Kluwer Arbitration Blog

Art-Related Disputes and ADR Methods: A Good Fit?

Alice Trioschi (Camera Arbitrale di Milano) · Sunday, July 8th, 2018

In the past few years, the discussion and research about the use of ADR methods in art & cultural heritage has increasingly grown. This is due partially to the rise of art related claims but also to the interest scholars and practitioners are showing to alternative and consensual ways of solving a conflict. Indeed, despite there are instances in which litigation in a national court would be entirely appropriate, such as when a legal precedent is sought (for common law systems) or a party is particularly uncooperative, a lawsuit is not always the best option.

Most claimants are detained from bringing an action to court due to its high expenses, long proceedings, the worsening of relations, the uncertainty of the outcome and the possible embarrassment of an adverse ruling. In addition, lawsuits are not always available: they might be rejected because of lack of jurisdiction or because their limitation period has expired. Furthermore, in the case of a final and binding decision upon two international parties, the winning one might need to ask the enforcement of the judgement in a foreign jurisdiction. The disadvantages the parties face when entering a lawsuit, pose the question of whether ADR methods such as mediation, arbitration and expert determination could be a better fit for art-related disputes. Which are the benefits of ADR in the art and cultural heritage sector?

Flexibility and creativity – Art-related disputes often involve sensitive non-legal issues that are relevant to the parties and are not normally addressed into court: emotional, moral, political and ethical matters. Therefore, ADR on art-conflicts could be considered a fertile ground for 'expanding the pie', meaning that a huge variety of interests can be taken into account to negotiate a mutual gain and a possible agreement between the actors. An example of a flexible and creative solution is the one reached in 2007 by the Tasmanian Aboriginal Centre (TAC) and the Natural History Museum (NHM) of London for the restitution of 17 human remains hold in the NHM's collection. After 20 years from the first restitution claim, the parties reached a mediation agreement respecting both their interests: the return of the remains to the TAC, with the possibility of the NHM to control part of the material to conduct non-invasive scientific analysis.

Preservation of long-term relationships – it could be said that most of art world relationships are largely based upon trust and personal connections between the parties. When the trust is lost, the actors often embark legal proceedings where the ensuing argument is driven by feelings of betrayal. The recent and still ongoing high-profile case of Yves Bouvier and Dmitry E. Rybolovlev is an example of this practice. In 2015 Mr. Rybolovlev commenced various trials in Singapore, Hong Kong, Paris and Monaco accusing Mr. Bouvier of having defrauded and overcharged him over $1 billion for the purchase of works of art. The Russian millionaire also

accused Mr. Bouvier of selling him stolen paintings, such as *Femme se Coiffant* and *L'Espagnole à l'Èventail* by Picasso, claimed back by the artist's daughter Jacqueline Roque. The two men had a long-term business relationship started in 2003 and ended suddenly with the legal claims. On this basis, ADR methods can help the parties to reach a concerted solution preserving the existing relationship: their agreement could include the provision of works of art in lieu of monetary damages, the shared ownership of an art piece or the use of long-term loans.

Consensus – Apart from the case in which a court mandates a specific ADR mechanism, the latter is generally consensual. The parties can use it when submitting their dispute to ADR, also through a clause previously included in their contract. This characteristic, especially in mediation, leads to a mutual solution of the dispute satisfying the parties.

Neutrality and expertise – ADR procedures allow the actors to choose a specific arbitrator, mediator or expert coming from the art world. Similarly, they can pick a person with a certain cultural or linguistic background. The skills and the ability of the arbitrator/mediator to see the art-dispute in its integrity are crucial to the outcome of the procedure. An example is the case faced by WIPO relating a cooperation agreement between a European gallery and e European artist for the promotion of the artist on the art market. Three years after signing the agreement, the parties entered a dispute and deferred it to three arbitrators experienced in art law issues. As a result, the arbitral tribunal encouraged the parties to negotiate and reach a concerted agreement. Subsequently, the tribunal rendered an award including the parties' agreement, encompassing the conclusion of the contract between them and the provision of a number of works from the artist to the gallery.

A single, quick and cheap procedure – art-related disputes are often multidimensional (including both institutional and private parties) and international. These two characteristics pose a problem of jurisdiction: judges from different countries could be involved in the same conflict. ADR methods allow the parties to choose a specific international forum, the applicable law and the language preferred, letting them save time and money. For instance, in accordance to the New York Convention, arbitration offers the advantage of an arbitral award that can be internationally enforced without a review of the case. Similarly, under D.Lgs.28/2010, the legislation for Italian mediation regulates the parties' possibility to reach an agreement directly enforceable on the Italian territory without further legal actions.

Confidentiality – the art market is renown to be an opaque world where the reputational factor plays a key role. The actors can be involved in court-case proceedings fostering negative publicity or further claims on the same issues. ADR mechanisms keep the dispute confidential and allow the parties to settle it in a more discrete manner, balancing their privacy with public interest requirements such as in the case of illicitly traded objects. Indeed, whatever is said in the presence of the arbitrator, mediator or expert must be kept private: if the agreement is not reached, the information disclosed during the process can't be further used in court.

CAM's (Milan Chamber of Arbitration) Experience

CAM established its ADR Art & Cultural Heritage (ADR Arte) project in 2015 to respond the need of a specific dispute resolution service for art-related disputes. The preferred method is mediation, intended as a process which facilitates the parties in their negotiation and in reaching a concerted

solution to their conflict. The mediation process can be activated under the rules of D.Lgs.28/20103, when the parties are involved in a domestic dispute and strive for an Italian enforceable title, or through the “fast track mediation rules”. These are particularly flexible and appropriate when the dispute is multidimensional, international, foresees the necessity of art experts and lower costs.

From 2015 to 2017, ADR Arte faced 32 art-mediations. Out of these, 25% relate to leasing contracts , 22% to inheritance, 19% to property rights, 16% to the distribution of the estate, 6% to financial contracts, 3% to libel, trading contracts and residual categories. 94% of disputes were compulsory under the D.Lgs. 28/2010, while 6% were voluntary. 53% of mediations was based on a contract liability between the parties while 47% was non-contractual. 6% started because of the judge’s request, while 3% because of a contractual clause deferring the dispute to mediation. Furthermore, the value of the conflict varied greatly: ranging from those < €20.000,00 (16%), the ones between €20.001,00 – €50.000,00 (12%), those between €50.001,00 – €150.000,00 (16%), €150.001,00 – €250.000,00 (34%), the ones from €250.001,00 to €1 million (6%) and those above €1 million (16%). Finally, the results: out of all art-related mediations, the percentage of agreements reached is 28%, a higher result if compared to the one of settlements attained generally during a mediation proceeding (22.5% in 2017). Differently, when the parties decided to move forward with mediation after the first session, the percentage of reached agreements increases to 82% (a higher result than the one of classic mediation, which was of 72.5% in 2017).

In the light of these results, three main conclusions seem to arise. The first, that ADR methods could be considered a good fit for those disputes concerning an ‘artistic’ actor, object or subject. In fact, they do solve most of complex nuances of the art market, such as confidentiality, preservation of long term relationships, quick and cheap procedures through pragmatic and innovative solutions. Second, ADR methods are particularly effective on legal categories as inheritance and division of the estate. Indeed, in arbitration and mediation the sensitive non-legal matters of the parties, often connected to personal relations, are free to arise and be included in their final agreement. The third, that only 3% of CAM’s art mediations started because of a contractual clause deferring the dispute to ADR. This means there is still room for enhancing the use of ADR in art-related disputes, especially with the inclusion of multi-step clauses in the contract concluded by the parties.

This entry was posted on Sunday, July 8th, 2018 at 11:54 am and is filed under ADR, Camera Arbitrale Milano, Cultural heritage
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.