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The Use of Alternative Dispute Resolution in Art Related Disputes

Stephan den Hartog (AZHA Avocats) · Friday, October 23rd, 2015

In 2012, Russian art collector Dmitry Rybolovlev acquired a painting made by Amedeo Modigliani, an Italian artist whose work from the early 20th century is regularly sold for record prices, from art dealer Yves Bouvier for an amount of no less than US \$ 118 million. Two years later, Rybolovlev learned by chance that Bouvier originally acquired this piece of art for 'only' US \$ 93.5 million, US \$ 24.5 million under what Rybolovlev thought the market price of the *Modigliani* was. Rybolovlev has since then initiated a wide array of legal actions against Bouvier, who helped Rybolovlev amass his art collection, accusing the art dealer of pocketing millions in secret profits from multiple art sales to Rybolovlev. Bouvier has struck back by alleging that Rybolovlev has been unable to finance the purchase from Bouvier of a US \$ 140 million *Rothko*.

Instead of fighting their battle before both the international press and national courts in, *inter alia*, Monaco, Singapore, Hong Kong and France, Rybolovlev and Bouvier could have considered to resolve their dispute using methods of alternative dispute resolution (ADR). Even though this may not have contained the dispute between the two men completely, it is unlikely that the *New York Times* would in that case have referred to it as "*perhaps the largest feud in the art world today.*"

Unsurprisingly, art related disputes are diverse by nature and may involve a variety of private parties such as artists, auction houses, art collectors and dealers, but also (semi-) public parties as museums, indigenous communities and States. In addition, the nature of art law disputes can be both contractual (such as the obvious example of the sale of a piece of art) and non-contractual (concerning for instance the return of an unlawfully exported cultural object).

Nonetheless, there are undeniably certain common features of art law disputes that explain why the use of ADR can be warranted and may in fact often be more appropriate than traditional court litigation.

Art related disputes more often than not have a distinct international character, involving parties from different countries and different cultural backgrounds. As such, as the Rybolovlev-Bouvier dispute illustrates, disputes can give rise to actions in national courts of multiple jurisdictions. These actions will not only be costly and lengthy, but could also result in conflict of law issues and contradictory outcomes.

Through ADR, the parties can agree to resolve a dispute in a single procedure that concerns different jurisdictions, thereby avoiding the expense and complexity of multi-jurisdictional litigation and the risk of inconsistent results.

In addition, the resolution of an art related dispute may require specific legal and technical expertise, something that a national judge may not always have. ADR allows the parties to choose a mediator or an arbitrator with the necessary expertise of the issues at stake and an understanding of the cultural backgrounds of the parties.

ADR also allows parties to keep the proceedings and outcomes (at least to a large extent) confidential. Parties can preserve their reputation and professional relationships, something that is often key in the international art market. Moreover, known disputes about attribution and provenance of a certain piece of art will almost always have a negative impact on its value, whatever the outcome. Confidentiality allows the parties to focus on the merits of the dispute without concern of its public impact. It should be noted, however, that there may also be parties that crave for the publicity of a trial either for tactical reasons or out of principle, something that may very well be the case in the Rybolovlev-Bouvier dispute.

A final consideration, and one that is perhaps most relevant in the context of art related disputes, is that ADR provides parties with the unique opportunity to adopt mutually satisfactory solutions beyond the remedies that are traditionally available in national courts. Art disputes often involve not only legal, but also highly sensitive non-legal issues. Disputes can be religious, cultural or political in nature. The parties involved in such disputes may quite possibly benefit more from creative remedies that are not necessarily available in national courts, such as the recognition of the importance of a cultural object for the cultural identity of one of the parties or the restitution of a cultural object accompanied by cultural collaboration initiatives.

When parties opt to resolve their dispute by means of arbitration, the World Intellectual Property Organization (WIPO), a self-funding agency of the United Nations, provides neutral, non-profit dispute resolution options. The WIPO Arbitration and Mediation Center offers case administration services and provides for different ADR procedures, including mediation, arbitration and expert determination. The WIPO Arbitration Rules are particularly adapted to intellectual property related disputes and are generally regarded as appropriate for art related disputes. In addition, parties can draw upon an extensive list of independent and specialized arbitrators, mediators and experts, identified by the WIPO.

Finally, litigation in a national court may of course be entirely appropriate in certain circumstances. For example, a court judgment will be preferable if a party seeks to establish a public legal precedent in order to clarify its rights rather than an award that is limited to the relationship between the parties. Nonetheless, before rushing to a national court in the event of an art related dispute, there are good reasons for parties to at the very least explore the possibilities of ADR. As to the feud between Rybolovlev and Bouvier, both men will have to live with the fact that this dispute will be fought out before the public eye in courts all over the world. As rightfully noted by a New York art adviser, and as a reminder of the worst-case scenario for most professionals in the art world, *“a movie could be made out of it.”*


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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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