

A New Arbitral Institution for the Art World: The Court of Arbitration for Art

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A new court dedicated to resolving art-related disputes was launched earlier this month in The Hague. The Court of Arbitration for Art ("CAA") was founded by the Netherlands Arbitration Institute ("NAI") in collaboration with Authentication in Art ("AiA"), a not-for-profit foundation that promotes best practice in art, particularly in art authentication.

The CAA will administer arbitrations conducted by arbitrators with significant disputes, art and art law expertise and under arbitration rules ("AiA/NAI Court of Arbitration for Art Adjunct Arbitration Rules" (the "Adjunct Arbitration Rules")) that have been designed to accommodate common issues in art-related disputes, such as provenance issues.

Submission to CAA arbitration

Parties can agree to submit a dispute to arbitration administered by the CAA and/or under the Adjunct Arbitration Rules in a contractual arbitration clause or submission agreement. Where parties have incorporated these Rules, the NAI Arbitration Rules will apply as well, except where they are modified by the Adjunct Arbitration Rules (Point 2, Adjunct Arbitration Rules and Explanatory Note 3.2).

Historically, the art market was notorious for conducting business without any paperwork or with only an invoice or very informal agreement to document a transaction, without any dispute resolution provisions. Where that is still the case or where no contractual relationship exists at all, the CAA would only have jurisdiction if the parties agreed a submission agreement after a dispute has arisen. Increasingly, however, written contracts are put in place for art purchases, consignments, artist/gallery agreements, loan agreements and other art-related transactions. It might be that in the early years of the CAA the majority of disputes will be referred to the CAA by way of a submission agreement after a dispute has arisen, but as the CAA gains prominence it will be interesting to see if parties decide to incorporate the Adjunct Arbitration Rules into their contracts from the outset.

Key features of the Adjunct Arbitration Rules

Number of arbitrators

The default position is that there will be three arbitrators, unless the value of relief sought is less than €500,000 or the parties have agreed to a sole arbitrator (Point 5). This is the reverse of the position of most leading commercial arbitration rules, under which a sole arbitrator is appointed unless the circumstances of the case warrant the appointment of three arbitrators (see Article 9.1 of the SIAC Rules 2016, Article 5.8 of the LCIA Rules 2014 and Article 12.2 of the ICC Rules 2017).

AiA/NAI pool of arbitrators

The starting point is that arbitrators will be appointed from a “Pool” compiled by the AiA Board and the NAI composed of international lawyers with experience in litigating or advising clients in art law disputes and/or international arbitration (Point 4 and Explanatory Notes 2.1 and 5.1). If a party wants to deviate from that Pool and has compelling reasons to do so, the party must obtain the consent of the NAI administrator (in consultation with the AiA Board) after having disclosed the name of the arbitrator they want to appoint and the reasons for the deviation (Points 4 and 6 and Explanatory Note 5.1). The only example of a compelling reason the Rules provide is wanting an arbitrator with a very specific background and the absence of such an arbitrator in the Pool.

Given the default position under the Adjunct Arbitration Rules is that the parties’ choice of arbitrator is restricted to the Pool, the calibre of people in the Pool has to be good and they have to be available to progress the proceedings efficiently, in order that parties have confidence in the process. If the Pool compiled by the NAI and AiA contains high quality candidates, these provisions should add credibility to the decisions and provide comfort to parties that their dispute will be resolved by a panel with the specific legal and sectorial expertise required in art disputes, which a judge in court may not always have.

Experts in forensic science and provenance

The only admissible expert evidence on forensic science and provenance issues will be from an expert or experts appointed by the tribunal (and not by the parties), which overrides Article 28 of the NAI Arbitration Rules (Point 10 and Explanatory Notes 7.1 and 7.2). The tribunal must consult with the parties on the appointment of the expert and will establish the expert’s terms of reference after considering comments from the parties.

These experts may come from an “Expert Pool” of art historians, materials analysts, forensic scientists and provenance researchers compiled by the AiA Board, but relevant scholars of a particular artist may be approached on a case-by-case basis. The parties are able to appoint experts on other issues, but any such evidence must not compete with or supplement the tribunal-appointed expert’s evidence on forensic science or provenance (Point 10 and Explanatory Note 2.2).

This provision, inspired by inquisitorial systems of civil law jurisdictions under which the court is in charge of investigating the facts of the case, appears to stem from the concern that party-appointed experts may advocate for the party who appointed them, as opposed to being a neutral expert whose duty is to assist the tribunal. The Explanatory Notes to the Adjunct Arbitration Rules state that “*As an alternative to having disputing parties retain their own respective experts in these particular fields [provenance and forensic science], with such experts then advocating for their side, the AiA/NAI Rules shall offer the Expert Pool to provide the exclusive analysis and testimony on these subjects*”. Parties who are used to a more adversarial system may not like to seemingly cede control to the tribunal in this regard. What is clear is that this feature reinforces the significance of provenance and forensic science, given they can be prominent or decisive factors in disputes regarding ownership, authenticity

and value. In practice it will be interesting to see what proportion of disputes fall into forensic science and provenance categories, thereby leaving the expert evidence solely in the hands of the tribunal in those cases. As with the Pool of arbitrators, the parties' confidence in the process and whether decisions rendered under these Rules will command the respect of the art market will depend on the calibre and independence of the experts in the Pool.

Technical process advisor

If the case involves highly technical issues, for example in relation to an object's authenticity, the tribunal may appoint a "technical process advisor" from the Expert Pool in relation to pre-hearing evidence gathering and evidence exchange processes (Point 12 and Explanatory Note 8). This advisor will only be appointed with the parties' consent, the parties first having seen the tribunal's proposal setting out the intended role, scope of authority and advisory mandate of the advisor. The technical process advisor will act under the tribunal's direction but, if requested, may draft proposed procedural orders for adoption by the tribunal. The Rules underline that the tribunal retains ultimate decision-making responsibility on all matters.

These provisions appear to have taken on board the criticisms often levelled at the use of tribunal secretaries that the scope of their role can lack clarity and transparency.

Choice of law guidance

Another interesting feature of the Adjunct Arbitration Rules relates to the cross-border nature of art-related practices and the international bearing of certain works of art in terms of legal implications typically arising under more than one legal system. Point 13 of the Adjunct Arbitration Rules provides that *"An appropriate choice of law for the arbitral tribunal may be the law of the principal location of the seller, if known at the time of the transaction, or, if no sale is involved, of the owner of the object in question at the time of the commencement of the arbitration."* Point 13 supplements Article 42.2 of the NAI Arbitration Rules which, like other commercial arbitration rules, provides that the tribunal shall apply the law it considers appropriate in the absence of party choice. Point 13 appears to be intended to enhance certainty with respect to factors relevant to the determination of the applicable law by a tribunal in the absence of a party choice. This is an issue of significance in art disputes where it is not uncommon for controversies to be resolved without the benefit of a choice of law provision. Given the lack of constraint on tribunals under Point 13, whether this provision will actually render the arbitration process more efficient remains to be seen.

Publication of awards

As is the case with the NAI Arbitration Rules, awards may be published by the NAI and AiA although the parties' identities will not be revealed. One difference under the Adjunct Arbitration Rules is that they note that the name or identity of the art work in question may be revealed (Point 15). Publication of the name of the object may be desirable if a party wants vindication, for example in relation to provenance. In other cases, sometimes the fact that there has been a dispute at all about an art work may negatively affect its value in the future, so a party may want to consider objecting to publication.

Looking ahead

The CAA certainly offers many attractive features that have been carefully tailored for art-related disputes. If the arbitrators and experts selected are well regarded in the art market, the CAA could become a popular method for resolving disputes, particularly when coupled with the other advantages arbitration offers, such as confidentiality which remains attractive to many parties involved in art-related transactions as well as the ease of enforcement of awards in foreign jurisdictions, which is pertinent given the cross-border nature of many art disputes. As the prominence of the CAA grows, this could lead to more parties including dispute resolution clauses in their contracts to refer disputes to the CAA.

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