

ARBITRATION IN THE INTERNATIONAL ART MARKET: CURRENT TRENDS AND OPPORTUNITIES

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INTRODUCTION

The international art market is a major economic force, totaling over \$67.8 billion in transactions, in 2022.¹ While the art world is usually thought of as one mainly governed by subjective taste and sensibilities, the reality is that more and more investors see artwork as potential assets to be acquired, and sold as investments in a specialized market.² However, the disputes that arise from the thousands of transactions recorded annually within this industry are particularly ill-suited to be determined by regular state or federal courts.³ In the unique context of artworks and the art world, alternate dispute resolution mechanisms, such as arbitration, provide an excellent option for the specific needs of the parties involved.⁴ In this article, we will explore the unique traits of art market disputes, how arbitration fits as a solution, and how the current market uses arbitration, providing recommendations for potential actors to incorporate arbitration more seamlessly into their workings.

I. THE INTERNATIONAL ART MARKET

The international art market refers to the complex ecosystem of stakeholders that take part in the sale and purchase of artworks every year. In 2022 there were approximately 37 millions of these transactions, valued at an estimated \$67.8 billion dollars.⁵ By Art Market, we mean the aggregate transactions and sales of artworks between buyers and sellers, mostly, but not wholly mediated by third parties such as art dealers and auction houses.⁶ This includes “traditional” art pieces such as paintings, sculptures, and works on paper (photographs, watercolors, prints, drawings, etc.), as well as digital art, such as film, video, and other media or decorative arts, including antiques, couture and jewelry, textiles, etc.⁷

While there are many different ways art is bought and sold, most recorded transactions occur through one of two major categories: art dealers and art galleries (55% of transactions in 2022), or auction houses (45% of transactions).⁸ This is an industry that has more than tripled in scale in the past decades.⁹ For example, in 1988, the Artnet Price Database tracked only 18 auction houses; by 2018 that figure was 534.¹⁰ On the other hand, the art dealer sector is estimated to make up close to 300,000 businesses globally, most of which operate a single gallery (71%).¹¹ Interestingly, 80% of all art sales occur in just three markets: the United States, United Kingdom, and China, in that order; meanwhile online sales accounted for 16% of the total art market turnover in 2022.¹²

¹ Clare McAndrews, *The Art Market 2023*, ART BASEL & UBS 1, 14, 17, 19 (2023).

² Lee Down, *Art as an Asset Class: Understanding the Risks and Returns of Investing in Fine Art*, ARTS, ARTISTS, ARTWORK (June 23, 2023), <https://artsartistsartwork.com/art-as-an-asset-class-understanding-the-risks-and-returns-of-investing-in-fine-art/>.

³ Anne Laure Bandle & Sarah Theurich, *Alternative Dispute Resolution and Art-Law - A New Research Project of the Geneva Art-Law Centre*, 6 J. INT'L. COM. L. TECH. 28, 29 (2011).

⁴ *Id.*, at 30-31.

⁵ McAndrews, *supra* note 1, at 20.

⁶ Quentin Bryne-Sutton, *Arbitration and Mediation in Art-Related Disputes*, 14 ARB. INT'L. 447, 449 (1998).

⁷ See McAndrews, *supra* note 1, at 249.

⁸ *Id.*, at 24.

⁹ Tim Schneider, *Goodbye Art World, Hello Art Industry: How the Art Market Has Transformed —Radically— Over the Past 30 Years*, ARTNET, (November 25, 2019), <https://news.artnet.com/market/how-the-art-world-became-the-art-industry-1710228>.

¹⁰ *Id.*

¹¹ McAndrews, *supra* note 1, at 58.

¹² *Id.*, at 26, 30.

II. THE INNER WORKINGS

In stark contrast to other multi-billion, cross-national industries, the art trade stands out for its lack of regulations and its premium on discretion.¹³ Buyers and sellers routinely use agents and intermediaries to remain anonymous in their transactions, for reasons that remain their own.¹⁴ This opacity provides mystique to the industry, which at the high end is the realm of the rich and powerful. In fact, privacy and discretion are so prized in the art market that the industry's leading trend reporter, Art Basel's 2023 survey of high-net-worth art collectors, reported that the top 2 concerns for these collectors were, equally, (1) the rise in legal issues in the art trade and (2) increased regulation and identification requirements for art transactions.¹⁵ It is this exact value on privacy and discretion that makes alternative dispute resolution options such as arbitration a great fit for disputes within the art market. The Art Market is also notorious for its subjectivity. As one leading economist described it, "the art market is prone to fads, passions, manias, booms and busts, because art works had no clear financial value and the [art] market was opaque."¹⁶ For this very reason, art disputes need to consider non-legal variables when seeking solutions for controversies between stakeholders and parties.

The art market as an industry has not only grown due to the increased number of buyers and sellers, but also to the army of professionals that has risen to support these transactions, along with their increased complexity.¹⁷ These are not just art gallery owners and employees of auction houses, but also restorers, agents, transporters, expert appraisers, insurers, banks and museums, as well as the legal experts that have developed a niche in this growing industry.¹⁸ Problematically, many of these stakeholders can hold multiple roles even in a single transactions, increasing the risk of conflicts of interests in deals, and therefore, controversies.¹⁹

III. "ART LAW" CONTROVERSIES AND DISPUTES

Legal disputes that arise from art market transactions include both those that are common to other types of sales, such as breach of contract issues, and topics more unique to this industry, such as copyright law, moral rights, resale royalties, ownership disputes, authentication questions, and many more.²⁰ For this reason, many practitioners and scholars refer to the umbrella term of "art law," which lacks a specific definition, but is concerned with the recurring questions of how to legally define "art," who is best qualified to make these judgements, how to determine the value or authentication of artworks, and who owns pieces with unclear origins due to time or questionable history.²¹ Other authors have

¹³ Jason-Louise Graham, *Art Exchange? How the International Art Market Lacks a Clear Regulatory Framework*, ART, CULTURAL HERITAGE AND THE MARKET 319, 320 (2014).

¹⁴ Tom Christopherson, *Art Law and the Art Market: Disclosure or Discretion?*, SOTHEBY'S INSTITUTE, (October 2, 2017) <https://www.sothebysinstitute.com/news-and-events/news/art-law-and-the-art-market-disclosure-or-discretion>.

¹⁵ Clare McAndrews, *Art Basel Survey of Global Collecting 2023*, ART BASEL & UBS 1, 146 (2023).

¹⁶ John Grapper & Peter Aspden, *Davos 2015: Nouriel Roubini says art market needs regulation* in THE FINANCIAL TIMES (January 22, 2015) <https://www.ft.com/content/992dcf86-a250-11e4-aba2-00144feab7de>.

¹⁷ Quinn Emanuel, *The Mediation and Arbitration of International Art Disputes*, LEXOLOGY GLOBAL, (January 12, 2022), <https://www.lexology.com/library/detail.aspx?g=a1d0d92a-1116-4407-907f-981210e88164>.

¹⁸ Alessandra Donati & Edoardo Mombelli, *Art and arbitration: an overview in light of the new Regulations on Arbitration in the Art Sector of the Venice Chamber of Arbitration* in ADVANT NCTM (January 20, 2021), <https://www.advant-nctm.com/en/news/articles/art-and-arbitration-an-overview-in-light-of-the-new-regulations-on-arbitration-in-the-art-sector-of-the-venice-chamber-of-arbitration>.

¹⁹ See Thomas Christ & Claudia von Selle, *Basel Art trade Guidelines*, 12 BASEL INST. ON GOVERNANCE 1, 12-13 (2012).

²⁰ Bryne-Sutton, *supra* note 6, at 448.

²¹ James B. Frankel & Simon J. Frankel, *All About Art Law: The Aesthetic, Moral, Ethical, and Political Issues Relating to the Visual Arts*, 27 S.F. ATT'Y 31 (2021).

suggested the descriptor of “[a] heterogeneous set of legal-economic knowledge” that come into play in disputes that arise from the art trade.²² Below we provide additional explanations and examples of these disputes.

IV. BREACH OF CONTRACT DISPUTES

Many disputes arising from artwork transactions arise from alleged breach of contracts, be it from the object of the sale being different than advertised (fraud), or parties trying to rescind transactions.²³ One such case was *Christie’s Inc. v. Turner*.²⁴ In this controversy, Turner consigned a painting at the famous international auction house Christie’s, for the latter to sell at auction through a Seller’s Contract with the company. The auction proceeded and The Sean N. Parker Foundation (“the Foundation”) bought the painting through a Buyer’s Contract with the auction house. However, a dispute developed between Christie’s and Turner, who contended that the Seller’s Contract was waived and that the painting should be returned to her. On the other hand, the Foundation solicited the strict compliance of its Buyer’s Contract and to be sent the artwork. Because Christie’s uses as a standard practice an arbitration clause under JAMS in both its Seller’s and Buyer’s contracts, the three-way dispute was submitted to JAMS for judgement. The arbitrator found in favor of Christie’s and the Foundation, ordering Turner to comply with the Seller’s Contract. Unfortunately, Turner did not comply, and Christie’s was forced to submit the arbitral award (the name given to an arbitrator tribunal’s final decision) to a U.S. District Court for confirmation, which the court promptly provided.

Another infamous dispute is that of the years-long and multiple lawsuits filed by Russian billionaire Dmitry Rybolovlev against Swiss businessman Yves Bouvier.²⁵ Bouvier served as Rybolovlev’s art dealer, or agent, for 11 years, buying Old Master and other multi-million-dollar art pieces on his behalf. That was until 2014, when Rybolovlev found out that Bouvier had allegedly been systematically overstating the amount he bought the artwork on behalf of the former, supposedly deceitfully pocketing markups routinely as high as 50% for each art piece.²⁶ All in all, Rybolovlev alleges that Bouvier made \$1.1 Billion in markups through 38 transactions valued at \$2 Billion.²⁷ The Russian billionaire filed multiple complaints in courts all over the world, seeking justice for what he believed was fraud and breach of fiduciary duties.²⁸ While most of these complaints have been dismissed, criminal investigations have been opened for both Rybolovlev and Bouvier based on accusations made by the other.²⁹ While this is a particularly dramatic instance of a transactional dispute due to its sheer magnitude and litigiousness, it is a useful example of how common art market dynamics, such as the use of agents and intermediaries for transactions, can open the doors for controversies and disputes. It is noteworthy to state that art market news outlets have described this legal battle as “the worst nightmare” for stakeholders in the industry.³⁰

²² Donati & Mombelli, *supra* note 18.

²³ Noor Khadim, *Arbitration in the Art World and the Court of Arbitration for Art: Heading Towards a More Effective Resolution of Arts Disputes?*, 24 ART ANTIQ. & L., No. 3 (October 2019).
<https://vlex.co.uk/vid/arbitration-in-the-art-826686365>.

²⁴ *Christie’s Inc. v. Turner*, 20 Civ. 3146 (NRB) (S.D.N.Y. Jan. 22, 2021).

²⁵ Alice Trioschi, *Art-related Disputes and ADR Methods: A Good Fit?*, KLUWER ARBITRATION BLOG (July 8, 2018), <https://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/>.

²⁶ Nina dos Santos, *\$1B feud involving Leonardo’s ‘Salvator Mundi’ reveals dark side of the art world*, CNN (June 3, 2021), <https://edition.cnn.com/style/article/salvator-mundi-scandal-bouvier-rybolovlev-intl/index.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

V. PROVENANCE AND TITLE ISSUES

Many famous art law disputes have their genesis in fraudulent origin or concealed previous ownership, situations that the anonymity and discretion in the art world easily lend themselves to.³¹ One of the most famous such cases is the now-legendary *Altmann v. Austria*, wherein the survivor of an Austrian Jewish family killed by the Holocaust sued the Government of Austria to recuperate five paintings, among them the famed Gustav Klimt painting *Woman in Gold*.³² Altmann alleged that the paintings were looted from her family's house during the Third Reich and had found their way into the possession of an Austrian government museum.³³ The case ultimately hinged on a question of original ownership and inheritance: whether Adele Block-Bauer, the subject of two of the portraits, including *Woman in Gold*, was the true owner of the paintings, in which case the testament that expressed her will to donate the portraits to the Austrian State Gallery would have made the museum the true owner; or whether the owner of the paintings was her husband, in which case his inheritors, including the Plaintiff, Maria Altmann, were entitled to them.³⁴ This case was originally litigated in U.S. federal courts, while the parties eventually transferred it to private arbitration, due in part to the financial toll of litigation.³⁵ Similar cases have originated during transactions decades after the original looting, often when the artwork is sold to a new owner or museum who acts in good faith.³⁶ The essential issue at play revolves around the question of whether the seller, or holder, had an actual claim to the title over the art piece, to then have authority to sell it or give it away.

VI. AUTHENTICITY DISPUTES

The quintessential case example is *Greenberg and Bauman*.³⁷ In this case, an artwork by Alexander Calder was bought by Mr. Bauman from Calder expert and art dealer Klaus Perls. 20 years afterward, Mr. Bauman dies and his daughter, Ms. Bauman inherits the artwork. Ms. Bauman then sold the artwork to a group of art dealers, who tried to resell it at a markup without success. The buyers then sent the piece to Perls to confirm its authenticity, but Perls concluded it was not an original Calder. The buyers then requested Bauman rescind the contract, and when she refused, they filed a suit claiming breach of contract.³⁸ At trial, Perls testified by deposition that the artwork was not an original Calder, while Bauman's expert witness testified that it was. Ultimately, the judge decided that the buyers had not sufficiently proved their burden of proof that the artwork was more likely than not a forgery, therefore ruling against them.³⁹ However, the art market valued Perls' opinion over Bauman's expert witness, making the art piece unsellable after the public spectacle at trial.⁴⁰ This is a very nuanced example of why even plaintiffs' that believe fervently in their cause might be better served by confidential arbitration disputes instead of airing all transactional details into the public record.

³¹ Anne Laure Bandle & Sarah Theurich, *Alternative Dispute Resolution and Art-Law - A New Research Project of the Geneva Art-Law Centre*, 6 J. INT'L. COM. L. TECH. 28, 29 (2011).

³² *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

³³ BANDLE & THEURICH, *supra* note 31, at page 37.

³⁴ *Id.* at page 38.

³⁵ *Id.* at page 38.

³⁶ Quentin Bryne-Sutton, *Arbitration and Mediation in Art-Related Disputes*, 14 ARB. INT'L., No. 4, 447, 448 (1998).

³⁷ *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993); *aff'd* without opinion, 1994 U.S. App. LEXIS 27175 (D.C. Cir. September 21, 1994).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Quinn Emanuel, *supra* note 17.

VII. ART MARKET AND ARBITRATION

In such a fraught landscape, the resolution of disputes requires a specialized approach. Traditional litigation, while effective in many other legal arenas, can fall short when applied to the unique nature of art market controversies.⁴¹ In response to these challenges, arbitration has emerged as an increasingly popular dispute resolution mechanism, offering a framework better tailored to the unique intricacies of the art world.⁴² This section delves into the distinctive advantages that arbitration affords in the context of art market-related disputes, shedding light on its capacity to leverage expert knowledge, ensure confidentiality, consider non-legal variables, deliver binding resolutions, and expedite proceedings in a cost-effective manner.

VIII. EXPERTS

Scholars and practitioners alike tout as a top advantage of arbitration the ability for parties to choose their own arbitrator and therefore the possibility of choosing “an expert who is able to resolve the dispute with the sensitivity necessary to apprehend its interdisciplinary nuances and the complexity of the issue at hand.”⁴³ In most cases traditional judicial forums often do not have the required expertise in art and the art market to resolve these disputes, leading to results that are not necessarily accepted by the art market.⁴⁴ This renders the justice-seeking process inefficient and ineffective, as exemplified by the *Greenberg v. Bauman* case.⁴⁵ Having the ultimate decision-maker be someone already knowledgeable in art and the art trade, especially if it is a person or persons recognized for their expertise in these spaces, also affords arbitral decisions with not just decisional accuracy, but also legitimacy.⁴⁶

IX. FLEXIBILITY

Disputes related to art frequently encompass delicate non-legal matters that hold significance for the involved parties but may not typically be considered within a courtroom setting.⁴⁷ For instance, arbitrators may need to factor in the far-reaching consequences of their decisions on the artwork in question. This includes considerations about the potential impact on the artistic value, cultural significance, or ethical aspects tied to the piece.⁴⁸ Arbitrators can consider a wide variety of interests and factors that may not fit neatly into a purely legal framework.⁴⁹ This expanded scope enables arbitrators to foster a more comprehensive understanding of the dispute and, in turn, facilitates the exploration of avenues for mutual gain and possible agreement among the involved parties.⁵⁰

⁴¹ Hayden & Hecker, *Cheers: A New Court for Resolving Art Disputes*, THE CENTER FOR ART LAW, (March 29, 2010), <https://itsartlaw.org/2019/03/29/cheers-a-new-court-for-resolving-art-disputes/>.

⁴² *Id.*

⁴³ Alessandra Donati & Edoardo Mombelli, *Art and arbitration: an overview in light of the new Regulations on Arbitration in the Art Sector of the Venice Chamber of Arbitration*, ADVANT NCTM (Jan. 20, 2021), <https://www.advant-nctm.com/en/news/articles/art-and-arbitration-an-overview-in-light-of-the-new-regulations-on-arbitration-in-the-art-sector-of-the-venice-chamber-of-arbitration>.

⁴⁴ EMANUEL, *supra* note 17.

⁴⁵ EMANUEL, *supra* note 17.

⁴⁶ EMANUEL, *supra* note 17.

⁴⁷ Stephan den Hartog, *The Use of Alternative Dispute Resolution in Art Related Disputes*, KLUWER ARBITRATION BLOG (October 23, 2015), <https://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/>.

⁴⁸ DEN HARTOG, *supra*.

⁴⁹ DEN HARTOG, *supra*.

⁵⁰ TRIOSCHI, *supra* note 25.

X. CONFIDENTIALITY

Due to the importance of reputation and discretion in the art market, the confidential nature of arbitration proceedings and awards is often cited as the most important benefit provided by this conflict resolution option.⁵¹ As one scholar put it “Confidentiality plays an undoubtedly important role in the relationships between professionals and protagonists on the art market, where reputation and discretion are imperative standards that must be adhered to in order to stand out and establish oneself in the sector as a professional and collector.”⁵² Parties to a transaction have the option of including confidentiality wording in the arbitral clause to their transactions, while major arbitration service providers often provide confidentiality by the arbitrators and/or parties as a standard practice for proceedings.⁵³

XI. BINDING NATURE

Due to the international nature of many art market disputes, the enforceability of a judicial opinion after litigation is an important factor when considering dispute resolution options.⁵⁴ There is no international standard practice for the recognition and enforcement of court decisions made by foreign judiciaries, with each nation-state developing its own processes based on different standards of review and recognition.⁵⁵ By contrast, arbitral awards have the distinct advantage of recognition in foreign states through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958, known simply as the New York Convention.⁵⁶ This international treaty signed by 169 countries requires courts of signing states to recognize and enforce arbitration awards made in other contracting states.⁵⁷ The very nature of the international art market makes this widely-accepted treaty a major reason for choosing arbitration as a dispute resolution option, particularly for parties seeking swift action and resolution from disputes, since the award decisions can be enforced in most countries through an easier process than foreign judicial decisions.

This is also an advantage even compared to other alternate dispute resolution mechanisms such as mediation.⁵⁸ While mediation is an excellent option for two cooperating parties that want to reach a solution, negotiations can be stalemated if either party does not accept the presented or negotiated terms.⁵⁹ In mediation, there is no requirement to reach a resolution, and instead relies on the good faith and cooperation of parties.⁶⁰ Unfortunately, these are now always forthcoming, especially in multi-billion dollar disputes like those described above.

⁵¹ EMANUEL, *supra* note 17; DONATI & MOMBELLI, *supra* note 18; HAYDEN & HACKER, *supra* note 41; TRIOSCHI, *supra* note 25.

⁵² Donati & Mombelli, *supra* note 18.

⁵³ Annabelle Gauberti, *Art and Arbitration: What Needs to be Done to Improve the Security of Art Sales and Transactions*, KLUWER ARBITRATION BLOG (March 27, 2019), <https://arbitrationblog.kluwerarbitration.com/2019/03/27/art-and-arbitration-what-needs-to-be-done-to-improve-the-security-of-art-sales-and-transactions/>.

⁵⁴ BRYNE-SUTTON, *supra* note 36, at 455.

⁵⁵ U.S. DEPT. OF STATE, *Enforcement of Judgements*, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assist/Enforcement-of-Judges.html> (last visited December 4, 2023).

⁵⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, 330 UNTS 3.

⁵⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Id.*

⁵⁸ BANDLE & THEURICH, *supra* note 31, at 30.

⁵⁹ BANDLE & THEURICH, *supra* note 31, at 30.

⁶⁰ EMANUEL, *supra* note 17.

XII. TIME AND COST

All of the above factors also contribute to two of the most common benefits associated with arbitration: their expedited time and lower costs compared to traditional litigation.⁶¹ While these are not unique advantages to art law disputes, they are nevertheless important to take into account for a party when they balance the pros and cons of each dispute resolution option they have at their disposal. While the parties in a dispute are required to pay for the arbitration tribunal and the institutional administrator, if they choose to work with one, the expedited nature of arbitration processes often leads to lower overall costs than those incurred by maintaining counsel through a traditional, and much longer and complex, litigation process.⁶² That said, for a dynamic market of buyers, sellers, and intermediaries, the promise of a swift resolution to disputes can in itself be a deciding factor.

XIII. SPECIALIZED ARBITRATION SERVICE PROVIDERS

While two parties can establish the rules and processes of their arbitration from scratch in an ad hoc manner, many people turn instead to arbitration service providers, organizations that develop standard arbitration rules, provide resources and review mechanisms for the parties.⁶³ These organizations also, to some degree, administer the arbitration tribunals, composed of the arbitrator or arbitrators chosen by the parties (and sometimes the service provider itself).⁶⁴ These resources provide guidance and standard practices that enable the swift and effective functioning of the arbitration and the dispute. By being able to name the arbitration service provider in an arbitral clause to a transaction, parties can by reference incorporate the rules and mechanisms that it provides for dispute resolution, instead of potentially having to negotiate these from scratch.⁶⁵ Standard rules provide basic rules of procedures, establishing how a request for arbitration must be presented, how a party must answer and within what timeframe, how the arbitrators will be chosen, what procedure to follow if they are disputed, etc.⁶⁶ Of course, most if not all arbitration service provider rules leave room for tailoring to the needs and preferences of each party, but they provide a structure and framework within which to work.⁶⁷

In the increasingly complex modern world we transact in, specialized arbitration service providers have been founded with rules, resources, and expertise specially tailored for the industry they support, such as the Court of Arbitration for Sport (CAS) or the Silicon Valley Arbitration and Mediation Center (SVAMC). Accordingly, in this section we review the two most well-known arbitration service providers that specialize in some way in art law, art topics, or art market matters, with special interest in the newest provider, the Court of Arbitration for Art (CAfA).

⁶¹ EMANUEL, *supra* note 17.

⁶² EMANUEL, *supra* note 17.

⁶³ WIPO ARBITRATION AND MEDIATION CENTER, WIPO ARBITRATION RULES, SCHEDULE OF FEES AND COSTS (July 1, 2021), https://www.wipo.int/export/sites/www/amc/en/docs/arbitration_rules_and_fees_2021.pdf (cited below as WIPO ARBITRATION RULES to avoid confusion); JAMS, COMPREHENSIVE ARBITRATION RULES AND PROCEDURES (June 1, 2021), <https://www.jamsadr.com/rules-comprehensive-arbitration/> (last visited Dec. 13, 2023); ICC, 2021 ARBITRATION RULES (January 1, 2021), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

XIV. THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations that provides standards, rules, and exchange of ideas internationally regarding intellectual property.⁶⁸ This renders the justice-seeking process inefficient and ineffective, as exemplified by the *Greenberg v. Bauman* case.⁶⁹ Having the ultimate decision-maker be someone already knowledgeable in art and the art trade, especially if it is a person or persons recognized for their expertise in these spaces, also affords arbitral decisions with not just decisional accuracy, but also legitimacy.⁷⁰

XV. FLEXIBILITY

Disputes related to art frequently encompass delicate non-legal matters that hold significance for the involved parties but may not typically be considered within a courtroom setting.⁷¹ For instance, arbitrators may need to factor in the far-reaching consequences of their decisions on the artwork in question. This includes considerations about the potential impact on the artistic value, cultural significance, or ethical aspects tied to the piece.⁷² Arbitrators can consider a wide variety of interests and factors that may not fit neatly into a purely legal framework.⁷³ This expanded scope enables arbitrators to foster a more comprehensive understanding of the dispute and, in turn, facilitates the exploration of avenues for mutual gain and possible agreement among the involved parties.⁷⁴

XVI. CONFIDENTIALITY

Due to the importance of reputation and discretion in the art market, the confidential nature of arbitration proceedings and awards is often cited as the most important benefit provided by this conflict resolution option.⁷⁵ As one scholar put it, “Confidentiality plays an undoubtedly important role in the relationships between professionals and protagonists on the art market, where reputation and discretion are imperative standards that must be adhered to in order to stand out and establish oneself in the sector as a professional and collector.”⁷⁶ Parties to a transaction have the option of including confidentiality wording in the arbitral clause to their transactions, while major arbitration service providers often provide confidentiality by the arbitrators and/or parties as a standard practice for proceedings.⁷⁷

XVII. BINDING NATURE

Due to the international nature of many art market disputes, the enforceability of a judicial opinion after litigation is an important factor when considering dispute resolution

⁶⁸ WIPO, <https://www.wipo.int/about-wipo/en/> (last visited December 13, 2023).

⁶⁹ EMANUEL, *supra* note 17.

⁷⁰ EMANUEL, *supra* note 17.

⁷¹ Stephan den Hartog, *The Use of Alternative Dispute Resolution in Art Related Disputes*, KLUWER ARBITRATION BLOG (October 23, 2015), <https://arbitrationblog.kluwerarbitration.com/2015/10/23/the-use-of-alternative-dispute-resolution-in-art-related-disputes/>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ TRIOSCHI, *supra* note 25.

⁷⁵ EMANUEL, *supra* note 17; DONATI & MOMBELLI, *supra* note 18; HAYDEN & HACKER, *supra* note 41; TRIOSCHI, *supra* note 25.

⁷⁶ DONATI & MOMBELLI, *supra* note 18.

⁷⁷ Annabelle Gauberti, *Art and Arbitration: What Needs to be Done to Improve the Security of Art Sales and Transactions*, KLUWER ARBITRATION BLOG (March 27, 2019), <https://arbitrationblog.kluwerarbitration.com/2019/03/27/art-and-arbitration-what-needs-to-be-done-to-improve-the-security-of-art-sales-and-transactions/>.

options.⁷⁸ There is no international standard practice for the recognition and enforcement of court decisions made by foreign judiciaries, with each nation-state developing its own processes based on different standards of review and recognition.⁷⁹ By contrast, arbitral awards have the distinct advantage of recognition in foreign states through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958, known simply as the New York Convention.⁸⁰ This international treaty signed by 169 countries requires courts of signing states to recognize and enforce arbitration awards made in other contracting states.⁸¹ The very nature of the international art market makes this widely-accepted treaty a major reason for choosing arbitration as a dispute resolution option, particularly for parties seeking swift action and resolution from disputes, since the award decisions can be enforced in most countries through an easier process than foreign judicial decisions.

This is also an advantage even compared to other alternate dispute resolution mechanisms such as mediation.⁸² While mediation is an excellent option for two cooperating parties that want to reach a solution, negotiations can be stalemated if either party does not accept the presented or negotiated terms.⁸³ In mediation, there is no requirement to reach a resolution, and instead there is a reliance on the good faith and cooperation of parties.⁸⁴ Unfortunately, these are not always forthcoming, especially in multi-billion dollar disputes like those described above.

XVIII. TIME AND COST

All of the above factors also contribute to two of the most common benefits associated with arbitration: their expedited time and lower costs compared to traditional litigation.⁸⁵ While these are not unique advantages to art law disputes, they are nevertheless important to take into account for a party when they balance the pros and cons of each dispute resolution option they have at their disposal. While the parties in a dispute are required to pay for the arbitration tribunal and the institutional administrator, if they choose to work with one, the expedited nature of arbitration processes often leads to lower overall costs than those incurred by maintaining counsel through a traditional, and much longer and complex, litigation process.⁸⁶ That said, for a dynamic market of buyers, sellers, and intermediaries, the promise of a swift resolution to disputes can in itself be a deciding factor.

XIX. SPECIALIZED ARBITRATION SERVICE PROVIDER

While two parties can establish the rules and processes of their arbitration from scratch in an *ad hoc* manner, many people turn instead to arbitration service providers. These are organizations that develop standard arbitration rules, provide resources, and

⁷⁸ BRYNE-SUTTON, *supra* note 6, at 454.

⁷⁹ U.S. DEPT. OF STATE, *Enforcement of Judgements*, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assistance/Enforcement-of-Judges.html> (last visited December 4, 2023).

⁸⁰ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, 330 UNTS 3.

⁸¹ *Id.*

⁸² BANDLE & THEURICH, *supra* note 31, at 30.

⁸³ BANDLE & THEURICH, *supra* note 31, at 30.

⁸⁴ WIPO, *What is Mediation?*, <https://www.wipo.int/amc/en/mediation/what-mediation.html> (last visited April 2, 2024).

⁸⁵ Marc Jonas Block, *The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes*, 44 Rutgers L. Rec. 1, 9 (2016-2017).

⁸⁶ Hon. L. Anthony Gibson, *The Increasing Appeal of Private Arbitration and a Brief Look at Some of the Downside*, Rutgers J.L. & PUB. POL'Y: BLOGS (February 22, 2017), <https://rutgerspolicyjournal.org/2017/02/22/increasing-appeal-private-arbitration-and-brief-look-some-downside/>.

review mechanisms for the parties.⁸⁷ These organizations also, to some degree, administer the arbitration tribunals composed of the arbitrator or arbitrators chosen by the parties (and sometimes the service provider itself).⁸⁸ These resources provide guidance and standard practices that enable the swift and effective functioning of the arbitration and the dispute. By being able to name the arbitration service provider in an arbitral clause to a transaction, parties can, by reference, incorporate the rules and mechanisms that it provides for dispute resolution instead of potentially having to negotiate these from scratch.⁸⁹ Standard rules provide basic rules of procedures, establishing how a request for arbitration must be presented, how a party must answer and within what timeframe, how the arbitrators will be chosen, what procedure to follow if they are disputed, etc.⁹⁰ Of course, most if not all arbitration service provider rules leave room for tailoring to the needs and preferences of each party, but they provide a structure and framework within which to work.

In the increasingly complex modern world we transact in, specialized arbitration service providers have been founded with rules, resources, and expertise specially tailored for the industry they support, such as the Court of Arbitration for Sport (CAS) or the Silicon Valley Arbitration and Mediation Center (SVAMC). Accordingly, in this section we review the two most well-known arbitration service providers that specialize in some way in art law, art topics, or art market matters, with special interest in the newest provider, the Court of Arbitration for Art (CAfA).

XX. WIP

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations that provides standards, rules, and exchange of ideas internationally regarding intellectual property.⁹¹ In 1994 the agency founded the WIPO Arbitration and Mediation Center, offering Alternative Dispute Resolution options for parties.⁹² The Center has standard rules, known as the WIPO Arbitration Rules, most recently updated in July 2021.⁹³ The WIPO Center has also developed special services for specific industries, among them a section for Art and Cultural Heritage disputes, where it provides examples of areas of dispute (such as appraisals, art fairs, documentation, droit de suite, hidden defects, insurance of art works, reproduction, etc.) and potential stakeholders.⁹⁴

The WIPO Rules establish a framework in which a single arbitrator is nominated jointly by the parties, or wherein each party (of class of party, be it claimants or respondents) nominates an arbitrator, and then those two arbitrators choose the third arbitrator, who will be the presiding arbitrator for the tribunal; with additional processes if no agreement can be made by parties within the specified timeframe.⁹⁵ These provisions promote both the legitimacy of the process through the neutrality of the arbitrators, and the importance of swift decision-making in order to move forward with proceedings. The role played by the

⁸⁷ WIPO ARBITRATION AND MEDIATION CENTER, WIPO ARBITRATION RULES, SCHEDULE OF FEES AND COSTS (July 1, 2021), https://www.wipo.int/export/sites/www/amc/en/docs/arbitration_rules_and_fees_2021.pdf (cited below as WIPO ARBITRATION RULES to avoid confusion); JAMS, COMPREHENSIVE ARBITRATION RULES AND PROCEDURES (June 1, 2021), <https://www.jamsadr.com/rules-comprehensive-arbitration/> (last visited Dec. 13, 2023); ICC, 2021 ARBITRATION RULES (January 1, 2021), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>.

⁸⁸ *Supra*, note 63.

⁸⁹ *Supra*, note 63.

⁹⁰ *Id.* at Art. 6, Art. 11, Art. 14, and Art. 35.

⁹¹ WIPO, <https://www.wipo.int/about-wipo/en/> (last visited February 18, 2024).

⁹² WIPO ARBITRATION AND MEDIATION CENTER, <https://www.wipo.int/amc/en/center/background.html> (last visited February 18, 2024).

⁹³ *Supra* note 87.

⁹⁴ WIPO ARBITRATION AND MEDIATION CENTER, WIPO ALTERNATIVE DISPUTE RESOLUTION (ADR) FOR ART AND CULTURAL HERITAGE, <https://www.wipo.int/amc/en/center/specific-sectors/art/> (last visited February 18, 2024).

⁹⁵ WIPO ARBITRATION RULES, *supra* note 87, Arts. 16-19.

WIPO Center in this instance, and in many others, is to make high-level decisions concerning the arbitrator tribunal itself, to facilitate fairness, legitimacy, and enforceability of awards.⁹⁶

The WIPO Rules have also been updated to increase ease of use in modern processes. For example, the new 2021 Rules incorporated means for electronic filing and remote arbitration meetings as a standard option available to all parties and/or disputes.⁹⁷ The rules also incorporated new disclosure requirements concerning third-party funder of disputes at the request of the arbitrator or arbitrators.⁹⁸ The aim is to prevent conflicts of interests between parties to the proceedings and the arbitration tribunal, therefore minimizing potential objections to the neutrality of decisions and ensuring the enforceability of awards.⁹⁹

The WIPO Rules provide provisions tailored for disputes in art disputes, such as rules concerning confidentiality and provisions for technical evidence, such as specific rules providing for site visits to view artworks.¹⁰⁰ The Center also maintains a database of over 2,000 dispute resolution practitioners and experts, known as the WIPO Neutrals, from which parties can choose their arbitrators, experts, and other technical advisors to the dispute.¹⁰¹ The list is not available publicly, but the Center provides it for parties that have engaged in a dispute through its processes. Due to the technical expertise and nuances that can be present in art disputes, the provision of a list of neutral experts is one of the defining benefits of the WIPO Center above more general arbitration service providers. Neutrals can also be appointed to the proceedings by the arbitration tribunal as technical experts, ordered to report to it on specific technical issues designated by the arbitrators.¹⁰²

XXI. COURT OF ARBITRATION FOR ART (CAFA)

The Court of Arbitration for Art (CAFA) was established in 2019 through a joint initiative between the Netherlands Arbitration Institute (NAI) and the Authentication in Art Foundation (AiA), an independent non-profit organization that provides tools and promotes best practices in the field of art authentication.¹⁰³ It was created in response to a perceived need in the market for an alternative dispute resolution provider that is specifically tailored to the needs and practices of the international art market. As two practitioners from the Center for Art Law put it: “the art market is not regulated, not transparent, and not necessarily rational. An art contract can be as little as one page and fail to include important details that open it to a future dispute. Add the complications surrounding ownership and issues of authenticity and it’s clear the art market has its share of unique problems and disputes that can be difficult to settle in a regular court of law in a manner that is acceptable to the open market.”¹⁰⁴

The most celebrated feature of CAFA is its framework establishing an Arbitrator Pool, a closely vetted list of international lawyers with demonstrated experience in art law disputes and/or international arbitration, “coupled with a pool of leading experts in the fields of forensic science and provenance research regarding art objects qualified to resolve

⁹⁶ WIPO ARBITRATION RULES, *supra* note 87.

⁹⁷ Ignacio de Castro, Heike Wollgast, & Justine Ferland, *Recent Trends in WIPO Arbitration and Mediation*, GLOBAL ARBITRATION REVIEW (December 21, 2022), <https://globalarbitrationreview.com/guide/the-guide-ip-arbitration/second-edition/article/recent-trends-in-wipo-arbitration-and-mediation>.

⁹⁸ WIPO ARBITRATION AND MEDIATION CENTER, *supra*, Arts. 9(vii) and 11(b).

⁹⁹ DE CASTRO, WOLLGAST, & FERLAND, *supra* note 74.

¹⁰⁰ WIPO ARBITRATION RULES, *supra* note 72, Art. 52.

¹⁰¹ WIPO ARBITRATION AND MEDIATION CENTER, WIPO NEUTRALS, <https://www.wipo.int/amc/en/neutral/index.html> (last visited February 20, 2024).

¹⁰² WIPO ARBITRATION RULES, *supra* note 87, Art. 57.

¹⁰³ COURT FOR ARBITRATION IN ART, <https://www.cafa.world/> (last visited February 20, 2024); AUTHENTICATION IN ART FOUNDATION, <https://authenticationinart.org/about-us/> (last visited April 2, 2024).

¹⁰⁴ HAYDEN & HECKER, *supra* note 41.

disputes in the wider art community, including matters involving international collectors, art historians, art market professionals, financial institutions, and other stakeholders in the international art market.¹⁰⁵ Parties can choose to deviate from this list, but only with consent from the Court after having proven the existence of “compelling reasons.”¹⁰⁶

CAfA is also unique in its strategic use of experts and expert advice during proceedings. The tribunal may appoint technical experts in specific circumstances where technical knowledge is needed.¹⁰⁷ Experts are also sourced from a pool of art historians, forensic scientists, provenance researchers, materials analysts, or artists scholars.¹⁰⁸ Parties may appoint experts in other matters, but their reports cannot compete with or supplement the tribunal-appointed experts’ on evidence regarding provenance or forensic science.¹⁰⁹ The goal is to avoid a “battle of experts” for these matters that the art market is so sensitive to and thus encourage the legitimacy that “authenticity decisions are based on truly neutral expert analysis.”¹¹⁰

A somewhat surprising feature of CAfA arbitration is its decision to publish final arbitration decisions and identify the art at issue, while keeping the proceedings themselves confidential and the parties’ identity anonymous, unless a party objects to this within 2 months of the arbitral award.¹¹¹ In this way, parties seeking arbitration primarily for confidentiality reasons can still choose to have the entirety of the proceeding stay confidential. This decision was made to “ensure market understanding and acceptance of the results.” Indeed, one of the members of the working group that developed the rules stated that everything “[...] came back to the questions of whether this is something the market will likely accept, and whether this is something that best positions the tribunal to render the right results.”¹¹²

XXII. CURRENT USE OF ARBITRATION IN THE MARKET

While scholarly and informal articles praising the benefits of arbitration for art market disputes abound,¹¹³ there is little data as to the rates of actual usage of this dispute-resolution mechanism in practice.¹¹⁴ This can be attributed in large part to the privacy and discretion inherent in both the art market and by arbitral service providers themselves as well. Arbitration providers do not publish specific awards, and while some do publish yearly statistics, such as the ICC’s International Court of Arbitration, they do not track art market disputes as a distinct category.¹¹⁵ That said, in a survey conducted by the author for this paper, out of 55 auction houses with online websites surveyed, only 4 included arbitration clauses in their sale terms and conditions. Of those 4, two established JAMS as the ruling arbitration service providers and rules used for the proceedings, one named the American Arbitration Association, and a final one established that arbitration would take place within a specific

¹⁰⁵ COURT FOR ARBITRATION IN ART, Explanatory Notes AiA/NAI Adjunct Arbitration Rules, 1.4. (January 1, 2019), <https://www.cafa.world/docs/CAfA%20Arbitration%20Rules.1.pdf>.

¹⁰⁶ *Id.* Art. 11.

¹⁰⁷ CAFA ARBITRATION RULES, *supra* note 82, Art. 29.

¹⁰⁸ CAFA ARBITRATION RULES, *supra*, note 82, Art. 29.1; Explanatory Notes AiA/NAI Adjunct Arbitration Rules, 2.2.

¹⁰⁹ CAFA ARBITRATION RULES, *supra* note 82, Art. 28.7.

¹¹⁰ EMANUEL, *supra* note 16.

¹¹¹ CAFA ARBITRATION RULES, *supra* note 82, Art. 51.

¹¹² Pryor Cashman, *First-of-Its-Kind Global Arbitration Court for Art Disputes Launching in June 2018*, PR NEWswire (May 7, 2018), <https://www.prnewswire.com/news-releases/first-of-its-kind-global-arbitration-court-for-art-disputes-launching-june-2018-300643034.html>.

¹¹³ BANDLE & THEURICH, *supra* note 31; EMANUEL, *supra* note 17; FRANKEL & FRANKEL, *supra* note 21; HAYDEN & HECKER, *supra* note 41; KHADIM, *supra* note 23; TRIOSCHI, *supra* note 25.

¹¹⁴ In fact, this author was not able to find any source that cited any information regarding frequency of use of arbitration in the art market, nor even rate of usage of arbitration clauses by art galleries or art auctions.

¹¹⁵ ICC, DISPUTE RESOLUTION 2022 STATISTICS: A YEAR IN REVIEW (December 22, 2022), <https://iccwbo.org/news-publications/news/icc-dispute-resolution-services-in-2022-a-year-in-review/>.

jurisdiction, without establishing which rules or service provider would preside. The remaining 51 auction houses named specific national or local courts as the competent forums for dispute resolution regarding controversies that arose from transactions they operated.

Similarly, we were unable to find any official or unofficial recommendations or guidelines from art industry associations regarding arbitration or other alternate dispute resolution (ADR) mechanisms. That said, the Basel Institute on Governance, an independent, international non-profit organization dedicated to preventing and combating corruption and strengthening governance around the world, did officially recommend non-judicial resolution mechanisms for art trade disputes in their Basel Art Trade Guidelines, published originally in 2012 and re-issued in 2018.¹¹⁶ This document, which proposes standards for art market operators directly recommends “taking recourse to out-of-court settlements, which include various Alternative Dispute Resolution (ADR) proceedings.”¹¹⁷

RECOMMENDATIONS

As the above shows, the art market is a unique industry that can greatly benefit from the use of arbitration as a standard dispute resolution mechanism by stakeholders. While arbitration has been recommended by scholars as a particularly great fit for art market disputes for years, there are still opportunities to better leverage these services.¹¹⁸ For this reason, we strongly encourage the adoption of official recommendations by art market professional associations of arbitration and other ADR methods as best practices and standards for dispute resolution from controversies arising from transactions. Similar to the mechanism established by the Basel Institute on Governance, professional organizations should provide implementation recommendations to include arbitral clauses in art transactions documents, conditions of sale, and final purchase/sale/consignment/donation/rental or other official documents. Including arbitration clauses in transactional contracts by art institutions, be they galleries, or auction houses, is the most effective way to inject its use in the industry, since such a large percentage of art transactions occur through these intermediaries.

As with any comparisons, there is no one-size-fits-all arbitration service provider that can be named as the best fit for all art trade disputes. For that reason, we encourage practitioners and professionals to weigh the pros and cons of the two highlighted arbitration institutions above and make a choice of which best fits their needs or specific situations. At the broadest level, each arbitration institution provides specific benefits. The CAfA is more tailor-made to the international art market and the context of art transactions through galleries, dealers, and auction houses. Its Pool of Experts and specific rules provide tools for decisions that are easily accepted by the market at large, while it also specializes in specific art authentication disputes.¹¹⁹ If these are of concern, CAfA provides clear benefits as a choice of arbitration provider. Conversely, the WIPO Center for Arbitration has the distinct benefit of institutional experience, knowledge, and success. By 2022 it had already logged more than 900 ADR cases, arbitrations among them, and is well known among practitioners.¹²⁰ Of course, the WIPO Center specializes in intellectual property, which is only one component of the art trade, albeit an important one.

However, the flexibility of contract provisions can provide a useful solution for this crossroads. If service providers wish to have both arbitration service providers as options for dispute resolution, they could name both in their arbitration clauses. Practitioners have the

¹¹⁶ CHRIST & VON SELLE, *supra* note 19.

¹¹⁷ CHRIST & VON SELLE, *supra* note 19, at 17.

¹¹⁸ See footnote 90.

¹¹⁹ HAYDEN & HECKER, *supra* note 41.

¹²⁰ WIPO, CASELOAD SUMMARY, <https://www.wipo.int/amc/en/center/caseload.html> (last visited December 13, 2023).

freedom and choice of naming an institution for certain types of cases, while another institution for others. For example, if the dispute arises regarding the authenticity or provenance of an art piece, these disputes can be named in the contract documents to be arbitrated through CAfA. Conversely, if the dispute revolves around an intellectual property issue, such as questions regarding droit de suite, copyright infringements, etc., then it can be named to be resolved by the WIPO Center for Arbitration.

Finally, we recommend further research regarding the current use of arbitration in the art market, particularly into the reasons why practitioners have chosen to include or abstain from choosing arbitration as their standard dispute resolution mechanism. A better understanding of the players in the art market can also lead to a better understanding of how to encourage this solution for art trade disputes.