

The Art of Mediation and Mediation in Art Disputes

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The term "**art disputes**" encompasses a broad range of disputes in the area of art and cultural heritage. They may relate to copyright and moral rights, chain of title, restitution, acquisition, donation, loan and deposit, insurance of art works, art as collateral in financing transactions, art fairs, digitalization, misappropriation of traditional cultural expressions, and several other issues concerning cultural objects or rights.

For example, disputes may arise between:

- a museum and a researcher over the reproduction of a work from the museum's collection;
- an auction house and the seller of a work of art over its authenticity; or
- an indigenous community and a museum over the digital reproduction of confidential traditional ceremonial songs.

See more case examples at www.wipo.int

Art disputes distinguish themselves not only by their highly specific subject matter but also other features. Parties may be both public and private, including but not limited to states, museums, indigenous communities, and – last but not least – artists or other individuals. In many cases multiple stakeholders from different countries (and cultural backgrounds) are involved.

Legal and non-legal issues may be intertwined. Court claims can be very expensive and time-consuming, generate harmful publicity and, in the end, satisfy none of the parties. Even worse, their outcomes may be simply ignored by third parties. For example, where the question of authenticity is at stake, the market often must not accept a court's finding that a work is genuine or fake.

Mediation and other ADR methods can help greatly in avoiding such shortcomings, as they allow the parties to tackle sensitive non-legal issues, generally irrelevant for court. In mediation, all the intricacies of an art dispute may be addressed. Diverse issues of emotional, commercial, cultural, ethical, political, historical, moral, religious, or spiritual nature, as well as customary laws and protocols, may be taken into consideration. Hence mediating such cases may be challenging. A mediator will need to act sensitively, with the sharpest sense of observation and intuition, genuinely as an artist in his own discipline.

The use of ADR for art disputes has attracted growing attention, partly due to the increase in volume of art law claims and inefficiencies of state court proceedings. Therefore, there have been several examples of successful mediations, such as:

- the dispute over the Canon Tables of the Zeyt'un Gospels between the Western Prelacy of the Armenian Apostolic Church of America and the J. Paul Getty Museum in California (the parties reached a settlement in 2015);
- the disputes resulting from the Momart Warehouse Fire, where a warehouse owned by Momart burned down in 2004 causing the destruction of a number of contemporary artworks by renowned British artists of an estimated value of £ 40 million; or
- the case between the Tasmanian Aboriginal Centre and Natural History Museum in London, and many others (including ones that were confidential).

Other recent broadly commented cases included the conflict over the rights to Henri Matisse's "Portrait of Greta Moll" exhibited in the National Gallery in London or the dispute between Russian art collector Dmitry Rybolovlev and Swiss art dealer Yves Bouvier (see Stephan den Hartog's post at [kluwerarbitrationblog](http://kluwerarbitrationblog.com)).

A number of international organizations have been promoting the use of ADR in art-law disputes. For example, the World Intellectual Property Organization (WIPO) and the International Council of Museums (ICOM) have established a not-for-profit mediation service — the WIPO-ICOM Art & Cultural Heritage Mediation project. It is based on the WIPO-ICOM Mediation Rules which refer to ICOM's Code of Ethics for Museums. The parties can choose an impartial art-expert mediator from WIPO's lists.

UNESCO also offers a mediation service. The key focus of this program is the return of looted cultural property to its country of origin or its restitution in case of illicit appropriation. The states, parties or not to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, may utilise for appropriate intervention the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, created in 1978. The current version of the mediation rules was enacted in 2010. The pool of mediators includes experts designated by UNESCO Member States.

Other initiatives are undertaken also by arbitration and mediation institutions. For example, in 2015, the Milan Chamber of Arbitration (CAM) created ADR Arte — a project aimed at solving art disputes through mediation. Between 2015 and 2017, ADR Arte handled 32 art mediations involving a broad spectrum of issues, with a high rate of effectiveness. Whenever the parties made the choice to continue with the mediation process after the first session, over three-quarters then went on to reach a final agreement.

Other institutions such as the Art-Law Centre of the University of Geneva have undertaken research projects dedicated to ADR in art disputes. The studies started in 2010 and led to the creation of the digital platform ArtThemis, a detailed public database of information about art-law dispute resolution, focusing on disputes settled through ADR.

Since June 2018, the group of ADR providers specializing in art disputes has had a new member. The Court of Arbitration for Art (CAFA) is a joint initiative of the Netherlands Arbitration Institute and The Hague-based not-for-profit group Authentication in Art (AIA). It has been launched on 7 June 2018 to resolve disputes in the art community through ADR. The cases will be administered by the NAI.

CAFA is now creating its lists of arbitrators and mediators. To be selected as CAFA mediators, candidates must be current or former judges, law professors, or lawyers in private practice and have at least five years' experience in dealing with authenticity; chains of title of art or cultural property; the purchase and sale of art through private sale or auction; art copyright; the insurance of art or cultural property; museum exhibition and loan agreements; the UNESCO; taxation, trusts, estate and succession; or import and export regulations. Those with five years' experience of international arbitration will also be considered. The selection criteria may appear demanding but do not forget that *every artist was first an amateur!* All applications will be reviewed by a selection committee consisting of academics and former judges who have gained particular experience in art law. The selection committee will propose candidates for placement into the mediator pools to CAFA.

Big-ticket international disputes over art and cultural property are becoming more common. No doubt we will see the increasing use of mediation and arbitration in this field in the future.