

The art of the deal

A new institution should add to the allure of using ADR in fine art disputes, says Liam Guidera FCI Arb

In October 2018, the world was reminded again of the vagaries of the international art world when Sotheby's auctioned street-artist Banksy's iconic *Girl with Balloon*. Readers may remember that moments after the hammer came down at £1.04 million, the work was partially shredded by a machine hidden in its frame and activated by a person in the auction room.

Somewhat remarkably, the purchaser decided to proceed and the work was then officially entitled *Love is in the Bin*. Alex Branczik, Sotheby's Head of Contemporary Art, said afterwards that: "Banksy didn't destroy an artwork in the auction, he created one."

We can only imagine, had the transaction not proceeded, what a court of law might have made of the issue using the standard legal principles of fundamental breach of contract, misrepresentation and the right to rescind. The controversy highlights yet again how many art-law issues are unsuited – for a variety of reasons – to be resolved through orthodox litigation.

Art law and cultural property disputes include all aspects of law dealing with the creation, exhibition, reproduction, sale, purchase and inheritance of works of art and other cultural objects. This can involve private and public international law, intellectual property law, contract law, the torts of detinue and conversion, and tax law.

In addition, these disputes can raise issues of a hugely sensitive and complex nature, extending far beyond the underlying legal principles involved. Cultural, political, historical, ethical, spiritual and racial considerations often come into play. Meanwhile, in matters involving international transactions, sometimes involving sovereign states,

very difficult issues of jurisdiction may need to be resolved before the dispute can ever be aired in court.

THE PROBLEM OF PROVENANCE

Issues related to provenance and authentication perhaps best highlight the unsuitability of courts in finding resolutions for fine art disputes. German art historian Wilhelm von Bode famously said: "Rembrandt painted 700 pictures; of these 3,000 are in existence." With this cautionary thought in mind, it's clear that the establishment of provenance is of great importance in proving authenticity, but is not in itself determinative. Questions of authenticity are typically proved through calling expert evidence, yet even the courts have acknowledged that it is the art market not the courts that is best placed to resolve such matters.

The principal reason for this is that a court can only weigh the evidence presented to it on the usual balance of probabilities. It should not be the role of the court to actually authenticate art. This has been highlighted in cases where even the alleged artist has disavowed a work, despite evidence as to provenance that suggested it is probable the artist did create the piece. Forensic science may, of course, also play a role in providing techniques for dating works, analysis of paint pigmentation and so forth. But, ultimately, the market could for whatever reason reject a court's verdict and refuse to accept the legitimacy or value of the artwork involved.

CUE CAFA

With all of this in mind, the use of ADR in cultural property disputes has gained momentum over recent years. Such is its perceived usefulness that the World Intellectual Property Organization and the International Council of Museums have created a not-for-profit mediation service based on a published set of rules. These incorporate a reference to a specific code of ethics for museums. UNESCO also offers its member states a mediation and conciliation service through its Intergovernmental Committee for

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Banksy
Love is in the Bin, 2018

Sotheby's

Promoting the Return of Cultural Property. In 2015 the Milan Chamber of Arbitration created ADR Arte, another mediation-focused service.

More recently, a group of lawyers with a particular interest in the field of art approached the Netherlands Arbitration Institute (NAI) with a view to sponsoring a specialised art tribunal. As a result, in June 2018 a new Court of Arbitration for Art (CAfA) opened in the Netherlands. This forum, a collaboration between NAI and Authentication in Art (AiA), will use both arbitration and mediation to solve art-related conflicts throughout the world.

The unexpected transformation of Banksy's Girl with Balloon immediately after it was sold for more than £1 million could have led to a complex dispute

CAfA has developed a number of individualised techniques to allow it to conduct its work. Some examples include:

- The appointment of a technical process advisor who acts as a 'gatekeeper', allowing the parties to create suitable discovery processes;
- The creation of pools of expert witnesses, including forensic scientists and provenance researchers, who are identified as the only experts capable of testifying on such issues;
- The opportunity to test expert testimony and for parties to engage their own experts;

- The provision of mediation by practitioners with a background in art law.

The new court is based in The Hague but proceedings can be held anywhere in the world, which should appeal to such an international industry. According to press reports, the AiA will provide support in examining evidence of attribution and also determining trails of ownership. Once a case is decided, a written report will provide details of the reasoning and the work of art involved, but maintain the anonymity of the parties.

As CaFA founder William Charron told Observer.com: "In the art market, people prize their anonymity, but we were also concerned with ... creating a decision-making apparatus that the market is going to respect."

CaFA is now seeking applications from interested arbitration and mediation professionals, who will eventually make up its expert pool.

Tracey Emin (pictured) was among the artists who settled with Momart through mediation after a warehouse fire

CULTURE CLASHES: ADR IN ACTION

BRITART BURNS

When a warehouse owned by art storage company Momart caught fire in 2004, the result was the loss of work by some of Britain's most high-profile artists, including Damien Hirst and Tracey Emin. Following a class action suit on behalf of a group of artists, galleries and collectors, which alleged negligent conduct by Momart, settlement was reached by mediation, reportedly including payment amounting to tens of millions of pounds.

REMAINS REPATRIATED

A long-running dispute between the Tasmanian Aboriginal Centre and the British Natural History Museum was ended when parties reached an



agreement through mediation 20 years after the first claim. The compromise, which related to the return of a collection of Aboriginal remains, allowed for the possibility for the museum to control part of the material to conduct scientific tests.

KLIMT RETURNED

Seeking the return of six paintings by Gustav Klimt that were taken from her

relatives by the Nazis during the Second World War, Maria Altmann brought a suit against the Republic of Austria and the Austrian National Gallery. Following a seven-year campaign, involving litigation up to the US Supreme Court, the dispute was resolved through arbitration in Austria, with five of the works being returned to Ms Altmann.

PLAY YOUR PART IN CAFA

The Court of Arbitration for Art is accepting applications for placement in its arbitrator and mediator pools. Read the selection criteria at bit.ly/WI19_Art

MEDIATION MANDATE?

However, while CaFA represents a useful opportunity, I would suggest that, beyond arbitration and expert adjudication, mediation is a hugely appealing option. The uniquely attractive aspects of mediation include: **Control.** The parties determine the form of the process, which is dynamic and can be varied throughout.

A complex dispute may involve a number of attempts at mediation, which ultimately may determine some but not all of the matters in issue.

Flexibility. Rather than determining the technical legal rights and wrongs of the issue and applying the standard remedies dictated by law, the parties can determine their respective priorities. These could include, for instance, moral or ethical considerations.

Co-operative compromise. We all know that even arbitration can sunder long-standing commercial and other close relationships. It has always been an enormous advantage of mediation that it offers the parties the ability to negotiate an honourable compromise that helps to preserve these. This can be particularly important in the narrow confines of the art world in helping to maintain precious reputations. It can also be invaluable in the context of international relations, where sovereign states sometimes seek to recover works of art of cultural significance that have been exported many years before and are now housed in museums or universities of world renown.

Lower costs. Many people, particularly artists who become involved in art law disputes, do not have unlimited budgets and would struggle to fund lengthy and hard-fought litigation. If employed at an appropriate early stage, mediation should deliver huge savings for all parties.

Fewer challenges. Generally speaking, mediated settlements tend to be challenged less frequently than agreements reached through other means. This is because, typically, the parties have invested so much personally in the outcome that they consider the settlement as theirs and one that should not be lightly rejected.

Academic research and anecdotal evidence of practising mediators suggest typical success rates of more than 75%. This is a stellar result that represents massive savings for the parties, not only in financial terms but more importantly in preserving relations. Mediation, like art, is both creative and individualised. Similarly, the resolution of art disputes generally demands more than conventional litigation can offer – such disagreements truly lend themselves to alternative dispute resolution in all its forms.