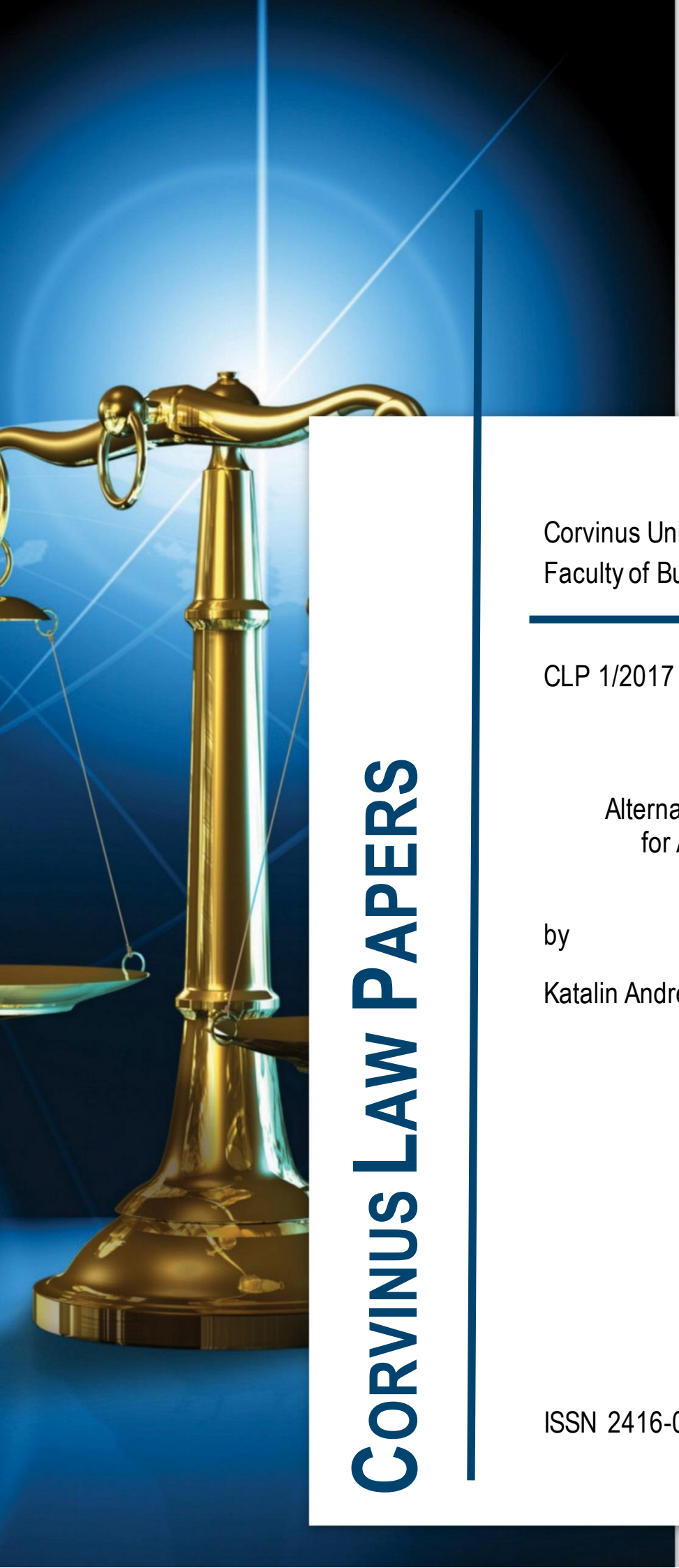

CORVINUS UNIVERSITY of BUDAPEST

Faculty of Business Administration

CORVINUS LAW PAPERS

Corvinus University of Budapest
Faculty of Business Administration

CLP 1/2017

Alternative Dispute Resolution for Art-Related Disputes

by

Katalin Andreides

ISSN 2416-0415

Corvinus Law Papers

CLP – 1/2017

The primary purpose of the Corvinus Law Papers (CLP) is to publish the results of research projects performed by those connected to the Department of Business Law as research reports, working papers, essays and academic papers. The CLP also publishes supplementary texts to be used for practical and theoretical training of students.

Publisher:

Corvinus University of Budapest
Faculty of Business Administration
H-1093 Budapest, Fővám tér 8.

Responsible for the edition:

Dániel Deák, Professor of Law

ISSN 2416-0415

Alternative Dispute Resolution for Art-Related Disputes

Katalin Andreides, LLM
attorney-at-law
katalin@andreides.tv

Abstract: As in many international commercial transactions, disputes are an inevitable occurrence in art related international transactions too. Art-related disputes cover a wide range of controversies with different subject matter. Authors, however, often underline the possibility to identify certain important common features in the given area. The particular nature of the objects involved is considered as one of these common features in that they have financial, special cultural and immaterial value that largely determines the relevant regulatory framework. Secrecy is also a common practice concerning art related transactions. The lack of transparency often relates to the identity of the parties involved, their relationship, the selling price, or certain particularities of the artwork. Further, the essential characteristics of the art market: its international and highly specialized nature and its closely connected players with strong emotional attachment to the artworks are circumstances appreciated in all type of art related disputes irrespective of the particular subject matter. Under these circumstances ADR techniques may play special role in the area of art-related disputes.

Keywords: ADR, law of arts, litigation, mediation, arbitration

I. Introduction

Notwithstanding predictions that global economy difficulties would affect the art market negatively, recent reports show "remarkable stability" and resilience.[1] The *Artprice*'s Contemporary Art Market Report 2016 underlines the role of the growing number of investment funds, the booming global museum industry and the ease to access to information as key features of market growth. This escalation results in a kind of proliferation of international art transactions and international contracts pertaining to art, concluded by parties from different legal, social and cultural background.

As in many international commercial transactions, disputes are an inevitable occurrence in art related international transactions too. Conflicts may concern practices of selling works of art by collectors or by intermediary dealers or the sale of art multiples and reproductions. Controversies often regard international loan agreements, the artist-dealer contractual relationship, consignment agreement, copyright infringement issues, the artists' moral rights and droit de suite. Important claims may emerge when private property rights compete with the artist's moral rights. Disputes may also arise out of complex matters as the auction sale participants' liabilities, expert opinion, authenticity and provenance. Additionally, museums, action houses, art galleries and private collectors have been facing important restitution claims due to the increased number of

[1]The Artprice Contemporary Art Market Report 2016 available at:http://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2016/contemporary-art-market-2016

title and provenance research and the enhanced due diligence required when acquiring cultural objects.[2]

Art-related disputes, therefore, cover a wide range of controversies with different subject matter. Authors, however, often underline the possibility to identify certain important common features in the given area. The particular nature of the objects involved is considered as one of these common features in that they have financial, special cultural and immaterial value that largely determines the relevant regulatory framework.[3] Secrecy is also a common practice concerning art related transactions. The lack of transparency often relates to the identity of the parties involved, their relationship, the selling price, or certain particularities of the artwork. Further, the essential characteristics of the art market: its international and highly specialized nature and its closely connected players with strong emotional attachment to the artworks are circumstances appreciated in all type of art related disputes irrespective of the particular subject matter.[4]

II. Litigation before national courts

The above mentioned features might already suggest the reasons for parties to decide that their case should be resolved other than in the national courts. It is generally argued that the public dispute settlement service provided by national courts follows rigid civil procedural laws set down by the given state and it rarely meets the characteristics of the specific case. National court procedures make part of one particular national system that does not necessarily takes into account the interests of parties from different jurisdictions across the world[5]. Additionally, not always but in many cases, national courts and judges have little experience with international transactions and will hardly be inclined to apply other than their own national conflict-of-law rules, substantive law or other legal rules.

The crucial decision on where and who will give judgement influences undoubtedly the outcome of the controversy. Substantive and procedural laws differ considerably from one country to another and parties may face unfavourable statute of limitation legislation, adverse evidentiary standard or special conditions to comply with as regards the passage

---

[2] The international standard of due diligence for an assessment of the circumstances of the acquisition is codified in Art. 4 (4) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) : "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonable accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."
Alessandro Chechi, "The Gurlitt hoard: An appraisal of the role of international law with respect to Nazi-looted art" p. 200-217.

[3] The special cultural importance attributed to the objects involved results in the adoption of for instance protective international treaties and national laws as well as export restrictions. The immaterial value is recognized by copyright, moral rights and droit de suite legislations.
Quentin Bryne-Sutton, "Arbitration and Mediation in Art-Related Disputes" Arbitration International, vol. 14, No.4, LCIA 1998

[4] It is pointed out in "Arbitration and Mediation in Art-Related Disputes" by Quentin Bryne- Sutton as one common feature of art-related disputes is the art market, "…a market within which they arise: it is international and highly specialized, with a limited number of passionate players who often have conflicting interests as well as particular habits, customs and codes of conducts."
Quentin Bryne-Sutton, "Arbitration and Mediation in Art-Related Disputes" Arbitration International, vol.14, No.4, LCIA 1998

[5] Julian D.M. Lew, Loukas A. Mistelis, Stefan M.Kröll, "Comparative International Commercial Arbitration" Kluwer Law International 2003. p.5

of title. To reduce uncertainties, and where it is possible from the outset, parties can make considerable effort in planning the resolution of their future disputes by agreeing on and including a forum selection provision in their contract. However, regardless of the most favourable forum the parties can possibly obtain, in many art related controversies parties will unlikely be best served by litigation.

Litigation is often considered as an expensive and slower process, often due to the difficulties to ascertain the factual basis of the case or because of the possibility of judicial review. Usually, the lack of an exclusive forum selection clause in the contract may result in parallel litigation, especially in copyright infringement cases. Moreover, the public nature of court litigation in art related disputes may hinder the parties' willingness to negotiate compromises. The option to conciliate the parties' positions in art conflicts is an important feature, though, requiring an attentive consideration of delicate ethical matters, fairness and other non-legal factors instead of a strict regard to the applicable law which may preclude effective remedies and may harm the parties' conflicting yet legitimate interests.[6]

III. Amicable settlement

There are different mechanisms which aim to help the parties to reach an agreed solution, such as negotiation or mediation. Negotiation is a flexible and informal way to reach a consensus and therefore it can be appropriate between players of the very specific art industry. It only works well, however, if parties are not obstinate and have a real intention to direct themselves to a compromise without the help of a neutral third party. The amicable nature of the direct discussions is an important feature as these processes can be more effective if skilled and experienced negotiators on behalf of the parties avoid "excessive posturing" and strategies typically used in litigation.[7] Also, parties' negotiators have to be skilled with empirical experience as to the common practices of the market, capable to identify and value the various interests involved and attribute different priorities to them.

Mediation is a process where a neutral third party works with the parties to help them to resolve their dispute by agreement.[8] Mediation is considered as perhaps the most convenient dispute resolution mechanism for art-related controversies. The role of the neutral third party may be essential when negotiation does not work and where parties are unable to recognise the weaknesses of their positions. A skilled mediator may suggest the grounds and the terms of the agreement to be settled by evaluating objectively the strength of the parties' cases. It is, however, not a binding adjudicatory system and where parties are not really concerned in the amicable settlement of their dispute the process will only impede effective solution.

---

[6] Quentin Bryne-Sutton, "Arbitration and Mediation in Art-Related Disputes" Arbitration International , vol. 14, No.4, LCIA 1998

[7] Dr. Loukas A. Mistelis, "ADR in England and Wales", Queen Mary, University of London

[8] Julian D M Lew, Loukas A Mittelis, Stefan M Kröll, „Comparative International Commercial Arbitration" p.13-14. Kluwer Law International 2003 p.13

The process where the neutral third party is rather to impose a solution is sometimes known as consiliation. Historically, and because of the slightly different methods applied in mediation and conciliation in public intenational law, they were perceived as different processes. Consequently mediation sometimes refers to a mehod where a mediator has a more proactive role (evaulative mediation) and conciliation sometimes refers to a method where a conciliator has a more facilitating mediator role (facilitative mediation).

IV. Negotiation and mediation cases

The above described mechanisms are often the only means to settle the controversy where ordinary or special time limits imposed by national laws for binding actions have elapsed or possessors are protected by anti-seizure laws. These questions arose in the case of the controversial Gurlitt's collection discovered in 2012 by the German customs officials.

Cornelius Gurlitt was the son of Hildebrand Gurlitt a German art historian and dealer; an associate of the Nazi leadership appointed to sell abroad confiscated art from Jewish families. He managed in fact to keep for his own collection important artworks which then passed to his son without the knowledge of the authorities. Cornelius Gurlitt, never declaring his earnings and incomes, was suspected of tax evasion and investigations led to the find of almost 1.500 artworks in Gurlitt's apartment in Munich. The collection, worth more than one billion euros, included masterpieces from Henri-Matisse, Pablo Picasso, Pierre-August Renoir or Marc Chagall.[9] Certain artworks of the collection suspected as having been looted could be returned to the original owners' heirs on the basis of an agreement concluded by the German State authorities and Cornelius Gurlitt. The agreement made possible comprehensive provenance research and provided for a mutually acceptable solution aiming the restitution of the artworks on a voluntary basis. As the lawyer appointed to look after Mr. Gurlitt legal affairs commented, by approving the agreement, Mr. Gurlitt accepted his moral responsibility, "apart from that what we believe to be a clear legal situation".[10]

Concerning contested art, in many cases, parties realize the weaknesses of their positions and understand the difficulties to support their arguments. Therefore, restitution disputes involving complex legal issues as ownership or due diligence may constrain the parties to negotiate. Still, through negotiation more flexible and creative solutions can be achieved than those offered by litigation. An illustration of an indeed creative settlement is the accord reached by Italy and the Wadsworth Atheneum Museum of Art in the case which concerned ownership issues of the celebrated painting "The Bath of the Bathsheba", bringing thus the complex dispute resolution process finally to an end.

The painting created by Jacopo Zucchi was looted by Soviet troops in 1945 from the Italian Embassy in Berlin, where it was on loan from the Galleria Nazionale d'Arte Antica of Rome. The Soviet soldiers sold the painting to a wagon-lit employee who then offered it to the Italian Embassy of Paris. The Italian Government, however, did not raise funds to buy the artwork, and thus it was sold to a Parisian antique dealer. In 1965 the painting was acquired by the Wadsworth Atheneum Museum of Art (Hartford, Connecticut) for $35.000. In 1970 an Italian art expert visited the Museum and identified "The Bath of Bathsheba" as the masterpiece removed from the Italian Embassy in Berlin. The Italian Government claimed immediately the return of the artwork but the Wadsworth Museum

[9] Alessandro Chechi, "The Gurlitt hoard: An appraisal of the role of international law with respect to Nazi-looted art" p. 200-217.

[10] See the Joint Press Release 64/2014 issued by the Federal Government Commissioner for Culture and the Media, the Bavarian State Ministry of Justice and Cristoph Edel, available at: https://www.bundesregierung.de/Content/EN/_Anlagen/2014-04-07-pm-bkm-gurlitt_en.pdf
In Alessandro Chechi, "The Gurlitt hoard: An appraisal of the role of international law with respect to Nazi-looted art" p. 200-217.

instead offered the painting for sale. Finally, subsequent to refusing the Museum's proposal, the Italian Government decided to commence court proceedings.[11]

After a 25-year-long litigation the parties reached an agreement on the conditional restitution of the famous artwork in exchange of a loan of a number of important Italian masterpieces grant to the Wadsworth Museum. Thus, the Zucchi masterpiece could be returned to Italy and the Museum received a loan of 28 prized Italian Baroque master paintings from Italy's national collection, including five works by Caravaggio. These works were displayed along with "The Bath of Bathsheba" in the three month-long exhibition titled "Caravaggio and His Italian Followers". The Italian Government paid for the transport and insurance; subsequently, with the end of the exhibition the masterpieces returned to Italy.[12]

The deal was fairly considered as mutually satisfactory for both of the parties. Italy obtained restitution without litigation and could thus circumvent adverse statute of limitation legislation and the issue of the negligent conduct as to its all reasonable effort to find the artwork[13]. On the other hand, the Wadsworth Museum avoided the consequences of the inaccurate conduct of its provenance research in a costly trial, and more importantly, had the opportunity to organize a significant exhibition, normally beyond its authority and budget.[14]

Disputes in the art world, however, do not only relate to allegedly looted art or illegally exported cultural property. Controversies may also arise in connection with the business-focused contemporary art system where auction houses, investment funds, art fairs and other operators are closely interconnected. Frequently, players of the contemporary art market are advised to cooperate and to take into consideration the advantages offered by the amicable mechanisms of dispute settlement. It is often the case when for the protection of the artist's reputation and to safeguard the market value of the artwork it is essential.[15]

Mediation led to settlement agreement in one of the most significant cases in Great Britain which concerned a fire in a warehouse owned by Momart, an important storage and handling company with clients such as the National Gallery, the Tate Modern and the Tate Britain and Buckingham Palace.[16] The incident caused the destruction of a great number of contemporary artworks by renowned British artists such as Damien Hirst, Patrick Heron, Tracey Emin, Chris Ofili, and Jake and Dinos Chapman, for an estimated

---

[11] Alessandro Chechi, Raphael Contel, marc-André Renold, "Case Bath of Bathsheba – Italy and Wardsworth Atheneum Museum of Art, "Platform ArThemis (http://unige.ch/art-adr), Art-Law Center, University of Geneva

[12] Alessandro Chechi, Raphael Contel, marc-André Renold, "Case Bath of Bathsheba – Italy and Wardsworth Atheneum Museum of Art, "Platform ArThemis (http://unige.ch/art-adr), Art-Law Center, University of Geneva

[13] In effect, the painting was traced by chance and only in 1970, despite the fact that it was on public display since acquisition, in 1965. Alessandro Chechi, aphael Contel, marc-André Renold, "Case Bath of Bathsheba – Italy and Wardsworth Atheneum Museum of Art, "Platform ArThemis (http://unige.ch/art-adr), Art-Law Center, University of Geneva

[14] Alessandro Chechi, aphael Contel, marc-André Renold, "Case Bath of Bathsheba – Italy and Wardsworth Atheneum Museum of Art, "Platform ArThemis (http://unige.ch/art-adr), Art-Law Center, University of Geneva

[15] It is the case in copyright infringement controversies where amicable settlement discussions may also help to maintain important business relationships and to avoid complex international legal battles, often even criminal complaints, involving the byzantine relations between dealers-brokers-collectors where e.g. attribution is based on contradictory expert opinion and fraud.

[16] A. L. Bandle, R. Contel, M. Renold, "Case Warehouse Fire – Gillian Ayers et al. and Momart," Platform ArThemis (http:// unige.ch/art-adr), Art-Law Centre - University of Geneva

value of £40 million. The Momart Warehouse was located near industrial buildings housing explosive gas canisters.

In June 2005, the artists involved filed a class action against Momart for negligent conduct before the English Commercial Court. According to the media, the petitioners asserted that Momart's storage facilities were "wholly unsuitable for high-value fine art". The claim was also addressed to Axa Art, as the company insured several Momart customers, galleries and collectors.

During civil proceeding the parties agreed to set up mediation and to appoint a mediator. The mediation led to an agreement where, according to the press, "tens of millions of pounds" were paid in damage by Momart to the agrrieved party. Since intense press coverage brought great attention to Momart's negligent conduct, mediation helped the company to save its reputation. The incident happened in a particular period of the contemporary art scene, prior to the Lehman Brothers collapse in 2008, when the market was characterised by drastic increases in value fuelled by heavy speculation.[17]

V. International initiatives

1. WIPO Arbitration and Mediation Centre[18]

The World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre provides ADR services to help players operating in the area of art and cultural heritage. The Centre offers interest-based solutions that may go beyond monetary relief, such as compensatory provision of artworks, long-term loans or co-ownership. It provides for a neutral forum in which international art and cultural heritage disputes can be resolved through a single procedure.

Moreover, the WIPO centre maintains an open-ended Panel, including mediators, arbitrators and experts from around the world with specific expertise in art and cultural heritage and with the understanding the cultural background. They can be appointed by parties in cases under WIPO Rules but parties are also free to select mediators, arbitrators or experts from outside the WIPO Panel.

Since 2011 WIPO has been collaborating with the International Council of Museums (ICOM) in the field of cultural heritage involving ICOM members' areas of activity. ICOM and the WIPO Centre have developed special mediation procedure in order to help to reach an agreement between parties for art and cultural heritage disputes, taking into consideration commercial, cultural, ethical, historical, religious issues, with the possibility to apply customary laws and protocols. The service offers the parties a list of experienced mediators in art and cultural heritage mediation, a clear and efficient procedural framework set out in the ICOM-WIPO Mediation Rules, specific provisions on mediators' impartiality and independence, other procedural advice and support. WIPO also provides for electronic case facility and disposes with a Schedule of Fees for ICOM-WIPO Mediation.[19]

---

[17] A. L. Bandle, R. Contel, M. Renold, "Case Warehouse Fire – Gillian Ayers et al. and Momart," Platform ArThemis (http:// unige.ch/art-adr), Art-Law Centre - University of Geneva

[18] WIPO Alternative Dispute Resolution, available at: http://www.wipo.int/amc/en/

[19] ICOM-WIPO Art and Cultural Heritage Mediation http://www.wipo.int/amc/en/center/specific-sectors/art/icom/

2. The Geneva Art-Law Centre[20]

It is of fundamental importance to mention the significant research activity of the Geneva Art-Law Centre in the field of art and cultural property law. The Centre is fully integrated within the Faculty of Law of the University of Geneva and receives important support from Art-Law Foundation founded in 1991.

The Art-Law Centre conducts its research study supported by the Swiss National Science Foundation (SNSF) on "Alternative Dispute Resolution Mechanisms and Cultural Property".

The Centre underlines the benefits of ADR in the art-law sector and examines the reasons that may lead the parties to decide that their disputes should be resolved by alternative means. More importantly, the Centre aims to analyze the practical, ethical and legal consequences they may have compared to court litigation.

One of the Centre's outcomes is the ArThemis database which contains case notes about disputes of cultural property. The case notes focus on the settlement of disputes through ADR but also examine judicial decisions. The database allows for search by dispute resolution process, lists the relevant chronology of the given case, describes the applied dispute resolution mechanism and summarize the legal issues emerged.[21]

VI. Conclusion and final thoughts

The growing tendency of art related disputes is induced mainly by the rapidly expanding international art market, the more extensive practice and duty of provenance research and an unprecedented amount of information that is accessible today.

It would not be wise to determine a single dispute resolution mechanism for all art related disputes and transactions. Litigation may be an entirely suitable option where the parties' positions can be sustained by clear technical legal arguments according to which the court reaches a binding judicial verdict based on the applicable law, especially when there are less significant enforcement issues involved.

However, players of the art industry, such as artists, collectors, art galleries, auction houses, financial institutions and insurance companies, museums and other public private institutions are more and more disposed to rely on alternative resolution mechanisms rather than submit their disputes to the adversarial judicial system of court proceedings. It is because art-related conflicts are often extremely delicate with an extensive non-legal dimension as their essential quality. The peculiarities concern not only the parties' professional relationship, their often converging interests, the importance of confidentiality, and the cultural-emotional significance of the artwork, but also the complex ethical, historical or political issues which may arise in relation to art and cultural property controversies.

Although consensual mechanisms are appropriate to reach more creative solutions irrespective of what the clear legal situation may offer, negotiation or mediation is not the

[20] Université de Genève, available at : http://plone.unige.ch/art-adr

[21] Concerning the national art scene, in 2016 the Arbitration Chamber of Milan set up a significant new project as for the alternative dispute resolution methods related to the art sphere. The Milano ADR-Arte initiative seems to have already been successful and enjoys the support of the important national art community. Milano ADR-Arte available at: http://www.camera-arbitrale.it/it/Mediazione/ADR+Arte.php

easiest way to resolve the controversies. The mediator helps to understand the respective position of the other side and assists to agree on the specific terms but does not make a biding adjudicatory decision and the parties will be required to conclude the settlement agreement. It is therefore true that the parties can obtain any remedy they wish, the only limits are on what they can realistically achieve and agree on. While as for litigation or arbitration, the court or tribunal is limited to remedies available at law.[22]

Consequently, it is highly advisable to sign a written contractual dispute resolution clause or an ADR submission agreement.[23] Further, it may be a proper choice if the amicable settlement as negotiation is included in a mandatory dispute resolution clause as the less formal initial stage that can then be followed by a third party assisted settlement and/or arbitration.[24] Step-by-step dispute resolution clauses may be suitable to contracts reflecting the peculiarities of the art world where parties preserving their business relationship can negotiate freely without the immediate threat of the arbitration process. It is important though to specify the procedure to follow on each tier, the point when one stage terminates and when the other is to be undertaken, and also the mandatory nature in that parties have the obligation to complete this first stage and if their effort fails the dispute is to be referred to mediation or arbitration.[25]

In the set of ADR mechanisms, arbitration is a distinct process and details on its suitability to art related disputes are intended to be discussed in a separate paper. Here are only briefly indicated the essential features that may be relevant.

Unlike negotiation and mediation, arbitration is a specially established mechanism for the final and binding determination of disputes. In this way, it is indeed an alternative, and more akin, to litigation. It is however a private form of dispute resolution which is selected and entirely controlled by the parties. The effect of party autonomy is a major reason why

---

[22] Julian D M Lew, Loukas A Mittelis, Stefan M Kröll, „Comparative International Commercial Arbitration" Kluwer Law International 2003 p.15.

[23] For existing disputes it is difficult to negotiate a submission agreement unless the parties are constrained to sit down to the negotiating table or it is dictated by their respective interests.

[24] Mitelis

[25] The care is to be taken for enforcement reasons mainly, to evidence that the dispute resolution clause is a multi-tiered arbitration clause and not an agreement providing for the resolution of disputes by a procedure other than arbitration, with the possibility of arbitration if the dispute cannot be resolved through the earlier procedures. Thus the dispute resolution clause will fall within the New York Convention. National courts have held also that mandatory mediation prior to arbitration in multi-tiered dispute resolution clause can be a condition precedent to arbitration and arbitration can be commenced only when stipulated mediation procedures have been exhausted.
Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing(Fourth Edition), 4th edition (Kluwer Law International 2013) p. 1-15
See also the CHRISTIE'S Terms and Conditions of Sale Art. 19. h.: *"... Before either we or you start any court proceedings (except in the limited circumstances where the dispute, controversy or claim is related to a lawsuit brought by a third party and this dispute could be joined to that proceeding) we shall consent to the mediation of any dispute following the mediation procedure of JAMS with a mediator affiliated with JAMS and mutually acceptable for each of us. Consent to mediation shall not be unreasonably withheld. If this dispute is not settled by mediation within 60 days from the date when mediation is initiated by either of us, then the dispute shall be referred to and finally resolved by arbitration in New York in accordance with the International Arbitration Rules of the International Center for Dispute Resolution ("ICDR") by one arbitrator appointed by the ICDR within 90 days after the initiation of arbitration, who may order the production of documents only for good cause shown. The arbitration shall be confidential, except to the extent necessary to enforce the judgement or in accordance with a court order. The arbitral award shall be final and biding on both of us. You submit to jurisdiction in the state and federal courts located in New York County for the limited purpose of enforcing this agreement to arbitrate. This arbitration and any proceedings conducted hereunder shall be governed by Title 9 (Arbitration) of the United States Code and by the Convention on the Recognition and Enforcement of Foreign Arbitral Award of June 10, 1958."*

arbitration has achieved large acceptance as the favoured and principle mechanism for resolving international disputes. Unlike the mediators' recommendations, the definitive and binding arbitration award is generally capable of enforcement though national courts.

Arbitration being considered as fully self-contained, transnational, it seems to be appropriate to certain art disputes as it permits substantial procedural flexibility and intended to be neutral in that it is not either parties' judicial system and adopts no single nation's litigation procedure. Also, the choice of the seat is one of the most important issues in international arbitration. It may influence which law govern the arbitration and it will indicate the jurisdiction that can exercise supervisory and supportive powers in relation to arbitration. More importantly, the seat is relevant for the ultimate enforcement of the arbitral award as if it made in a state party to the New York Convention it will enjoy "the Convention's pro-arbitration enforcement regime".[26]

Additionally, in the absence of the parties' agreement to the contrary, the tribunal has broad discretion to determine the applicable substantive law. Indeed, arbitrators can apply non-state transnational rules generated through custom in a particular sector. The parties may also expressly authorise the arbitrators to act as amiable compositeurs or ex aequo et bono according to fairness and common sense principles. They can thus ignore the applicable law rules, but arguably not the contract between the parties.[27]

There are, however, concerns that the evident advantages of arbitration are only theoretical in certain types of art-related disputes. Only well drafted and enforceable arbitration clauses can lead to appropriate solution. Often artists have limited financial resources and do not have written contract with the infringing party. Also, barriers can be constituted in disputes over ownership of cultural objects in the absence of any contract underlying a restitution claim.[28] Generally, state claimant party would keep away from arbitration while in other circumstances it would be more favourably disposed to it. This is the case when the cultural object is situated in a country reticent in accepting jurisdiction over foreign state claim, or when the forum is in a country that for political or cultural reason is not favourable to the claim in question.[29]

There are more sophisticated art transactions such as public auction sales where auction houses act as mere intermediaries, or guaranteed action sales relying on third-party guarantees in order to reduce the financial risk of an artwork not being sold.[30] An attentive scrutiny is required to see whether, if efficiently drafted arbitration clause exists, the arbitration tribunal would decide to assume jurisdiction over the entity non-signing the arbitration agreement.

Other important consideration is whether experts may themselves act as arbitrators adjudicating the dispute rather than merely giving an opinion. As Norman Palmer explained: "…In this context the skills which make for a good attributor do not necessarily make for a good adjudicator. On the other hand, empirical experience as to

[26] Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing(Fourth Edition), 4th edition (Kluwer Law International 2013) pp. 1-15

[27] Nevertheless, the arbitrator tribunal's power to find a fair and equitable solution may be limited by relevant mandatory procedural and substantive rules.

[28] Quentin Bryne-Sutton, "Arbitration and Mediation in Art-Related Disputes" Arbitration International , vol. 14, No.4, LCIA 1998

[29] Quentin Bryne-Sutton, "Arbitration and Mediation in Art-Related Disputes" Arbitration International , vol. 14, No.4, LCIA 1998

[30] The third party takes all or part of the risk and will be remunerated in exchange for accepting this risk. See e.g. in: Christie's Impressionist and Modern Evening Sale catalog, Nov. 1, 2011, at 298

the practices of the trade (rather say, high academic expertise within a particular technical field) may offer a valuable background for the adjudicatory role, provided concerns about "trade bias" can be overcome."[31]

Although commercial parties still consider confidentiality as one of the main inherent element of arbitration, recent criticism concern also the lack of transparency and the secrecy of the award and the arbitration process. Nevertheless, the most arbitration awards remain unpublished.[32]

Moreover, the question of arbitrability of intellectual property disputes may also deserves attention, as here legal protection is granted by a sovereign power through registration. Therefore often the existence and validity of registered intellectual property rights are not considered to be arbitrable.[33] Normally, though, disputes concerning the exercise of such rights without having direct effect on third parties, and rights which exist independently of registration such as copyright may be referred to arbitration. However, attention must be paid to the national courts' view on arbitrability of the artists' moral rights in certain jurisdictions.[34]

Finally, important concern is that arbitration is becoming too expensive and time-consuming. Concerning art related disputes, it is still a significant factor when parties decide to arbitrate.

[31] Quentin Bryne-Sutton, "Arbitration and Mediation in Art-Related Disputes" Arbitration International , vol. 14, No.4, LCIA 1998

[32] In WIPO Arbitration Rules it detailed in art. 76-78 which aspects of arbitration shall remain confidential. According to the SIAC New rules 28.10 the award will be published with the name of the parties and other identifiable information redacted.

[33] For example in the European Union, see: Regulation (EU) 1215/2012 Article 24 (4) which confers exclusive jurisdiction on certain national courts in relation to the registration and validity of patents and trademarks.

[34] See disputes concerning the ownership or authenticity of a literary, artistic or scientific work because of the alleged inalienability of the relevant right.