‘AGREEING ON HOW TO DISAGREE’: ARBITRATION AND OTHER ALTERNATIVE RESOLUTION METHODS FOR ART AND CULTURAL DISPUTES

By: Noor Kadhim

"[We need] a process, a way to resolve these complicated situations in a non-confrontational, non-emotionally charged way." - Glenn Lowry[1]

Caravaqqio - The Cardsharps, Kimbell Art Museum, Fort Worth, painted circa 1594

INTRODUCTION

The economics of art resides in a world of murky waters and mysterious boundaries, where conspiratorial smiles and concealed handshakes hide a multitude of opaque and often interconnected transactions. By contrast, the legal world is supposed to represent the face of justice and transparency, the embodiment of the objective distinction between what is patently right and wrong. For these reasons, the two worlds may be said to mix like oil and water. But will this be for much longer?

In the last issue of this publication, the present author wrote about the importance of having adequate protection in contracts guarding against future title claims against purchased artwork. However, during the opening of the 55th International Venice Biennale this year, a collector pointed out that this is all very well. But what happens when things go wrong? I have bought fake works from a gallery. How can I get my money back? The collector had a point. It is one thing to dispose of a right, and another to enforce it. And litigation in the art world leaves as bad a taste in the mouth as cheap wine at a gallery opening. So when the possibility of resolving the dispute outside the courts was mentioned, the gentleman's colour changed. I'm listening, he said.

PART ONE: FORMS OF ALTERNATIVE DISPUTE RESOLUTION

Art-related disputes are on the rise. This is due in part to increased title and provenance research, which has propelled restitution and other claims that have become the bugbear of museums, collectors and auction houses in recent years. High-profile cases include the Knoedler Gallery in New York, which closed in 2011 after 165 years in business, after facing a spate of legal actions disputing authenticity. The gallery sold scores of counterfeit Abstract Expressionist works attributed to artists including de Kooning, Rothko and Pollock. The Warhol Foundation recently dissolved its authentication board, shaken by a lengthy legal battle that eventually settled[2]. Lawsuits also abound on issues such as artists' resale rights[3], and the unauthorised reproduction of traditional images[4]. Moreover, let us not forget the Fine Art Auction (Miami), which incited the fury of London's Wood Green residents over a Banksy mural that FAA had intended to auction online. The mural was purported to have been gifted to the North London borough by the elusive street artist. It was alleged to have been stolen some time before it resurfaced[5]. Finally, indigenous communities have become more active in seeking to repatriate looted artefacts[6]. Within the field of dispute resolution, as in the art industry, there are many layers. These include alternative channels of dispute resolution (ADR) that do not involve sweating it out in a court room in the company of stern, wig-wearing lawyers. In this article, different forms of ADR will briefly be discussed, with a focus on commercial arbitration[7], which can prove the most effective of these forms.

NEGOTIATION

"Let us never negotiate out of fear. But let us never fear to negotiate."
John F. Kennedy.

Before resorting to the courts or to arbitration, parties could try to settle their differences amicably. One might think this is too obvious to require enunciation. However, if the obligation to negotiate is to be taken seriously, it should be formally expressed, and a time limit imposed. That way, a moral duty is placed on the parties to try to work it out. The Metropolitan Museum of Art, New York, the Boston Museum of Fine Arts, and the Getty Museum in 2007 reached an amicable settlement in relation to restitution of works based on the duty to negotiate that was contained in their agreements.

MEDIATION AND CONCILIATION

"Conflict is inevitable, but combat is optional."
Max Lucade.

Sometimes the parties are so entrenched and emotionally charged, however, that negotiation does not work and an objective third party's intervention becomes necessary. Mediation or conciliation may provide a quicker, cheaper, and less didactic way out of an uncomfortable predicament than a court action. The difference between the two is that a conciliator makes a recommendation to the parties, which they can accept or ignore, while a mediator facilitates resolution between the parties on their own terms. According to the World Intellectual Property Organization (WIPO), 67% of cases going to mediation settle, compared to 40% of arbitrations. The difference is perhaps due to the fact that parties going into mediation are more inclined to reach a mutually acceptable solution than to wage war[8]. Moreover, often these forms of ADR provide the only avenues for redress where there is no legal basis for a court or arbitration action. For instance, if the prescribed limitation period for bringing a claim has expired, or where instead of the typical judicial 'black or white' result, a more creative solution is required. The 2006 settlement reached between the Swiss cantons of Zurich and St Gall, which concerned a dispute over the ownership of 35 cultural manuscripts looted during an 18th century regional war, is a well-known example of such a creative solution. Under

mediation. St Gall accepted Zurich's ownership, which, in return, recognised the relevance of the objects for St Gall's cultural identity and agreed on an unpaid and indefinite loan of the items to St Gall. However, these forms of ADR sometimes delay and frustrate the parties' inevitable course to the courts. Where two sides are at extreme loggerheads, forcing them to talk it out is like waving a white flag in the path of two charging bulls. The key issue is that people should not be tied into a mediation or conciliation they wish to abandon at the outset or during the course of a dispute. ADR being based on consensus, once the consensus breaks down, the process becomes costly, wasteful, and drawn-out.

ARBITRATION

"Thoughts speculative their unsure hopes relate. /But certain issue strokes must arbitrate. /Towards which advance the war." Siward, from Macbeth (the Scottish Play), William Shakespeare.

The 'Venice collector' owned a gallery and was sensitive to maintaining good relations with his peers and clients. He claimed to have purchased artworks whose authenticity he now questioned from another gallery. He was angry and wanted to make a point of principle. Given the gentleman's position, arbitration seemed more of a viable option. Arbitration is often misleadingly categorised with mediation and conciliation under the umbrella of ADR. However, it should be considered distinctly. This is because unlike the former, which are not final and binding in the judicial sense, an arbitration decision is. If the process is consented to and managed properly, arbitration can avoid the frills of a showy, expensive, public court trial presided over by judges not necessarily familiar with art and heritage disputes. In arbitration, the parties can choose which law governs the procedural aspects, known as the 'seat', of the arbitration. The seat should not be confused with the governing law of the contract. The laws of the 'seat' of the arbitration (the *'lex loci arbitri'*) govern the extent to which assistance from the courts can be sought at the place of arbitration, and retain supervisory control over the arbitration proceedings, while the law of the underlying contract governs the facts, or merits, of the case. Unlike in litigation, parties also have a say in which arbitrators shall hear the dispute, and the institutional rules that should apply[9]. They also jointly control the timetable of the proceedings, how much document disclosure should happen, and the extent to which the parties must keep the proceedings confidential. This better serves the interests of the small reputation-conscious art community. Since consensus is the raison d'être of ADR, there should be a clear and irrevocable agreement between the parties to arbitrate. One of the problems that arbitration clauses are yet to address completely is the existence of third parties who may interject later with an interest or claim, but who cannot be deemed to have 'agreed' to arbitration. However, this discussion is limited to parties whose identities are known at the time of the dispute. One of the major restitution cases to have been settled by arbitration concerned Maria Altmann's bid to recover six Gustav Klimt paintings formerly owned by her wealthy uncle, Ferdinand Bloch-Bauer[10]. Having first been confiscated by the Nazis, some of the paintings were claimed by Altmann to have been wrongly transferred to the Austrian State Gallery in Vienna. Four years of litigation in the United States ensued, but a decision on the merits was not reached because the Austrian government could not face the prolonged and costly court proceedings that loomed ahead, having lost on the sovereign immunity claim in the US courts. Eventually, the parties agreed to arbitration in Austria and a three-member arbitration tribunal decided in favour of Altmann to return five of the paintings in 2006. In that case, considerable time and expense had already been wasted in the courts prior to the arbitration, and the wrangle had become quite public. It was a Pyrrhic victory for Maria Altmann, who had to sell the paintings in order to pay for the extortionate costs of the litigation. In any event, prospective litigants should have deep pockets and a fierce appetite, even for arbitration. It is no longer the case, as some believed in the 1990s[11], that arbitration is cheaper than litigation[12].

PART TWO: ADVANTAGES OF ARBITRATION OVER LITIGATION IN ART AND CULTURAL DISPUTES

Arbitration is often more suited to art disputes for a variety of reasons. This part of the discussion focuses on three major advantages of arbitration over litigation, being: the ability to maintain confidentiality; the international nature of arbitration and the existence of choice and flexibility; and the relative facility of enforcement of arbitration awards compared to foreign court judgments.

CONFIDENTIALITY

Unlike court proceedings whose details are usually public, arbitration institutions and tribunals must keep the existence and details of arbitrations confidential. However, to what extent the parties themselves are obliged to maintain secrecy depends on what they contractually agree. Art world disputes are particularly sensitive and prone to secrecy. Norman Palmer has stated that, 'the art world places much reliance on confidentiality, on close personal relations, and a corpus of grey letter law: ethics, guidelines, conventions and codes rather than legal rules. (There is)... a vulnerability to political change, a pre-occupation with scholarship, and (perhaps) a desire to be seen to act elegantly or fashionably as well as honourably[13].' Relationships can be better preserved, and there is more flexibility and control, within the context of a private arbitration than a litigation that may be splashed all over the press and which may negatively affect the value of an artwork. One would hesitate before buying a Pollock whose authenticity has been publicly questioned, for example, than one that is blemish-free.

There is another reason for valuing confidentiality and closeness. It has something to do with that inconsolable feeling one has when the beautiful painting one is accustomed to gazing at every day is prised away. The intrinsically non-commercial quality of an artwork engenders an emotional attachment between the item and its possessor that is independent of its detached economic value. The idiosyncrasy of this dual relationship is something that arbitration can cater for more adequately than the courts, within its framework of privacy, adaptability, and relative commercial autonomy.

INTERNATIONALITY AND CHOICE

Some art disputes are particularly suited to arbitration because of their international dimensions, involving parties in different jurisdictions and the

1. Anne Laure Bandle, Raphael Contel, Marc-AndreŞRenold, "Case Ancient Manuscripts and Globe - Saint-Gall and Zurich," Platform ArThemis (http---unige.ch-art-adr), Art-Law Centre, University of Geneva
2. Jackson Pollock - Untitled - A fraudulent work purportedly sold by Knoedler Gallery, New York

interaction of different foreign laws. Pierre Legrand, a leading scholar of comparative law[14], opines that lawyers in each culture possess a 'collective mental programme' (a 'mentalite') that contains 'a certain range of accepted interrogations and paths of reasoning, characteristic themes, paradigmatic assumptions and received frames of reference' making up the deep structures of legal rationality[15]. Given that the mentalite of every state must influence the reasoning of its judical profession on a collective and an individual plane, and on a conscious and subconscious level, any judicial decision, he concludes, 'partakes in these institutionally reinforced social practices and discursive modalities, which are acquired by the members of a community through social interaction and experienced by them as generalised tendencies and educated expectations congruent with their conception of justice[16].' Logistically, and from the perspectives of culture and of enforcement[17], the ability to influence the composition of the arbitration panel and the seat of the arbitration is important even if the governing law of the contract is different. In this way, parties can minimise the risk of an unpredictable outcome based, in whole or in part, on the mentalite or 'attitudes' of foreign legal systems, their lawyers and judges.

One cannot eradicate the risk of contradictory outcomes, however, not least because legislation on art law itself is not harmonised. However, each case should be taken on its own merits and this is where the selective qualities of arbitration can help. For example, the status of someone who acquires a painting in good faith varies greatly depending on whether one is subject to New York laws, where the rights of the true owner of a work prevail over third party rights, or French law, where the position of a buyer in good faith is much stronger. An innocent purchaser who has bought a stolen Vermeer from an auction house is likely to want to appoint arbitrators who are predisposed towards the concept of good faith, whereas the auction house will seek the opposite. Expertise is also an important issue in art and cultural disputes. As Daniel Shapiro has noted, 'given the lack of experience of judges and juries in art matters, the arcane nature of art and the art market, and the difficulties often inherent in explaining art-related disputes, the outcome of art litigation is highly unpredictable, which should create hesitancy in bringing a lawsuit[18].' However, the aspect of expertise and the number of adjudicators required are features that the parties have more control over in arbitration. It is possible to select a tribunal composed of arbitrators familiar with art and heritage disputes, such as those recommended by the WIPO. The WIPO works with other organizations such as the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) and the International Council of Museums (ICOM). The WIPO Center is adapted for the resolution of cross-cultural disputes, maintaining a list of mediators, arbitrators and experts[19] with arts-related experience[20].

ENFORCEMENT

To add to the advantages mentioned above, the enforcement of an arbitration award in states that have ratified the New York Convention of 1958[21] should theoretically and generally be easier than that of a foreign court judgment. This is because a uniform set of rules exists under that treaty containing limited instances where an award can be refused recognition or enforcement by the courts of its signatory states[22]. On the other hand, foreign judgments are subject to the vagaries of each state's legal system and its process for recognition of such decisions, and unless a bilateral treaty is in force, the path to enforcement may be littered with obstacles. However, promoters of litigation point to the ability to rely on precedent in court cases, unlike in arbitrations where there is no such option. Despite the unavailability of precedent, remedies available in arbitration are flexible and diverse. Amounts in dispute in WIPO cases have varied from USD 20,000 to several hundred million USD, and awards range from damages, injunctions, and specific performance, to provision of security, restitution, or formation of new contracts. Additionally, innovative solutions can be sought that are not as readily available in the courts, such as the splitting of title and possession by arranging a long-term or indefinite loan, such as in the St Gall/Zurich example.

CAVEAT EMPTOR...

Arbitration clauses in a contract can be complex, and for good reason. The fewer the provisions you have in the contract to deal with the anticipated problems that may arise, the greater the delay, effort, and cost. There is a risk, however, of over-egging the pudding, so a careful balance should be struck. A badly drafted arbitration clause that casts doubt on the parties' agreement to arbitrate, or which contains conflicting provisions or omissions, may delay proceedings[23]. The eminent Lord Denning put it thus in the case of Lovelok v Exportles[24]. 'The first part of this arbitration clause would send 'Any dispute and/or claim' to arbitration in England. The second part would send 'Any other dispute' to arbitration in Russia. It is beyond the wit of man - or at any rate beyond my wit - to say which dispute comes within which part of the clause.' Challenges also frequently arise during or at the conclusion of the proceedings, post-delivery of the award, brought by the weak or losing party/parties. The tribunal's jurisdiction, or the validity of the award, or any manner of issues may be questioned.

CONCLUSION

Art and cultural heritage disputes are in a category of their own because there are so many subtle issues at play. The hidden identities of the parties and their relationships, the emotional attachment to, and subjective value of, the artworks, and often their historical and cultural significance, make situations of conflict extremely delicate. The dispute resolution mechanism itself ends up playing an invisible role behind the curtains of a theatrical production in which faces are concealed and tongues speak a foreign language that is not accessible to everyone. So where relationships need to be conserved in art disputes of moderate-to-high value, where expertise and control are sought and there is an international dimension, and where privacy is a necessity rather than a luxury, ADR may well provide the best solution, as long as there is consent, consistency, and clarity. The parties must agree, firstly, on the decision to adopt ADR method(s) and, secondly, on the scope of the ADR. If proper advice is sought and it is carried out well, ADR may lead to a more efficient and practical resolution of an art-related dispute than battling it out in the courts.

ABOUT THE WRITER

Noor is an English-qualified lawyer who lives in London, specialising in international commercial litigation, international arbitration, and art law issues. As a partner in the international arts and legal consultancy "Matters Creative" she advises private clients and those involved in the creative industries (ranging from artists, musicians, gallerists, and collectors, to museums, educational/arts institutions and financial organisations) on the commercial and legal aspects of their transactions. Noor speaks English, Arabic, and French fluently, and has had experience working as a lawyer in Britain, the UAE and France. Noor also founded INtheFRAME (www.intheframe.org) under whose auspices she curates exhibitions, writes articles and promotes/deals with Iraqi and Middle Eastern contemporary art. She may be contacted at noor@intheframe.org (for Middle Eastern arts-related matters) or noor@matterscreative.com (for general commercial and legal matters).

End Notes

1. Director of the Museum of Modern Art, New York, in Mosk, the Lawyer and Commercial Arbitration: The Modern Law, 39 A.B.A.J., 193-6, 256-8, March 1953, and 58 Corn. L.J. 63 (1953).
2. The Andy Warhol Foundation For The Visual Arts, Inc., The Andy Warhol Art Authentication Board, Inc., Vincent Fremont And Vincent Fremont Enterprises V. Philadelphia Indemnity Insurance Company (New York Supreme Court; 2012)
3. In October 2011, for example, a proposed class of artists filed three federal lawsuits against auction houses Christie's, Inc., and Sotheby's, Inc., and internet auctioneer eBay, Inc., alleging that the defendants sold their artwork at California auctions and on behalf of California sellers, but failed to withhold royalties due.
4. Cf the now famous case of Cariou v. Prince, 11-1197-cv (2d Cir. April 25, 2013), where the Second Circuit Court found in favour of the defendant, Prince, on appeal, holding that the appropriation by Prince of Cariou's images, when the original and secondary works were viewed side-by-side, amounted to Prince's works being sufficiently transformative in aesthetics, size, and expression to qualify for the 'fair use' exception in US Copyright law, which is fairly wide.
5. It was eventually claimed back with the help of the Arts Council, only to be later sold in an auction in Britain.
6. See this author's article on Iraq's Looted Heritage, in Ibraaz Platform 6 (www.ibraaz.org).
7. There are two forms of arbitration: (international or domestic) commercial arbitration, and investment treaty arbitration (between individuals and states). This article shall discuss only the former type. One should not rule out the possibility of bringing a treaty claim for restitution of heritage, for example, where a treaty exists. Since the issue is complex, it is outside the scope of this article.
8. See above discussion of mediation and conciliation.
9. The International Commercial Court (ICC) and the London Court of International Arbitration (LCIA) are the most common.
10. Republic of Austria v. Altmann, 541 U.S. 677 (2004)
11. American Law Institute, Legal Problems of Museum Administration 273 (1994).
12. The parties will need to cover the expenses of the trial (such as rent of the venue, catering, printing and other costs), and the fees of the arbitrators, which can be expensive. Paying for a sole arbitrator will be less expensive than for a three-person tribunal, logically. The institution that is used, if one is used, will have also have a bearing on the fees; the ICC operates a sliding scale of costs where the fees paid will be a proportion of the amount in dispute, capped at an amount. However, for LCIA arbitrations, the LCIA Court determines the fees based on various issues that include the complexity of the dispute. The fees cannot therefore be predicted with accuracy, and will depend on each case.
13. Norman Palmer, Litigation: the Best Remedy?, in Resolution of Cultural Property Disputes: Papers Emanating from the Seventh PCA International Law Seminar 290 (2004).
14. Professor of Law and director of Postgraduate Comparative Legal Studies, Universite Pantheon-Sorbonne; University Professor, University of San diego Law School; Senior Fellow, University of Melbourne School of Law; distinguished Visitor, Faculty of Law, University of Toronto.
15. Pierre Legrand, Comparative Legal Studies and the Matter of Authenticity, page 435
16. Ibid.
17. See below.
18. Daniel Shapiro, Litigation and Art-related Disputes, in Resolution Methods for Art-related Disputes 22 (1999)
19. The possibility of including an expert determination clause, enabling an expert to decide an issue before the matter goes to arbitration or litigation, also exists. Indeed, there are qualified experts in this regard for arts disputes, and this may be especially useful where the facts of the case are undisputed and where the parties both reside in England and Wales, where the expert's decision may be upheld by the courts. However, as an expert's determination may not be readily enforceable by courts in other jurisdictions, disputes that arise out of some international contracts may be better resolved by another method of dispute resolution such as arbitration.
20. Particularly cautious parties may go as far as to include in their arbitration agreement the requirement that the arbitrators are to have specific art or culture-focused qualifications.
21. The New York Convention on the International Recognition and Enforcement of Arbitration Awards (1958)
22. That being, there are certain jurisdictions where the 'public policy' exception under the New York Convention is interpreted widely by a state, allowing it to thwart the enforcement of an award that would otherwise be valid in other, less opaquely or less strictly governed jurisdictions, where court judgments are publicly recorded. Saudi Arabia is notorious amongst these, with no formal evidence (to date) of having ratified an arbitration award under the New York Convention, although anecdotal evidence of the same exists.
23. See further, Ernest Legier, AAA Vice President, ADR Benefits Advocacy Effective Drafting of Arbitration Clauses, Address before Tulane Advanced American Arbitration Law Seminar (Spring 2010).
24. (1968) 1 Lloyd's Rep 163.