing, case management, and arbitrator fees, which in total could be considerably more expensive for Consumers than equivalent proceedings in their local courts, in which they may also avoid an adverse costs order if unsuccessful.
c) The chosen seat of arbitration or location for hearings may unfairly prejudice a Consumer. Arbitration agreements have been challenged on the basis of prejudice to the Consumer, where the seat of the arbitration proceedings is inconvenient for the Consumer. It may, for example, be considered prejudicial to a Consumer located in Singapore to be required to arbitrate disputes in a far-flung jurisdiction such as Panama, against a business offering its services globally.
d) Arbitration may result in less favourable outcomes for Consumers. Research has suggested that, at least in the securities industry, "*securities firms hold information and selection advantages over consumers that result in more industry-friendly arbitration outcomes*."[4]
e) Arbitration restricts Consumers' ability to commence class action lawsuits. The rules of arbitral institutions commonly contain restrictions on joinder and consolidation- meaning that individual Consumers are prevented form grouping together to consolidate their arbitration proceedings arising out of the same set of facts (such as an Exchange service outage) against businesses. At least in the United States, this is the primary way for Consumers to hold large businesses to account, as class actions lower the otherwise often prohibitive legal costs for each Consumer and, in jurisdictions which so permit, such costs may only be payable by such Consumers upon the condition of successful recovery of damages in the proceedings.

[1] Ozone Networks, Inc. doing business as OpenSea, https://opensea.io/tos

[2] Legal | Uber

[3] Forced Arbitration: A Clause for Concern - Consumer Reports

[4] https://siepr.stanford.edu/publications/tipping-scales-balancing-consumer-arbitration-cases

Key global legislative and institutional responses to arbitration agreements in consumer contracts

Several jurisdictions have responded to these criticisms by regulating the terms of B2C Arbitration Agreements, regardless of the seat and/or applicable institutional rules. These regulations similarly apply to arbitration agreements between Consumers and Exchanges. For example:

a) The European Union Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts creates a presumption that arbitration clauses contained in contracts concluded between a seller or a supplier and a Consumer are not binding on the latter.

b) The Unfair Contract Terms in Consumer Contracts Regulations 1999 Regulation 1(q) of Schedule 2 of the UK Unfair Terms in Consumer Contracts Regulations 1999 expressly states that terms, "...*excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions* [...] *may be regarded as unfair*...".

c) Further, Sections 89 to 91 of the English Arbitration Act 1996 provides that Part 2 of the Consumer Rights Act 2015 (**CRA**) applies to an arbitration agreement, "...*whatever the law applicable to the arbitration agreement is*...". Accordingly, for consumer claims under GBP 5,000, arbitration clauses are automatically unfair and foreign law clauses are automatically disapplied, whilst consumer claims over GBP 5,000 are to be disregarded if the consumer has a close connection with the United Kingdom.

d) In Australia, the Federal Court ruled that the country's "fairness" requirements under the Australian Consumer Law, "...*encompass, but are not limited to, whether or not a term grants one party an additional right, protects them from consequences to which the other party is subject, or creates a significant imbalance between the parties*..." This has not been specifically applied to arbitration agreements yet, but the Australian legislation bears the hallmarks of the EU and UK approach, as exhibited by Section 25(k) of the Australian Consumer Law, which states that a type of clause that may be unfair would be one that, "...*limits, or has the effect of limiting, one party's right to sue another party*...".[5]

By contrast, jurisdictions including Singapore and the United States have traditionally adopted a more liberal approach towards B2C Arbitration Agreements.

a) The Singapore Unfair Contract Terms 1977 (**UCTA**) expressly states that, "...*an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part as excluding or restricting any liability*...".

b) There is similarly no prohibition on the ability of a company to enter into arbitration agreements with Consumers in the United States. Congress voted against the Consumer Financial Protection Bureau promulgation of a rule in 2016 that would have prohibited consumer financial service providers (including Exchanges) from including class action waivers in their arbitration agreements.

Arbitral institutions have also attempted to mitigate the perceived unfairness of B2C Arbitration Agreements. For example, JAMS provides for minimum standards in arbitrations in circumstances where a business has, "...*an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause*..." – which would very likely be the case for arbitration agreements that are typically found in the standard terms of Exchanges. These minimum standards address many of the criticisms outlined above.

They include, among other things:

a) requirements that the consumer must be provided with written notice of the arbitration agreement and that its existence, terms, conditions and implications must be clear;
b) limiting the arbitration fees paid by the consumer to US $250 and obliging the business to bear all the costs of the arbitration such as the JAMS Case Management Fee and all professional fees for the arbitrator's services;
c) giving consumers the right to an in-person hearing in his or her hometown area;
d) entitling either the business or the consumer to seek remedies in, "...*small claims court for disputes or claims within the scope of its jurisdiction*..."; and[6]

[5] Is arbitration innately unfair? - Contracts and Commercial Law - Australia (mondaq.com)

[6] Consumer Arbitration Minimum Standards | JAMS Mediation, Arbitration, ADR Services (jamsadr.com)

e) providing for the possibility of bringing a class action arbitration, unless the relevant arbitration agreement, "*contains a class preclusion clause or its equivalent, unless a court orders the matter or claim to arbitration as a class action.*"

The American Arbitration Association (**AAA**) has also formulated a set of Consumer Arbitration Rules and a Consumer Due Process Protocol Statement of Principles which together seek to strike an appropriate balance in fairness between the Consumer and the business. By way of example, under these Rules, if not agreed by the parties, the location of any physical hearing which may be required shall be determined by the AAA, and shall be one which is reasonably convenient for the parties, taking account of, "*...their ability to travel and other pertinent circumstances...*"[7].

However, not all arbitral institutions have rules specifically catered toward arbitrations with Consumers. Unlike JAMS and AAA, three of the dominant institutions for arbitration in Asia: the Singapore International Arbitration Centre (**SIAC**), Hong Kong International Arbitration Centre (**HKIAC**), and the International Chamber of Commerce (**ICC**) do not have consumer-focused arbitration rules, nor do they provide for class action arbitration. As such, subject to any municipal legislation providing otherwise, Consumers who consent to an arbitration agreement providing for an arbitration administered by the aforementioned Institutions will not benefit from those additional provisions. Conversely this might make those Institutions appealing to businesses. who may actively seek to adopt the rules of these Institutions.

Exchanges and arbitration agreements

Being relatively late entrants to the world of B2C Arbitration Agreements, Exchanges have had the benefit of learning from various financial services and other Web2 service providers' experiences with arbitration agreements in determining: (i) whether to include arbitration agreements in their standard terms; and (ii) the Institution and applicable rules of such arbitration. Perhaps unsurprisingly, Exchanges located in Asia tend also to favour arbitral Institutions with a significant presence in Asia, such as the SIAC, HKIAC, and ICC, whilst Exchanges located in North America tend to favour arbitral institutions located in North America, such as JAMS and AAA which, as explained above, include concessions for Consumers. Regardless of the seat or the rules, many Exchanges expressly or impliedly exclude Consumer rights to commence class action proceedings against them. For example:

CEXs
a) Binance's applicable Terms of Use[8] refer disputes to arbitration under the rules of the HKIAC, seated in Hong Kong, and include an express waiver of class or representative actions, and the consolidation of proceedings is expressly specified as being impermissible, without the consent of all parties, "*including Binance*";
b) Similarly, Crypto.com's non-U.S. terms also require disputes to be arbitrated, "*...solely through individual action, and will not be brought as a class arbitration, class action or any other type of representative proceeding....*", seated in Hong Kong, under the administration of the HKIAC[9];
c) Bybit refers disputes to arbitration in Singapore under the Arbitration Rules of the SIAC[10], whose rules do not presently specifically cater for class arbitration proceedings;
d) Another major CEX, KuCoin, requires that disputes, "*...shall be submitted to the Singapore International Arbitration Commission for arbitration...*"[11] [sic]. No express choice of seat is specified; and
e) Gate.io's User Agreement[12] refers disputes to arbitration in Panama, in accordance with the Arbitration Rules of the ICC.

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[7] Pursuant to R-11 of the AAA's Consumer Arbitration Rules (https://adr.org/sites/default/files/Consumer%20Rules.pdf), the place of any in-person arbitration hearing shall, if not agreed by the parties in dispute, be determined by the AAA, with reference to the underlying principle that, "*...the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances...*".

[8] Binance Terms of Use, 12 April 2023, Article X: https://www.binance.com/en/terms

[9] Crypto.com Exchange Terms and Conditions published by CRO DAX Limited, 14 February 2023, Clause 26.10: https://crypto.com/exchange/document/tnc

[10] Bybit Fintech Limited Terms and Conditions, August 4, 2021: https://www.bybit.com/app/terms-service/information

[11] Terms of Use, 2019/08/13 16:20:35, Article 100: https://www.kucoin.com/news/en-terms-of-use

[12] https://www.gate.io/docs/agreement.pdf

f) United States based CEX such as Kraken (the trading name of Payward, Inc.), require users to agree to arbitration in San Francisco, California, administered by JAMS, with the state or federal courts of San Francisco having exclusive jurisdiction over any appeals of an arbitration award.

DEXs
a) The operator of the front-end user interface of one of the most popular DEXs, Uniswap Labs, refers disputes to arbitration in New York under the JAMS Optional Expedited Arbitration Procedures under its Terms of Service. Uniswap Labs' terms expressly specify that, "...[u]*nless we agree otherwise, the arbitrator may not consolidate your claims with those of any other party...You must bring any and all Disputes against us in your individual capacity and not as a plaintiff in or member of any purported class action, collective action, private attorney general action, or other representative proceeding. This provision applies to class arbitration. You and we both agree to waive the right to demand a trial by jury...*"[13];
b) Another popular DEX user interface, operated by dYdX, also refers disputes between users and itself to JAMS arbitration, on an individual basis and, "*...will not be brought as a class arbitration, class action, or any other type of representative proceedings...*" this time in San Francisco, and under the JAMS Streamlined Arbitration Rules and Procedures[14]; and
c) Popular DEX PancakeSwap's Terms of Service refer disputes to HKIAC arbitration in Hong Kong, and also include an express waiver of both class action and, "*class arbitration*"[15].

It is apparent from the above that many major Exchanges remain keen to avoid any potential for multiple or consolidated claims against them. In the absence of the adoption of arbitral rules which permit multiple arbitrations to be consolidated or batched, taking such action would not ordinarily be a viable option for groups of users of an Exchange's service, and claims would need to be brought individually. Similarly, absent any agreement to consolidate more than one set of arbitral proceedings, achieving consolidation of multiple arbitrations arising out of similar facts would be difficult at best, and more likely, impossible in these circumstances, as we have explored previously in our previous comparative analysis of consolidation requirements, across key arbitral rules globally[16].

Challenges to and effectiveness of such measures

Notwithstanding the criticisms above, the courts in the United States (where many challenges to B2C Arbitration Agreements have been brought), have traditionally adopted a strict approach towards the enforcement of B2C Arbitration Agreements. No distinctions are generally made between arbitration agreements between businesses (who often have equal bargaining power) and B2C Arbitration Agreements (who involve parties that do not). The United States courts have held that challenges to B2C Arbitration Agreements are generally limited to the same grounds as any arbitration agreement such as assent, unconscionability, lack of consideration, or fraud.[17]

Despite the limited scope for Consumers to challenge B2C Arbitration Agreements, businesses must still ensure that B2C Arbitration Agreements meet certain minimum standards of fairness and any changes to such terms are communicated timely and unambiguously to Consumers. The United States District Court in California recently denied Live Nation Entertainment and Ticketmaster's (ticket sales and distribution companies) motion to compel arbitration against users who complained that they were compelled to pay uncompetitive fees to purchase tickets on Live Nation Entertainment and Ticketmaster's online platforms. The court avoided the relevant B2C Arbitration Agreement as, among others, Live Nation Entertainment and Ticketmaster had unilaterally changed the arbitration provider in the B2C Arbitration Agreement from JAMS to a relatively new institution, New Era, whose rules the court held to contain several objectionable elements including: (i) a mass arbitration protocol allowing New Era's affiliated neutrals to make determinations on bellwether cases which would bind subsequent cases; (ii) the lack of a right to discovery; and (iii) the limited right of appeal.[18]

The court arrived at this decision even though Live Nation Entertainment and Ticketmaster had an express right under the relevant B2C Arbitration Agreement to unilaterally amend the terms of the B2C Arbitration Agreement.

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[13] Clauses 8.2 and 8.3, Uniswap Labs Terms of Service, March 3, 2023: https://uniswap.org/terms-of-service

[14] dYdX Trading Limited Terms of Use, April 18, 2023, Section 15:

[15] PancakeSwap Terms of Service, 28 February 2023: https://pancakeswap.finance/terms-of-service

[16] https://www.hfw.com/downloads/003468-Core-issues-in-international-arbitration.pdf

[17] Amy J. Schmitz, American Exceptionalism in Consumer Arbitration, 10 Loy. U. Chi. Int'l L. Rev. 81 (2012) (https://core.ac.uk/reader/217048190)

[18] Skot Heckman, et al. v. Live Nation Entertainment, Inc., et al (Case No. CV 22-0047-GW-GJSx), page 27

The court described such changes as involving an "*extreme amount of procedural unconscionability*" for, among other reasons: (i) that for the users to discover that he/she had agreed to resolve his/her dispute under a novel mass arbitration procedure, the users, "*would need to parse through New Era's separately posted Rules and comprehend their implications*";[19] and (ii) these changes were made whilst Live Nation Entertainment and Ticketmaster were engaged in several JAMS administered arbitrations against other users (which, as explained above, provide several protections to Consumers).

Further, the court held that the class arbitration procedure in the New Era rules was substantively unconscionable as such rules, "*contain a substantial amount of ambiguity*", as to how the bellwether cases are to be applied to the subsequent cases and provide no guidance on how the New Era affiliated neutral is to exercise his/her discretion on whether and how to apply the bellwether cases.[20]

The above decision underscores the importance of ensuring that the terms of B2C Arbitration Agreements meet the minimum standards good faith and fair dealing, and any changes thereof are communicated to Consumers in an unambiguous and easy to understand manner. Additionally, whilst the inclusion of class arbitration provisions in B2C Arbitration Agreements may be seen as a boon for Consumers, the contents of such provisions will not escape scrutiny and the entire B2C Arbitration Agreement risks being avoided, should it be found to be substantively unconscionable, as was the case for Live Nation Entertainment and Ticketmaster.

Aside from challenges on these limited and grounds, the traditionally strict approach has been recently re-emphasised by the United States Supreme Court in a case involving Coinbase, who had filed a motion to compel arbitration and moved to stay class action proceedings in the United States District Court commenced by several users who alleged that Coinbase failed to replace funds fraudulently taken from Coinbase users' accounts. A narrow majority held that the CEX's appeal against the denial of a motion to compel arbitration automatically stays the users' proceedings in the district court.[21] This decision (which is of general application, not just in relation to B2C Arbitration Agreements) is a re-affirmation of the Griggs principle under United States Federal law (i.e., a district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing) and a further indicator that the United States federal courts are unwilling to make any special exceptions to the general principles on the enforcement of arbitration agreements in B2C Arbitration Agreements.

In light of the above, most of the successful challenges to the enforcement of B2C Arbitration Agreements are either: (i) the result of a decision by the business themselves, from either the negative publicity of enforcing such provisions against Consumers, or being faced with the unintended prospect of having to pay millions in arbitration filing fees in circumstances where mass arbitrations have been commenced against them; or (ii) the result of certain mandatory rules of municipal law. Businesses must therefore be mindful of the full range of potential implications of inserting arbitration clauses in their standard terms of use, including the reputational risks arising therefrom.

In relation to the former, RushCard (an online financial services provider) was compelled to waive its rights to arbitration in 2015, due to public pressure, in disputes with 132,000 consumers who lost access to their accounts for several days. Similarly, in 2021, Amazon informed its customers in the United States that they could resolve disputes with Amazon in the United States. federal court system, notwithstanding the presence of an arbitration agreement in its applicable standard terms of use. Observers have suggested that this change was the result of Amazon facing more than 75,000 mass arbitration claims commenced by users of products which, under the applicable arbitration rules, would entail Amazon paying "*tens of millions of dollars*" in arbitration fees.[22]

More recently, DoorDash (a food delivery service) found itself in the uncanny position of attempting and failing to set aside an arbitration agreement in *its own* standard terms of use. A US District Court upheld the arbitration clause in its standard terms of use and found DoorDash liable to pay US $12 million in arbitration fees to the AAA to administer mass arbitration proceedings commenced by 5,879 DoorDash couriers who each independently asserted in individual arbitrations that they were improperly classified as independent contractors instead of employees.[23]

In relation to the latter, Consumers in England have had some success in relying on municipal consumer protection legislation to challenge arbitration agreements with Exchanges. In the case of *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297 (***Soleymani***), the English Court of Appeal allowed part of an appeal by an English-domiciled user of an NFT trading platform whom, among other things, sought declaratory relief that the New York seated arbitration agreement was "*unfair and not binding on him*". Whilst the Court of Appeal disagreed with the assertion that the English courts had the jurisdiction to hear the application under section 15(B) of the Civil Jurisdiction and Judgments Act 1982 (**CJJA**) on the grounds that where arbitration is the subject matter of proceedings, such proceedings are excluded from the application of the Brussels Recast Regulation, the Court of Appeal observed that under changes

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[19] Skot Heckman, et al. v. Live Nation Entertainment, Inc., et al (Case No. CV 22-0047-GW-GJSx), page 14

[20] Skot Heckman, et al. v. Live Nation Entertainment, Inc., et al (Case No. CV 22-0047-GW-GJSx), page 20

[21] *Coinbase v Bielski* (599 U.S. ___ (2023)

[22] https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html

[23] *Abernathy v. DoorDash* 438 F. Supp. 3d 1062 (N.D. Cal. 2020)

to the court rules governing the jurisdiction of the English courts taking effect on 1 October 2022, the English Courts would have jurisdiction to hear the claim.[24]

The Court of Appeal nonetheless directed that there should be a trial to determine if the arbitration agreement with Nifty Gateway was, "...*null and void, inoperative, or incapable of being performed*...", on the grounds that the English court is better placed to determine whether Soleymani's rights as a consumer had been vindicated.

Many of the Court of Appeal's observations in *Soleymani* on the applicability of consumer protections under the CJJA were subsequently affirmed in the case of *Payward, Inc. and others v Chechetkin* [2023] EWHC 1780, which is the subject of another HFW briefing[25]. where the English High Court refused to enforce a final award issued by a Tribunal in a New York seated JAMS Arbitration in a dispute between Payward (a group of companies which run the Kraken Exchange) and a user domiciled in the UK, on the grounds that, among others, the enforcement of the final award would be contrary to public policy, as so doing would enable Payward to bypass the protections in the CRA for consumers such as the defendant , who had a close connection with the UK.

What this means for the direction of travel

As cryptocurrencies and NFTs increase in popularity and adoption globally, it is likely that more Consumers will attempt to set aside arbitration agreements contained in an Exchange's standard terms. Exchanges must therefore be aware of and alive to the risks, both legal and reputational, of including arbitration agreements in their standard terms, particularly in jurisdictions with robust consumer protection laws such as, the United Kingdom, European Union, and Australia, and increasingly, in the United States - where there is a real risk that B2C Arbitration Agreements may be found to be void and of no legal effect, regardless of how they are drafted. Businesses also risk being faced with lengthy satellite litigation when Consumers seek to challenge the validity of their arbitration agreements.

Mitigation of risks

There may be ways in which Exchanges can mitigate these risks, whilst maintaining arbitration as the sole, or majority, forum for dispute resolution in B2C contracts, these include:

- The adoption of specific Consumer-friendly arbitration rules;
- The inclusion of an opt-out of arbitration provision, triggered by notice by the Consumer within a specified period of acceptance (as has been adopted by Crypto.com in the terms applicable to the use of its U.S. application[26]); or
- Applying different sets of terms and conditions, with bespoke and jurisdiction-specific arbitration provisions for Consumers located in different global jurisdictions.

However, the present direction of travel demonstrates that these approaches may not succeed in all jurisdictions, and may be the subject of court challenges from Consumers. As such, broad consideration of all relevant factors, and the careful, appropriate and balanced tailoring of bespoke arbitration agreements or other dispute resolution clauses, as well as careful consideration if and when a business wishes to make changes to them, should be considered imperative for any such businesses engaged in offering Consumer-facing goods or services across multiple jurisdictions.

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[24] *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297, paragraph 94

[25] https://www.hfw.com/downloads/005188-HFW-A-Warning-To-Non-UK-B2C-Businesses-UK-Commercial-Court-Refuses-To-Enforce-Foreign-Arbitration-Award-On-Public-Policy-Grounds.pdf

[26] Crypto.com App U.S. Terms & Conditions, Last Update: July 24, 2023: https://crypto.com/document/entity_us.pdf

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