

Art and Arbitration: What Needs To Be Done To Improve The Security Of Art Sales And Transactions

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Having practising in the art law field since 2012, I have drawn the following observations from this experience:

1. litigation is not the most time-efficient and cost-efficient approach to adequately resolving disputes in the art sector;
2. the absence of secrecy in court proceedings is a major issue for the buy side of the art market, i.e. art collectors, art foundations and museums, deterring them from suing even bad players in the field and
3. law suits can drag on forever, especially if court-imposed mediation measures are taken, against the parties' will, or if a party appeals the first-degree judgment handed down by the courts.

Consequently, a better option than litigation is needed in the art sector, such as arbitration. However, there is a lack of effective arbitration services offered to stakeholders operating in this industry. What can be done about it, to increase the trustworthiness of this opaque yet dynamic market?

What users want to see in the art world, as far as alternative dispute resolution is concerned

Having advised many buyers of art works and artefacts, I witnessed their concern with the lack of proper, often any, terms and conditions (T&Cs) of sale, provided by dealers, when they made art purchases. While this unlawful practice is reprehensible in itself, in particular for sales made outside the dealers' premises (such as at art fairs or online via ecommerce), it becomes a major problem when a dispute arises out of a sale. However, such occurrence of a "deal gone wrong" happens on a regular basis in art sale transactions, because of provenance claims, hidden defects issues, lack of resemblance between the description of an art work set out in an auctioneer's catalogue and the real art work released to the buyer on delivery, or complete destruction of the art work during storage and/or transport to its new owner. If there are no T&Cs, or if they are badly drafted or incomplete, buyers cannot rely on them to find a way out of the dispute. Moreover, most arbitration bodies can only be instructed by the parties involved in an art sale, provided that an appropriate arbitration clause had firstly been set out in the T&Cs. Therefore, buyers want dealers and auction houses to

provide clear, well-drafted and exhaustive T&Cs, at the time of sale, which set out that any dispute between the parties will be settled under the rules of a clearly defined reputable art-specialised arbitration body, instead of court-led litigation.

Secondly, all good faith stakeholders in the art sector want impartial and seasoned arbitrators, with an inner knowledge of the workings of art transactions, to get involved in resolving disputes in the most time-efficient and cost-efficient manner. Hence, there is a need for reputable and established arbitration bodies in the art sector, which will support the parties in finding the right arbitrator and arbitration setup, in a systematic manner, while operating economies of scale to keep arbitration costs down.

Thirdly, given that time is of essence in these disputes, the arbitral award must be fully enforceable, in particular through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. As such, it is necessary to reach out to the competent court of the country in which the award is to be enforced, which in majority of cases, is usually the country where the art dealer or the auction house has its assets located.

Fourthly, and this is of particular importance to art buyers, as mentioned above, such enforceable arbitral award must remain confidential, as arbitration proceedings should be too.

What currently exists, as far as alternative dispute resolution is concerned, in the art world

The current state of play in the art world requires substantial improvement: as mentioned above, proper T&Cs must be implemented.

This is one of the reasons why regular art world scandals are making newspapers' headlines, while there is a lack of barriers to entry for dealers in the art market, and, consequently, many potential buyers - especially high net worth individuals - refuse to invest in this asset class and stay away. Whenever they take the plunge, they are often faced with disputes arising out of their purchases or sales, especially with art dealers and auction houses.

Finally, becoming aware that it is in their interest to add security to transactions being made in their industry, art dealers and auction houses should understand that arbitration services are a must-have service.

The following art arbitration bodies have therefore been set up, in the last twenty years.

Internationally, the World Intellectual Property Office (WIPO) Alternative Dispute Resolution for Art and Cultural Heritage service, located in Geneva, provides dispute resolution advice and case administration services to support parties in resolving disputes without the need for court litigation. However, the WIPO does not disclose any information about the number of disputes being looked at, and hopefully resolved, by its body on a yearly basis, even to neutrals who are on the arbitrators' and mediators' panel (like myself).

More recently, the Court of Arbitration for Art (CAfA) in the Netherlands was set up as a specialised arbitration and mediation tribunal exclusively dedicated to resolving art law disputes. CAfA is not fully operational yet and it will be interesting to watch what added value it can bring, compared to WIPO's similar services.

Aside from these two art-focused arbitration bodies, there are the usual arbitration institutions, such

as ICC, JAMS, l'Association Francaise d'Arbitrage (AFA) or the LCIA. However, these arbitration bodies do not have a particular art-sector expertise, and, arguably, few "art experts" arbitrators on their respective rosters of neutrals.

Having looked hard and wide for any precedents in art law arbitration, I came back empty-handed, not having found one mentioned in the public domain. It may well be that this is because a strong confidentiality undertaking has been imposed on all parties, and arbitrators involved. My hunch is that this is more due to the fact that arbitration is still unchartered territory, for the art sector and its stakeholders.

To conclude, and taking the standpoint of buyers of art works, the arbitration services on offer in the art sector seem to be either disconnected from the market, such as WIPO's ADR for Art and Cultural Heritage service. While CAfA may potentially be a viable alternative, it remains to be seen whether its ADR services will focus more on arbitration than on mediation, as inferred by its title. There is therefore much room for improvement, for arbitration services in the art sector. Dealers and auction houses should understand that it is in their best interest to pool together and finance adequate arbitration services for their respective clients, if they want the art market to exponentially grow and expand on the demand side.

Dealers and auction houses should also pull together and draft some template terms and conditions of sale and consignment, setting out some standard alternative dispute resolution clauses, which would become the golden standard in the art market. These streamlining and enhanced security efforts are common practice in other industries, such as the banking and finance sector which [Loan Market Association](#) and [International Swaps and Derivatives Association](#) provide plenty of standard commercial contracts, to trade in securities and capital market products within established practices.