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CONFIDENTIALITY IN ART-RELATED ADR: A NEED FOR CHANGE?

Olivia Huey

Art and cultural heritage disputes can involve a variety of subject matter and “sensitive non-legal issues of a commercial, cultural, ethical, historical, moral, religious, or spiritual nature,¹ while more often than not having a distinct international character.² For such complex matters, there has long been conversations about the benefits of using ADR mechanisms instead of traditional litigation to address the issues that are highly relevant and important to the parties, but which courts are often not equipped or designed to address.³ Art-related disputes often involve not only a variety of private parties such as artists and art dealers but also public and semi-public parties such as museums, indigenous communities, and states, all across the globe.⁴ ADR mechanisms can provide flexible and confidential forums to support creative solutions that are sustainable, interest-based, and go beyond monetary relief such as compensatory provision of art works and long-term loans.⁵ Moreover, ADR mechanisms help preserve the existing relationships between the parties, the continuation of which is often critical in resolving art-related disputes.⁶

¹ *WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage*, WIPO, <https://www.wipo.int/amc/en/center/specific-sectors/art/> [<https://perma.cc/FV4U-8RWA>] (last visited Nov. 9, 2022).

² Stephan den Hartog (AZHA Avocats), *The Use of Alternative Dispute Resolution in Art Related Disputes*, Kluwer Arbitration Blog (Oct. 23, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/> [<https://perma.cc/2NZG-NLKQ>].

³ Alice Trioschi (Camera Arbitrale di Milano), *Art-Related Disputes and ADR Methods: A Good Fit?*, Kluwer Arbitration Blog (Jul. 8, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/> [<https://perma.cc/HJK2-L39M>].

⁴ Hartog, *supra* note 2.

⁵ WIPO, *supra* note 1.

⁶ Maria Beatrice Deli & Veronica Proietti, *Art-Related Disputes and ADR Methods*, 17 *BRAZ. J. INT'L L.* 127 (2020), at 130.

One similarity between arbitration, mediation, or negotiation is confidentiality. Among art-related disputes resolved through ADR, text of most deals remain confidential,⁷ and cases are rarely publicized.⁸

Art-related disputes are as unique as the arts themselves. The ability to tailor solutions overshadows the drawback of missing out on the law-making and precedent aspect of traditional court proceedings.⁹ Nonetheless, this uniqueness and the lack of demand for precedent is why it would be beneficial to systematically preserve a public record of the parties' solutions, to inform non-repeat players of possible outcomes. Currently, such databases exist, but what's lacking is an incentive to systematically publicize the creative solutions, extending the parties' ADR outcomes even further.¹⁰

In the art world, many artists prefer to remain anonymous to protect the free and genuine nature of their art.¹¹ Opaqueness also provides protection from developing bad press or reputation that can affect an art's value and the party's future transactional prospects.¹² Yet even in this notoriously opaque market, where chief among its several rules is "an almost pathological level of

⁷ *Id.*, at 141.

⁸ *Id.*, at 146.

⁹ *See generally*, ARBITRATING CULTURAL PROPERTY DISPUTES, 13 Cardozo J. Conflict Resol. 477, at 521.

¹⁰ *See* ArThemis, (a fully searchable database with case notes about art-related disputes that settled through ADR methods as well as through traditional judicial proceedings). <https://plone.unige.ch/art-adr> [<https://perma.cc/9AU2-V9RC>] (last visited Nov. 12, 2022).

¹¹ Marina Azcarate, *Does Identity in Art Matter? The Case of the Anonymous Artist*, THE NEXT CARTEL (Aug. 15, 2022), <https://thenextcartel.com/discover/does-identity-in-art-matter-the-case-of-the-anonymous-artist/> [<https://perma.cc/AB35-TKA9>].

¹² *4 Big Art Market Trends That are Impacting the Art World*, ARTWORK ARCHIVE, <https://www.artworkarchive.com/blog/4-big-art-market-trends-that-are-impacting-the-art-world>, [<https://perma.cc/8PAW-T5FD>] (last visited Nov. 10, 2022).

discretion,”¹³ more transparency is being demanded. ¹⁴ It is time to demand more transparency in the legal proceedings as well.

¹³ M.H. Miller, *The Big Fake: Behind the Scenes of Knoedler Gallery's Downfall*, ARTnews (Apr. 25, 2016 9:30am) <https://www.artnews.com/art-news/artists/the-big-fake-behind-the-scenes-of-knoedler-gallery-s-downfall-6179/> [<https://perma.cc/8ZPS-7S9N>].

¹⁴ Tom Christopherson, *Art Law and the Art Market: Disclosure or Discretion?*, Sotheby's INSTITUTE OF ART, <https://www.sothebysinstitute.com/news-and-events/news/art-law-and-the-art-market-disclosure-or-discretion> [<https://perma.cc/4HKG-RWTA>] (last visited Nov. 9, 2022).