

ARBITRABILITY OF CONSUMER-FACING DISPUTES SURROUNDING NFT TRANSACTIONS

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I. INTRODUCTION

In March 2021, Christie's, an art auction house, sold digital artist Beeple's *Everydays: The First 5000 Days*, a purely digital Non-Fungible Tokens (NFTs)-based artwork, for \$69,346,250.¹ In June 2021, another elite auction house, Sotheby's, sold artists Matt Hall and John Watkinson's masked CryptoPunk NFT named *Covid Alien* for \$11.8 million.² The original source of both of these artworks is a digital code stored on a blockchain: in other words, their creators did not use a single drop of paint.³

The Museum of Modern Art (MoMA) recently received an endowment from the William S. Paley Foundation partly to fund the museum's "new strategic acquisitions" of digital art, potentially including NFTs.⁴ The Foundation has since begun to auction off twenty-nine out of eighty-one masterpieces long loaned to MoMA,

1. Rebecca Riegelhaupt, *RESULTS: Beeple's Purely Digital NFT-Based Work of Art Achieves \$69.3 Million at Christie's*, CHRISTIE'S (Mar. 11, 2021), <https://www.christies.com/about-us/pressarchive/details?PressReleaseID=9970&lid=1> [https://perma.cc/M368-9LZC].

2. OPENGEEKSLAB, *9 Legal Issues That Stand Behind NFTs*, <https://opengeekslab.com/blog/legal-issues-nfts/> [https://perma.cc/XF9G-QWVV] (last visited Mar. 22, 2023).

3. *Id.*

4. Kabir Jhala, *Sotheby's to Sell \$70m of Art Stored at MoMA to Benefit New York Museum's Digital Initiatives*, THE ART NEWSPAPER (Sept. 14, 2022), <https://www.theartnewspaper.com/2022/09/14/sothebys-70m-william-paley-collection-museum-modern-art> [https://perma.cc/XK6B-LMSD].

including pieces by Picasso, Francis Bacon, Renoir, and Rodin.⁵ They were loaned with the understanding that both the museum and foundation could determine “how these works could best be used to serve the public and the changing needs of the institution,” according to a MoMA press release that announced the forthcoming sale.⁶ And in November 2022, Picasso’s *Guitare sur une table* was sold for \$37.1 million to help the museum expand its digital footprint.⁷

While trading a Picasso for a collection of digital pixels may seem counterintuitive, these examples reflect trends that have led many to speculate that NFTs represent the future of art. This all begs the following questions: What are NFTs? How can a digital signature be worth millions of dollars? What legal issues surround this new type of art? In Part II, this annotation will explain the key features of NFTs that make them unique. Part III will discuss the current legal system that lags behind the booming popularity of NFTs, with a focus on the questions of arbitrability of disputes involving NFTs or blockchain-based platforms. Part IV will introduce the stance that the English courts have taken in the ongoing case of *Amir Soleymani v. Nifty Gateway LLC*. Part V will discuss the key implications of the case. Part VI concludes.

II. OVERVIEW OF A NON-FUNGIBLE TOKEN (NFT)

A non-fungible token is a digital asset, based on computer code and recorded on a digital ledger, or blockchain.⁸ As blockchains permanently record and timestamp transactions, an NFT is an undisputable record of authenticity and ownership of the token, a unique asset.⁹ Non-fungible” means that the token is unique and thus

5. OPENGEEKSLAB, *supra* note 2.

6. Kabir Jhala, *supra* note 4.

7. Kelly Crow, *Picasso’s ‘Guitar on a Table,’ Long Held by MoMA, Sells for \$37.1 Million at Sotheby’s*, THE WALL STREET JOURNAL (Nov. 14, 2022), <https://www.wsj.com/articles/picassos-guitar-on-a-table-sells-for-37-1-million-at-sothebys-11668473578> [<https://perma.cc/S3F7-3Z36>].

8. Robyn Conti & Benjamin Curry, *What is An NFT? Non-Fungible Tokens Explained*, FORBES (updated Mar. 17, 2023), <https://www.forbes.com/advisor/investing/cryptocurrency/nft-non-fungible-token/> [<https://perma.cc/QWY3-M7FV>].

9. Fred Clark, Satjivan Aujla & Emily Gould, *What are the Legal Issues Concerning Non-fungible Tokens (NFTs)?*, ART LAW & MORE (July 8, 2021), <https://artlawandmore.com/2021/07/08/what-are-the-legal-issues-concerning-non-fungible-tokens-nfts/> [<https://perma.cc/9GTY-G5QI>].

cannot be replaced.¹⁰ This nature distinguishes an NFT from other digital assets that are created to be fungible or interchangeable.¹¹

Each NFT is unique and cannot be counterfeited.¹² Just like a Picasso is different from a Renoir, even if they are of the same monetary value, one NFT is different from another NFT. Therefore, NFT-based artwork represents a work deriving its value from the provenance rather than the quality of the work itself.¹³ Anyone can view *Covid Alien* online for free and a number of copies of the artwork may exist. However, only one person can claim ownership of the version authenticated by the artists themselves.¹⁴

The booming popularity of NFTs largely stems from the scarcity they create. Digital works by their very nature can be copied, recreated, and replicated infinitely. While an NFT does not change that, it creates scarcity by generating a digitally unique record authenticating sole ownership of a particular version, the *true* version, of a digital work.¹⁵ In sum, not only do NFTs make digital artworks unique, and thus, commercially marketable, the technology also responds to the art world's need for authentication in the digital realm, permanently linking a digital asset to its creator.¹⁶

III. EXISTING LAW

The creation, distribution, ownership, and trading of NFTs are new phenomena which raise a plethora of legal issues, many of which remain ambiguous or unresolved.¹⁷ As a result of the rapid growth of NFT-related transactions, there is a disconnect in which the surrounding legal system has not yet fully evolved. Even though NFTs are gaining popularity, regulations governing their legal status remain scarce.¹⁸ Moreover, current regulatory and legal frameworks governing

10. KASPERSKY, *What are NFTs and How Do They Work?*, <https://usa.kaspersky.com/resource-center/definitions/what-is-an-nft> [https://perma.cc/2KTX-HEUQ] (last visited July 8, 2023).

11. *Id.*

12. Fred Clark, *supra* note 9.

13. *Id.*

14. *Id.*

15. NFT, MOMA, <https://www.moma.org/collection/terms/nft> [https://perma.cc/W4EX-LQEV] (last visited Mar. 3, 2022).

16. Zachary Small, *Even as NFTs Plummet, Digital Artists Find Museums Are Calling*, N.Y. TIMES (Oct. 31, 2022) <https://www.nytimes.com/2022/10/31/arts/design/nfts-moma-refik-anadol-digital.html> [https://perma.cc/S4Y7-DP7G].

17. Fred Clark, *supra* note 9.

18. OPENGEEKSLAB, *supra* note 2.

art were not designed to accommodate NFTs.¹⁹ Whether NFTs end up being the future of the art world or a more minor phenomenon, their increased presence in the field makes it impossible to ignore these foundational legal questions. Given the interest-based global nature of technologies like NFTs, many disputes surrounding NFTs involves international arbitration.²⁰ Arbitration may be regarded as a suitable forum for resolution, but whether a case is actually arbitrated is uncertain. In 2022, the English High Court determined in *Chechetkin v. Payward Ltd & Others* that it had jurisdiction to hear a claimed commenced by a consumer, rejecting the arguments that an arbitration clause in the terms and conditions of the transaction at issue should prevent the claim from proceeding in the domestic court.²¹

On the other hand, a U.S. court decision ruled differently in a similar case. In contrast with the position taken in the English court, the Northern District Court of California determined that the arbitrability of the dispute involving a decentralized finance platform operating on a blockchain should be decided in arbitration, rejecting a consumer's claim that he should not be bound by the arbitration agreement in the platform's terms of service.²² These varying court decisions create uncertainty as to whether an arbitration agreement in NFT transactions has as much teeth as it was intended to.

IV. LEGAL ISSUE SURROUNDING NFTs AND *AMIR SOLEYMANI V. NIFTY GATEWAY LLC*

One legal issue surrounding NFTs arises when online auction platforms sell NFT art to international consumers. This dilemma is exemplified in the recent case of *Amir Soleymani v. Nifty Gateway LLC*.²³ The case was brought in 2022 by Amir Soleymani, a U.K. art collector of NFTs, against Nifty Gateway LLC, a New York-based company that operates the online platform Nifty Gateway (Nifty), a marketplace for NFTs.²⁴ Mr. Soleymani participated in an auction over Bepple's

19. JONES DAY, *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class* (Apr. 2021), <https://www.jonesday.com/en/insights/2021/04/nfts-key-us-legal-considerations-for-an-emerging-asset-class> [<https://perma.cc/2Z3Y-QX2R>].

20. Dan Perera & Justine Barthe-Dejean, *The Arbitrability of Web3 Disputes: an Effective Court or First World Problems?*, HFW (Mar. 2023), <https://www.hfw.com/The-arbitrability-of-Web3-disputes-An-effective-court-of-First-World-problems-March-2023> [<https://perma.cc/RC4Z-CVB3>].

21. *Chechetkin v. Payward Ltd & Others* [2022] EWHC 3057 (Ch).

22. *Johnson v. Maker Ecosystem Growth Holdings, Inc. et al.*, No. 20-cv-02569-MM (N.D. Cal. Sep. 25, 2020).

23. *Soleymani v. Nifty Gateway LLC* [2022] EWCA Civ 1297.

24. *Id.*

Abundance on Nifty.²⁵ The auction was a “ranked” auction: there were 100 NFTs associated with the same artwork and each of the top 100 bids received an NFT akin to a limited edition print rather than an original painting.²⁶ Mr. Soleymani came third in the auction, but Nifty claimed that under its terms and conditions, he was a “winner” and thus liable to pay the total sum of his highest bid in return for the third edition of the NFT.²⁷

Mr. Soleymani disputed.²⁸ The issue came down to what the plaintiff would have seen or reasonably understood before making bids.²⁹ Mr. Soleymani claimed he was not made aware that there could be more than one successful bid; he believed there would be only one winner.³⁰ Nifty argued that auction rules were clearly displayed on the platform and Mr. Soleymani would have seen these rules because he clicked the “How does this work” button.³¹ Users of the platform are required to confirm they have read the terms and conditions before proceeding, and there was a hyperlink to Nifty’s terms and conditions.³²

Beyond his claims about the auction, Mr. Soleymani also challenged Nifty’s general terms and conditions of business for the use of the platform, which mandated dispute resolution through arbitration in New York.³³ Pursuant to the terms and conditions, Nifty commenced arbitration proceedings in New York.³⁴ To try to prevent this, Mr. Soleymani commenced a claim in the English court system to challenge the arbitration agreement contained in Nifty’s terms and conditions.³⁵

Mr. Soleymani’s challenge initially failed before the London High Court.³⁶ For many years, English courts have taken a supportive approach to arbitration.³⁷ Again, this instance recognized that arbitral

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. LAYTONS, *Consumer Protection from Nifty Sales of NFT’s? Think Before You Click!* (Nov. 10, 2022), <https://www.laytons.com/news/consumer-protection-from-nifty-sales-of-nfts-think-before-you-click> [<https://perma.cc/BQE3-M6XX>].

31. *Soleymani*.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. LAYTONS, *supra* note 30.

tribunals can determine issues as to their own jurisdiction.³⁸ The High Court ruled that it was appropriate for this issue to be determined by the New York arbitral tribunal, thus granting a stay of the proceedings before the English court.³⁹ In the High Court's view, the issues relating to the validity and the enforceability of the arbitration agreement should be considered by the New York arbitrator.⁴⁰ Mr. Soleymani appealed the decision of the High Court to the English Court of Appeal on grounds including that the court erred in staying the proceedings without determining the question of fairness or directing a trial before an English court on the issues.⁴¹

Interestingly, the Competition and Markets Authority (CMA), the U.K. consumer rights regulator, intervened in the submissions to the court because of the high-profile nature of the case, the NFT subject matter, and how the auction terms of business interacted with Consumer rights law in the U.K.⁴² In particular, the CMA asked the Court of Appeal to consider the manner and forum in which a British consumer can challenge the fairness of a compulsory clause in an online consumer contract, which requires any dispute to be arbitrated overseas under foreign law.⁴³ The CMA was concerned that the High Court's decision could erode the level of protection afforded to British consumers in that: (1) compulsory clauses that subjects a consumer to a foreign jurisdiction are generally unfair and not binding, and (2) in consumer cases, the English court itself should determine the issue of arbitrability rather than leaving the issue up to arbitral tribunals, especially those overseas.⁴⁴ The regulatory agency also emphasized that the English court has "a positive and non-delegable duty" to consider

38. *Id.*

39. *Soleymani*.

40. SIMMONS & SIMMONS, *Court of Appeal decision: Soleymani v Nifty Gateway* (Oct. 20, 2022), <https://www.simmons-sisommons.com/en/publications/cl9h5g885671b0a47a90tg4el/court-of-appeal-decision-soleymani-v-nifty-gateway>.

41. HAUSFELD, *Consumer Win on Crypto Arbitration Clause: Dispute Set for the English Courts?* (Oct. 27, 2022), <https://www.hausfeld.com/en-gb/what-we-think/perspectives-blogs/consumer-win-on-crypto-arbitration-clause-dispute-set-for-the-english-courts/> [https://perma.cc/6C9Y-FHFR].

42. *Id.*

43. LEXISNEXIS, *Stay of NFT Consumer Claim in Favour of New York Arbitration Refused under AA 1996, s 9(4) (Soleymani v Nifty Gateway)* (Oct. 19, 2022), <https://www.lexisnexis.co.uk/legal/news/stay-of-nft-consumer-claim-in-favour-of-new-york-arbitration-refused-under-aa-1996-s-9-4-soleymani-v> [https://perma.cc/VBW6-XFPD].

44. Helen Mulcahy, *Landmark NFT Decision on Consumer Rights Overturned on Appeal*, FIELDFISHER (Oct. 14, 2022), <https://www.fieldfisher.com/en/insights/landmark-nft-decision-on-consumer-rights-overturned-on-appeal> [https://perma.cc/MHZ8-NPBH].

and determine the fairness of those compulsory clauses and that the burden of proving the unfairness of the terms should not be placed on consumers.⁴⁵

The Court of Appeal found that English consumers are entitled to public hearings in English Courts to determine their consumer rights, rather than being beholden to private overseas arbitrations.⁴⁶ The Court held that this jurisdictional protection over consumers takes precedence over arbitration agreements, emphasizing that the *public* importance of protecting Mr. Soleymani's consumer rights was a significantly powerful factor in determining whether to refuse a stay of the English proceedings.⁴⁷ While Mr. Soleymani himself is a high net worth individual and an unusual type of consumer, the Court noted that rulings affecting consumer rights are of such public importance that they should be considered in a public court rather than in a private arbitral tribunal.⁴⁸

It is also worth noting that the Court of Appeal did not find the intrinsically cross-border, decentralized nature of an online transaction, let alone the NFT market, much different from a more traditional one: "no matter how global, borderless or decentralized 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."⁴⁹ As a result, the question of whether the arbitration clause in Nifty's standard terms of business is valid is left to be decided in a full trial before the English court.

V. IMPLICATIONS OF *AMIR SOLEYMANI V. NIFTY GATEWAY LLC*

Arbitration remains a popular alternative to litigation in court and is the method of choice for resolving cross-border disputes.⁵⁰ Particularly, arbitration remains an attractive form of dispute resolution for online agreements like NFT sales because of the ability to enforce awards in different jurisdictions.⁵¹ After the ruling in

45. *Id.*

46. *Soleymani*.

47. *Id.*

48. *Id.*

49. Andrea Montague-Doghan & Nathan Searle, *Consumer Rights Claim: Online NFT Contract Governed by New York Law and Arbitration - Is It Fair?*, JD SUPRA (Nov. 7, 2022), <https://www.jdsupra.com/legalnews/court-of-appeal-lifts-stay-to-allow-9046496/> [https://perma.cc/TU8B-MWYJ].

50. WALKER MORRIS, *NFTs and Arbitration: A Recent Case of Interest* (May 30, 2022), <https://www.walkermorris.co.uk/in-brief/nfts-and-arbitration-a-recent-case-of-interest/> [https://perma.cc/TZG3-GEVX].

51. Montague-Doghan & Searle, *supra* note 49.

Soleymani, however, disagreements over transactions involving individuals may require litigation in the English courts to determine any consumer rights claims as a precursor to or in parallel with arbitration or other dispute resolution proceedings under the relevant contract.

Soleymani was an interim jurisdiction decision and not a decision that the arbitration agreement is unenforceable.⁵² Despite this, the case is still an important decision for English consumers, who will gain comfort from the fact that English courts will step in to determine consumer rights issues and that the judicial system is supported in this position by the CMA. The Court's pro-consumer approach, especially in the context of a relatively high value transaction and 'sophisticated' consumer, emphasizes the importance of consumer protection in English law. This is particularly helpful in the context of commercial transactions involving NFTs, whose decentralized and anonymized nature could be seen as presenting practical obstacles to legal intervention.⁵³

Also, this case presents the limits to the arbitrability of the disputes surrounding NFT marketplaces. In a dispute involving consumers, consumer protection laws may come into play in particular jurisdictions. In *Soleymani*, the Court of Appeal took the view that there is a valid question to be tried in the domestic court over the validity of an arbitration agreement, for reason of unfairness to the consumer.⁵⁴ This limitation and varying court decisions present the need to consider a range of factors when determining whether to refer disputes involving NFT transactions to arbitration.⁵⁵ The next phase of *Amir Soleymani v. Nifty Gateway LLC* will involve an English High Court trial to determine the merits of Mr. Soleymani's consumer rights claims.⁵⁶ These proceedings may provide further guidance regarding the application of consumer protection legislation to NFT transactions in the art world.

VI. CONCLUSION

The quick expansion of NFTs in recent months indicates that the legal system has yet to catch up with this phenomenon. *Soleymani* was the first case to examine whether a consumer wishing to exercise their consumer rights should be able to invoke those rights in front of the

52. *Soleymani*.

53. HAUSFELD, *supra* note 41.

54. *Soleymani*.

55. Perera & Barthe-Dejean, *supra* note 20.

56. *Soleymani*.

English court to invalidate an arbitration agreement.⁵⁷ It was also the first time that the English Court of Appeal ruled on a case involving NFTs.⁵⁸ The legal ambiguity surrounding different aspects of buying and selling digital artworks via NFTs extends not only to the case explored above, but to other areas of law as well: data protection, privacy, money laundering, and estate planning, to name a few. It is only a matter of time before more legal disputes involving NFTs and digital art arise.⁵⁹

57. PENNINGTONS MANCHES COOPER, *Soleymani v Nifty Gateway LLC (competition and markets authority intervening)* [2022] EWCA CIV 1297 (Nov. 16, 2022), <https://www.penningtonslaw.com/news-publications/latest-news/2022/soleymani-v-nifty-gateway-llc-competition-and-markets-authority-intervening-2022-ewca-civ-1297> [https://perma.cc/KSE9-UZV9].

58. Amir Soleymani, *Russells: Art Collector's Successful Appeal Against Digital Auction Platform is a Landmark Moment for British Consumers*, CISION PR NEWSWIRE (Nov. 14, 2022), <https://www.prnewswire.com/news-releases/russells-art-collectors-successful-appeal-against-digital-auction-platform-is-a-landmark-moment-for-british-consumers-301676265.html> [https://perma.cc/ZM7H-RM43].

59. Fred Clark, *supra* note 9.