
LITIGATION VS. ARBITRATION IN THE CONTEXT OF ART AND CULTURAL HERITAGE DISPUTES

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Introduction

Art justifies and extols our existence, but there is a paradox at its heart, for as Picasso famously said, “Art is a lie that helps us realize the truth.”¹ Nevertheless a lucrative but less noble kind of deceit is very familiar in this day and age – Fraud in Art. The rise in art transactions globally has led to a commensurable growth of art law as a field of expertise and a rise in cultural heritage and art disputes.

Understandably, disputes related to art are of diverse nature and may involve not only multifarious private parties with multiple interests such as artists, art collectors, auction houses and art dealers but also public parties such as museums, universities and states. Moreover, the nature of art law disputes can be both contractual and non-contractual.

This interdisciplinary nature means that disputes related to art and cultural heritage may include a host of various subject areas involving application of principles of copyright law, ownership issues, contractual obligations, accusations of misappropriation and potential theft, forgery. Thus, settling art and cultural heritage disputes is extremely challenging with the global expansion of art transactions wherein parties to the disputes hail from different countries with different jurisdictions and cultural backgrounds.

For instance, in 2015, The New York Times reported that Rybolovlev, a Russian billionaire and owner of one of the world’s most valuable art collections was involved in “what has become perhaps the largest feud in the art world today”² with Bouvier, a Swiss businessman, who acted as a sort of broker to assist the former in acquiring various pieces of art over the years. They have been battling in courtrooms all around the world with allegations that Bouvier fleeced around \$1 billion for multiple pieces of art.

¹ <https://www.forbes.com/quotes/7313/>

² <https://www.nytimes.com/2015/09/24/arts/design/the-billionaire-the-picassos-and-a-30-million-gift-to-shame-a-middleman.html>

Though there are instances wherein litigation would be absolutely appropriate, a lawsuit is not always the finest option. Most claimants are impeded from bringing an action to court due to its high expenses, lengthy proceedings, deterioration of relations and uncertain outcomes. Moreover, lawsuits may be rejected for want of jurisdiction or expiration of limitation period. Furthermore, in the case of a final binding decision upon two international parties, the winning party might be required to enforce the judgment in a foreign jurisdiction.

One way to minimize the flaws of traditional court litigation to tackle art and cultural heritage disputes is to consider arbitration as the resolution mechanism wherein parties can resolve a dispute in a single procedure that concerns different jurisdictions, thereby avoiding the complexity and expense of multi-jurisdictional litigation and the risk of inconsistent results. Moreover, it permits the parties to choose an arbitrator with expertise of the issues at stake and an understanding of the cultural background of the parties thereby enabling them to keep the proceedings confidential and preserve their reputation and professional relationships.

As art disputes often involve highly volatile religious, cultural or political issues, the parties may benefit more from creative remedies that are not necessarily available in litigation. Most of the major international arbitration providers - the International Chamber of Commerce, the International Centre for Dispute Resolution, the CPR Institute, the London Court of International Arbitration and JAMS have emergency arbitrator provisions in their default rules.

When it comes to providers, the World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center) and the Court of Arbitration for Art (CAfA)³ are the ones to consider specifically for art and cultural heritage disputes.

The WIPO Center is widely regarded as appropriate for disputes involving intellectual property. Besides administering art and cultural heritage disputes, the Center maintains a broad roster of highly qualified arbitrators who have demonstrated expertise in such disputes. Meanwhile the CAfA, a recent art law arbitration court in Hague, provides a venue to navigate the intricacies of art disputes has begun to officially accept cases on April 1, 2019 and is now open for dispute settlement.

³ <https://www.cafa.world/>

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one international treaty providing that CAfA decisions will be legally binding under international arbitration enforcement rules.

However, some parties are skeptical in relying arbitration over litigation in art and cultural heritage disputes for want of appeal process as the parties must abide with the arbitrator's decision irrespective of the fairness of the outcome. Nevertheless, considering the advantages arbitration affords, parties should be encouraged to consider this option more seriously lest their disputes become the latest public "feud in the art world."