

Stay of NFT consumer claim granted in favour of New York arbitration under AA 1996, s 9 (Soleymani v Nifty Gateway)

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Dispute Resolution analysis: In one of the first English decisions relating to non-fungible tokens (NFTs), the English High Court stayed a consumer's claim for a declaration that an arbitration agreement in an auction platform's terms of use was unfair. While the court held that it had jurisdiction to hear the non-arbitration aspects of the claim, proceedings were stayed under section 9 of the Arbitration Act 1996 (AA 1996). It was common ground that the consumer was a party to the arbitration agreement providing for arbitration in New York. Although it was disputed whether the arbitration agreement could be enforced against the consumer, issues going to the validity and enforceability of the arbitration agreement were to be considered in the New York arbitration. Written by Simon Chapman, partner and Olga Dementyeva, associate at Herbert Smith Freehills.

Soleymani v Nifty Gateway LLC [\[2022\] EWHC 773 \(Comm\)](#)

What are the practical implications of this case?

Pursuant to [Article 1\(2\)\(d\)](#) of Regulation (EU) 1215/2012, the English court will not generally have jurisdiction to hear consumer disputes, including disputes between individuals and online auction platforms, where the essential subject matter of the proceedings is arbitration. Nevertheless, there may be circumstances where the relief sought by the consumer is framed in a way that would circumvent this exception even if the claim is related to an ongoing arbitration. For example, in this case, it was held that the English court would in principle, have jurisdiction to hear the non-arbitration related claim for declaratory relief under the [Gambling Act 2005 \(GA 2005\)](#) and the claim that the governing law clause was unenforceable.

Nonetheless, such proceedings before the English court may be stayed in favour of the ongoing arbitration initiated against the consumer in accordance with the parties' agreement to arbitrate their disputes. The existence of English law issues, including consumer law issues, would not in itself tip the balance in favour of the English court deciding them. Here, key factors were that there was no evidence to suggest any legitimate concern as to the quality of the tribunal or process in New York, the supervision of the New York courts or the ability of New York law to protect consumers and address questions of English law.

What was the background?

What was the factual background to the dispute?

Mr Soleymani (the Claimant), a resident in Liverpool, took part in an auction held on the online platform of Nifty Gateway ('Nifty') (the Defendant), a US corporation. In order to use the platform and place bids, the Claimant had to (i) open an account with Nifty and (ii) sign up to Nifty's Terms of Use. The Terms of Use provided that (1) by agreeing to them one also agreed to resolve all disputes with Nifty through arbitration held in New York and administered by JAMS (the 'Arbitration Agreement'); and (2) the Terms of Use shall be subject to the laws of the State of New York (the 'Governing Law Clause').

In the auction Mr Soleymani placed a bid for an NFT associated with an artwork by Beeple (the 'Bid'). Nifty informed Mr Soleymani that he had been among the highest 100 bidders and therefore a 'winner' in the action. Mr Soleymani claimed he was unaware of the non-traditional rules of the auction. There was a dispute as to whether Mr Soleymani was liable to pay the sum of the Bid.

New York arbitration

Nifty commenced arbitration in New York relying on the Arbitration Agreement. Mr Soleymani argued that the arbitration should be dismissed, claiming, among other things, that he was a consumer and

that Nifty's Terms of Use were not properly brought to his attention. On a preliminary determination Mr Soleymani was treated as a consumer (such that certain additional standards of fairness were imposed). However, Mr Soleymani's motion to stay was dismissed. At the time of the proceedings before the English court the New York arbitration was on-going, and the arbitrator was yet to determine Mr Soleymani's jurisdictional objection.

What issues were before the English Court?

Mr Soleymani commenced proceedings in the High Court. He requested a declaration that (a) the Governing Law Clause and/or the Arbitration Agreement in Nifty's Terms of Use were unfair and not binding upon him; and (b) any contract arising from the Bid was void for illegality. He argued that (1) [section 62\(1\)](#) of the Consumer Rights Act 2015 ([CRA 2015](#)) and (2) [section 15B](#) of the Civil Jurisdiction and Judgments Act 1982 ([CJJA 1982](#)) operated to impugn the validity of the Arbitration Agreement. In addition, (3) he alleged that Nifty's auction was covered by and infringed [GA 2005](#), although he accepted that it did not impugn the Arbitration Agreement because of the doctrine of separability. Nifty applied for a stay of proceedings.

Accordingly, the two key issues before the court were whether: (1) it had no jurisdiction under [CPR 11](#); and (2) Nifty was entitled to stay the proceedings under [AA 1996, s 9](#) and/or the court's inherent jurisdiction under [CPR 3.1\(2\)\(f\)](#).

What did the court decide?

Did the English Court have jurisdiction under CJJA 1982, s 15B?

The court concluded that [CJJA 1982, s 15B](#), which entitles consumers to resolve disputes in their domestic courts of residence, did not apply to Mr Soleymani's claim for a declaration that the Arbitration Agreement in Nifty's Terms of Use was unfair and not binding upon him. The court referred to [CJJA 1982, s 15A\(2\)](#), which provides that [CJJA 1982, ss 15B–15E](#) applies only if the proceedings are within the scope of the Regulation. However, the Regulation did not apply to arbitration by virtue of [Article 1\(2\)\(d\)](#) of Regulation (EU) 1215/2012, whereas the subject matter of the claim was whether Mr Soleymani was under a legal obligation to arbitrate. Accordingly, [CJJA 1982, s 15B](#) did not apply to that part of the claim.

However, Nifty was directing commercial activities in the UK, such that Mr Soleymani concluded a 'consumer contract' under [CJJA 1982, s 15E](#). Article 1(2)(d) of the Regulation did not apply in this instance, because the declaratory relief was also sought by reference to [GA 2005](#) and included a claim that the Governing Law Clause was unenforceable. Accordingly, there was plausible evidential basis for the application of the relevant jurisdictional gateway.

Was Nifty entitled to a stay of proceedings under AA 1996, s 9 and/or the court's inherent jurisdiction?

It was common ground that Mr Soleymani was a party to the Arbitration Agreement, even though it was disputed whether it could be enforced against him. The court therefore decided that (1) the requirements of [AA 1996, s 9\(1\)](#) were satisfied; (2) there was no basis for exercising the court's inherent jurisdiction to stay; and (3) a stay must be granted unless [AA 1996, s 9\(4\)](#) applied and the arbitration clause was 'null and void, inoperative or incapable of being performed' on the balance of probabilities. The court had a wide discretion as to whether to decide [AA 1996, s 9\(4\)](#) summarily, make directions for trial, or stay proceedings (on the basis that such issues can be addressed in the arbitration).

Mr Soleymani's case was not strong enough to suggest that there was no triable issue on the factual questions raised under [CRA 2015](#). As drafted, the Arbitration Agreement covered issues going to its validity and enforceability. The court held that even if the issues raised were ones of consumer protection based on English law under [CRA 2015](#), they could be considered in the New York arbitration. There was no evidence to suggest any legitimate concern as to the quality of the tribunal or process in New York, the supervision of the New York courts or the ability of New York law to protect consumers and address questions of English law. Accordingly, the court concluded that the claim for the declaration should be stayed under [AA 1996, s 9](#).

Case details:

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Clare Ambrose QC (sitting as a Deputy Judge of the High Court)
- Date of judgment: 24 March 2022

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