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Alternative dispute resolution in art-related cases

Abstract: One of the features of so called "art cases" is that the solutions are rarely black and white, therefore conventional remedies such as damages are often not adequate. Choosing alternative methods, widely recommended by international organizations, permits parties to reach creative non monetary solutions. The article aims at discussing how non-judicial methods are used in art cases and whether they are better for solving art related disputes. The first part of this article describes the methods that are used in particular cases, the formation of ADR clauses and also refers to the institutional rules of conduct. The second part lists the arguments for using ADR methods in art cases.

Keywords: alternative dispute resolution, art cases, restitution, WIPO Arbitration Centre, ICOM-WIPO Art and Cultural Heritage Mediation

1. Introduction

In 2006, after six years of unsuccessful judicial proceedings, the Arbitration Tribunal in Austria rendered an award adjudicating five Gustav Klimt paintings to Maria Altmann, a heir of Ferdinand and Adele Bloch-Bauer. The pictures were looted during World War II and then exhibited in the Austrian National Gallery[1]. This case is worth mentioning

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[1] Source: Arbitral Award, *Maria V. Altmann and others v. Republic of Austria*, January 15, 2004, http://bslaw.com/altmann/Klimt/award.pdf, accessed October, 19 2017. See also: C. Renold, A. Chechi, A.L. Bandle, M.A. Renold: *Case 6 Klimt Paintings — Maria Altmann and Austria*. Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva. Last visited: 19.10.2017.

not only because it is a landmark case in the field of cultural property, but mainly because it is an example of a case that was finally solved out of court through arbitration. Moreover, other non-judicial methods of solving art disputes such as mediation or negotiations have gained popularity in recent decades as they seem to be better suited to this type of cases.

The nature of the so-called "art cases" may vary. The disputes relate to different legal fields and involve a wide variety of private and public stakeholders[2]. The conflicts may be of a contractual nature, e.g. disputes between cultural institutions over loan agreements, between museums and donors over donation agreements or over deposits (which are frequently encountered in Poland). There may also be conflicts with insurance companies over insurance contracts. In the art market, conflicts may arise between auction houses and art collectors (over the warranty of authenticity or auctioneer's negligence)[3]. In addition, there are disputes over sale agreements in relations between artists and the owners of galleries. Among non-contractual disputes one can point out the cases of intellectual property over an artist's rights, and — the most commonly encountered — cases involving the restitution of stolen cultural property[4].

In order to improve the processes for solving these types of matters, many international organizations encourage parties to use alternative dispute resolution (ADR) methods. The UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects of 1995 recommends that the parties submit the dispute to arbitration[5]. The Washington Confer-

[2] However, the situations where the character of the dispute is administrative, e.g. between the public body (e.g. a monument's conservator) and a private investor in the process of renovating an immovable monument are beyond the scope of this article. Mediation, as a way of solving administrative disputes, was added to the Polish Code of Administrative Procedure by the Law of the change of the Code of Administrative Procedure and other acts of 7 April, 2017 ("Journal of Laws" 2017, position 935). More on this topic see: V. Vadi: *Cultural Heritage in International Investment Law and Arbitration*. New York University 2014.

[3] For more on the issue of the liability of auction houses see A.L. Bandle: *The Sale of Misattributed Artworks and Antiques at Auction*. Cheltham, UK 2016.

[4] The term "restitution" is understood broadly here and includes not only cases of the restitution of stolen cultural property but also the return of the cultural property that was illicitly exported. This differentiation is mentioned in art. 1 of The UNIDROIT Convention on Stolen or Illegally Exported Objects (1995). For a more extensive discussion of terminology see W. Kowalski: *Restytucja dzieł sztuki*. Katowice 1993, p. 23 et seq.

[5] See art. 8(2) — principles 8,9,11 ("the parties may agree to submit the dispute… to arbitration"). Other advantages of arbitration with particular reference to the UNIDROIT Convention such as neutrality, expertise, speed, efficiency and cost were described by E. Sidrorsky: *The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. "International Journal of Cultural Property" 1996, 19, p. 32—37.

ence on Holocaust-Era Assets of 1998 also recommends that "the parties to any claim involving Nazi-looted art consider mechanisms that exist to resolve claims without the necessity of litigation such as mediation, arbitration and alternative dispute resolution"[6]. Furthermore, mediation and conciliation are seen as ways to facilitate the return and restitution of cultural property within a special body working under the auspices of UNESCO[7].

Some of the organizations go a step further and offer the help of an institutional facilitator that is established under their auspices. A good example is the Mediation and Arbitration Centre, which was set up by the World Intellectual Property Organization (WIPO) to solve intellectual property disputes that involve artists. It offers mediation, arbitration, expedited arbitration and expert determination as extrajudicial methods of solving disputes[8]. A more specific body for solving typical art cases was created together with the International Council of Museums: the ICOM-WIPO Art and Cultural Heritage Mediation[9]. Recently, museums worldwide (and Polish ones as well) have been faced with complicated legal issues, among which the issues of the provenance of objects is in the foreground[10].

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[6] See http://www.lootedart.com/web_images/pdf2014/Chapter%204%20Nazi-Confiscated%20Art%20Issues.pdf, p. 541.

[7] The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in the case of Illicit Appropriation (hereinafter: ICPRCP). In order to exercise the mediation and conciliation functions, the Committee may establish appropriate rules of procedure. The outcome of the mediation and conciliation process is not binding on the Member States concerned, so that if it does not lead to the settlement of a problem, it shall remain before the Committee, like any other unresolved question which has been submitted to it. See: Statutes of the ICPRCP adopted by 20 C/Resolution 4/7.6/5 of the 20th session of the General Conference of UNESCO, Paris, 24 October—28 November 1978, source: http://unesdoc.unesco.org/images/0014/001459/145960e.pdf, access: 26.09.2017.

[8] For instance, artists, whose IP rights have been violated, could ask for this offer. That was the case of a European art gallery that concluded an exclusive cooperation agreement with a European artist in order to promote the artist in the international market. The case was resolved through arbitration. Source: http://www.wipo.int/amc/en/arbitration/case-example.html. Last access: 30.10.2017.

[9] See: http://www.wipo.int/amc/en/center/specific-sectors/art/icom/. In the special Resolution we read: "It is the policy of ICOM to encourage the amicable resolution of disputes regarding the ownership of objects in museum collections that allegedly were stolen or illegally exported from the country of origin and the early settlement of such disputes through voluntary settlement procedures rather than through litigation or political decisions".

[10] In recent years, many Polish museums have faced the problem of the withdrawal of artworks from their collections. The position of the museum, which often initiates mediation or negotiation with the owners, is twofold. On one hand, it refers to the objects

The aim of this article is discuss how alternative dispute resolution methods are used in art cases and whether they are better for solving art related disputes. The first part of this article describes the methods that are used in particular cases, the formation of ADR clauses and also refers to the institutional rules of conduct. The second part lists the arguments for using ADR methods in art cases.

2. Drafting dispute resolution clauses Examples of dispute resolution processes

The term "alternative dispute resolution" (ADR) comprises the methods of solving disputes that are alternatives to judicial settlement[11]. Among the numerous forms of ADR, in this article I will address arbitration, mediation and negotiation, as they are the ones that are most commonly used in art cases[12]. All of these methods differ. The power and the duty of an arbitral tribunal to make binding decisions distinguishes arbitration as a method for resolving disputes from other procedures, such as mediation and conciliation, the aim of which is to arrive at a negotiated settlement[13]. When referring to negotiations as a method for settlement, there is always a risk of going nowhere, as there is no impartial

formerly nationalized after World War II on the basis of the so-called "rural reform" in 1946 that kept in museums for a long time. After judicial proceedings in which they are adjudged to the owners, the museums try to negotiate to keep those objects that are still exhibited in their collections. On the other hand, as a result of the price increase in the art market, some heirs of the artists start withdrawing the objects from the museums. To prevent the emptying of their permanent collections, museums, sometimes well beforehand, start the negotiating process.

[11] In the doctrine, alternative dispute resolution methods are described as alternative to the formal procedures adopted by the courts of law as part of a system of justice that is established and administered by a state. See: N. Blackaby, C. Partasides, QC with A. Redfern, M. Hunter: *Redfern and Hunter on International Arbitration*. 6th ed. Oxford 2015, p. 40.

[12] Conciliation is recommended by UNESCO as one of the dispute solving methods. It is, however, rarely used. The Spoliation Advisory Panel or the German Lost Art Foundation is a good example. The role of the conciliator is to make proposals for settlement or in the words of UNICITRAL Conciliation Rules art. 7(1) to "assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute".

[13] N. Blackaby, C. Partasides QC with A. Redfern, M. Hunter: *Redfern*..., p. 24.

third party who can help to rescue the discussions[14]. Although it is often observed that the parties frequently refer to negotiations "in good faith" before embarking on a more formalized way of solving a dispute, such an obligation is nebulous[15] and rarely leads to a settlement.

An examination of different types of contracts in the field of art indicates that many of them include clauses that refer to ADR. Those clauses, however, are usually not very precise. The most commonly used phrasing that is met in the contracts that are concluded by museums is that: "Every dispute arising out of this contract should be in the first place settled out-of-court. In case of not reaching a consensus, the dispute will be settled by the court proper to the lender"[16]. This clause cannot, however, serve as an example of an arbitration clause that has a binding effect.

When a dispute arises, the parties can request the assistance of an institutional facilitator or *ad hoc* mediation/arbitration. As there are many institutions that deal with ADR that have established rules[17], a contract may simply refer to the terms and rules of an institutional facilitator. In this analysis, the focus will be on those that have especially been adapted for art cases, i.e. the WIPO Arbitration and Mediation Centre, WIPO-ICOM Mediation Centre or the private initiative — Art Resolve Mediation[18].

In this part, I will discuss the alternative dispute resolution processes, focusing on the formalities of the clauses and will also discuss the example sets of rules provided for the specific proceedings conducted by the WIPO Arbitration Centre and ICOM-WIPO Art and Cultural Heritage Mediation. This section lists the "must have" ingredients in a clause and explains how these should be tailored for the maximum benefit in art cases. I will also address examples of some cases concerning cultural property disputes.

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[14] Ibidem, p. 40.

[15] Ibidem. The Authors ask the following questions: who is to open negotiations? How long are they to last? How far does the party need to go in order to show "good faith"?

[16] One of the loan contracts between a Polish museum and a foreign museum. On file with the author.

[17] The most widely recognized are the International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration and the Centre for Effective Dispute Resolution (CEDR).

[18] See: artresolve.org/art-disputes-mediation-adr-services/ (rules: https://artresolve.org/wp-content/uploads/2014/09/Art-Resolve-Mediation-Rules-2014.pdf).

2.1. Arbitration

Beginning the analysis with arbitration is justified by the fact that among the methods of ADR, it is the most formalized one. According to the doctrine, arbitration "begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties play a significant role. Yet, it ends with an award that has binding legal force and effect, and which, under the appropriate conditions, the courts of most countries of the world will recognize and enforce"[19]. If the award is not carried out voluntarily, it may be enforced by legal proceedings both locally and internationally, under such international conventions as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[20].

To submit a dispute to arbitration, there should be a valid agreement to arbitrate, which is usually expressed in an arbitration clause[21]. Arbitration clauses are drawn up and agreed to as part of a contract before any dispute has arisen, or — less commonly — once a dispute has arisen[22]. The pre-dispute arbitration clauses are used in most cultural property contracts, in particular loan contracts[23], donation contracts, sales[24] or insur-

[19] N. Blackaby, C. Partasides QC with A. Redfern, M. Hunter: *Redfern*..., p. 27.

[20] Ibidem, p. 26.

[21] For a more extensive discussion on the issue of the formal requirements pertaining to arbitration clause see G. Żmij: *Arbitration agreement*. In: *Polish Arbitration Law*. Ed. B. Gessel-Kalinowska vel Kalisz. Warszawa 2014, p. 87 et seg.

[22] N. Palmer, P. Kaye: *International dispute resolution: cross-border loans and exhibitions*. London, Art loans, 1997, p. 374.

[23] A loan contract between a Polish museum and a foreign institution (on file with author): "Any dispute arising in connection with this Agreement shall be finally settled under the Swiss Rules of International Arbitration by three arbitrators appointed in accordance with the said rules. The place of arbitration shall be Zurich, Switzerland" can serve as an example. Morover, in the sample loan contract recommended to museums by the Network of European Museum Organizations, we find a clause entitled Governing law and jurisdiction: "This agreement shall be governed by the law of... (insert name of state/country). Any disputes or differences between the Lender and the Borrower arising out of this agreement shall be settled by means of negotiation and arbitration. Should this fail they are to be decided by the rule of the Arbitration Institute of... (insert name of state/country). Chamber of Commerce" (source: http://www.ne-mo.org/index.php?id=110/inurl%27A=0%27A=0).

[24] Interestingly, very few auction houses contain a clause in their consignment agreement and conditions of sale that expressly refer to the ADR process. Both Christies' and Bonham's include an express mediation and arbitration clause in their Conditions of Sale, which applies to the consignors' claims against the auction houses. The German Auction Haus Auctonata provides for arbitration proceedings in its authenticity guarantee to purchasers pursuant to its conditions of sale. See: A.L. Bandle: *The sale of*..., p. 321.

ance contracts. The institutions that deal with arbitration, such as the WIPO Arbitration and Mediation Centre, have their own recommended form for arbitration clauses[25]. The latter type of arbitration clauses, post-dispute ones[26], can take the form of a stand-alone contract. However, such a "submission agreement"[27] is not easy to formulate as the hostility between the parties grows[28]. When it comes to art cases, it is primarily used in title disputes, third party disputes or failed cultural property transactions[29]. It can be tailored more to the dispute than a pre-dispute arbitration agreement as the parties know the specific issues that arose between them. Sometimes, one more type of an arbitration clause is mentioned, that is, a step arbitration agreement. After a mediation or negotiation fails, the parties may turn to arbitration[30]. Mediation followed by arbitration (in the absence of a settlement) is also

[25] An example given by WIPO: "Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction]".

[26] An example: "We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules: [brief description of the dispute]. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction]".

[27] N. Blackaby, C. Partasides QC with A. Redfern, M. Hunter: *Redfern*..., p. 13.

[28] Especially in the field of art. As A.S. Rau describes it: "An artist or a collector in particular may be unwilling — or may find it difficult-to draw a clear distinctions between the subject matter of the dispute (e.g. a particular work of art) and his own persona. And when a dispute has been festering for some time, personal elements arising out of the dispute itself — such as the need to vindicate one's honor and integrity — may well have been added to the original subject matter, giving rise to mutually reinforcing spirals of self-righteousness and resentment". See A.S. Rau: *Mediation in Art-Related Disputes*. In: *Resolution Methods for Art-Related Disputes* 1999, p. 179.

[29] E. Varner: *Arbitrating Cultural Property Disputes*. "Cardozo Journal of Conflict Resolution" 2012, vol. 13, p. 491.

[30] A good example is a contract for a traveling exhibition that states that: "For a period of at least 30 days, Organizer and Participant will use reasonable, good faith efforts to resolve any dispute between them in connection with this agreement and/or the exhibition at the Facility. If they are unable so to resolve any such, then such dispute will be resolved by arbitration". Cit. after: E. Varner: *Arbitrating*..., p. 493.

suggested by the WIPO Arbitration Rules[31] and in the ICOM-WIPO Mediation Rules[32].

An arbitration clause can be construed broadly ("the disputes arising under or in connection with this contract") or narrowly. However, using a narrow arbitration clause ("disputes arising under this contract") is risky, as it delegates some issues to the scrutiny of arbitration, and others to the judicial proceedings. In the case Schlaifer Nance & Co. v. Estate of Andy Warhol, the court noted: "a party who consents to the inclusion in a contract of a limited arbitration clause does not thereby waive his right to a judicial hearing on the merits of a dispute not encompassed within the ambit of the clause"[33]. According to the court, as the parties split their claim in the agreement, they could raise claims arising out of the same transaction in both forums.

To commence an arbitration, a formal notice must be given. The date of the receipt of the request for arbitration by the claimant is also the date of the commencement of the proceedings[34]. When it comes to the composition and establishment of a Tribunal, the methods for the appointment of the arbitrators are specified in the rules, but the decisions made by the parties in the arbitration agreement should be respected. An arbitration agreement should list the number of arbitrators[35], provide

[31] "[…] If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60] [90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules".

[32] See Art. 16 b: "Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration of the parties, procedures or means for resolving those issues which the mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues. […]".

[33] The Licensing Agreement between the Schlaifer Nance & Company, Inc (SNC) and the Estate of Andy Warhol granted SNC exclusive rights to license Warhol's artwork, trademarks and copyrights to third parties for the use of various products. The Agreement contained a limited arbitration clause, which required disputes under some sections of the agreement to be arbitrated, and thus left those under other sections to be litigated. Certain rights, duties and representations in the Licensing Agreement, particularly the Estate's duties and representations regarding Warhol works, are set forth both in the sections that are subject to arbitration and in others which are not. Schlaifer Nance & Co. v. Estate of Andy Warhol, 194 F.3d 323 (2nd Cir. 1999).

[34] See articles 6—10 of the WIPO Rules. Art. 9 specifies what the Request for Arbitration shall contain.

[35] A clause used by one auction house can serve as an example: "The parties shall submit the dispute for binding arbitration before a single neutral arbitrator" (Condition of Sale in California, New York, Bonhams & Butterfields). An arbitration clause in a con-

the method for selecting arbitrators[36] and specify their neutrality. In cases concerning art, an issue that is of crucial importance is the arbitrators' expertise. In contracts concerning the appraisal of the art objects or their authenticity, the agreement should specify an appraiser or cultural property specialist. If the contract is for the sale or the dispute is over the title, the arbitration agreement should specify a lawyer and an art dealer. If the contract involves conservation, one of the arbitrators should be a conservationist[37].

When it comes to procedural law, the agreement should state whether the parties opt for an arbitral institution or *ad hoc* arbitration. When referring to the institutional rules ("Disputes should be arbitrated according to the rules…"), the clause should specify the date of the rules as institutional rules change[38]. The arbitration clause should also specify the arbitration location, as the seat of the arbitration determines the procedural law over the cultural property dispute[39]. Finally, the arbitration clause should specify the language of the arbitration. The rules that govern international arbitration are, first, the mandatory provisions of the *lex arbitrii* and second, the rules that the parties themselves may have chosen[40]. Clauses specifying the substantive law can be very basic, e.g. "these..are governed by the laws of the…".

To illustrate this reasoning with some examples of disputes that have been settled through arbitral proceedings, the following cases may be cited. One well-known art gallery concluded an exclusive cooperation agree-

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tract for the co-ownership of a painting required that "any disagreement of the parties concerning the Painting shall be submitted for arbitration to a panel of three arbitrators". Cit. after E. Varner: *Arbitrating…*, p. 511.

[36] Examples given by E. Varner: "Any disagreement of the parties concerning the painting shall be submitted for arbitration to a panel of three arbitrators: one chosen by Museum X, one chosen by gallery Y and a third chosen by those two". Ibidem, p. 512.

[37] To more thoroughly examine this topic see E. Varner: *Arbitrating…*, p. 514.

[38] A contract for a traveling exhibition required the "Commercial Arbitration Rules of the American Arbitration Association applicable at the time of initiation of the arbitration". Example after: E. Varner: *Arbitrating…*, p. 501.

[39] If the seat of arbitration is the Republic of Poland, the provisions of part five of the Code of Civil Procedure shall apply.

[40] Art. 39 of Polish Private International Law states that "Arbitration agreements are governed by the law chosen by the parties. In the absence of the choice of law by the parties, the arbitration agreement shall be subject to the law of the country in which the agreed arbitration venue is situated. If the parties have not made such a designation the arbitration agreement shall be subject to the law applicable to the relationship to which the given dispute relates; it shall be sufficient, however, that the arbitration agreement be effective under the law of the country in which the arbitration takes place or in which the arbitral tribunal issued the award". Private International Law, Act of 4 February 2011 (O.J. 2011 No. 80, item 432).

ment with an artist in order to promote the artist in the international market. The parties' relationship began to deteriorate three years after the agreement was signed and the artist sent a notice terminating the agreement to the gallery. The agreement contained an arbitration clause providing for a three-member tribunal according to the WIPO arbitration rules. The tribunal issued a preliminary case assessment encouraging the parties to resume the settlement negotiations that the parties had attempted at an earlier stage. The parties reached a settlement and asked the tribunal to render a consent award that incorporated the parties' settlement agreement. The terms of the settlement included the termination of the cooperation agreement and the provision of a number of works by the artist to the gallery in the final settlement[41].

Referring once again to the arbitral ruling in the Klimt case, the parties agreed to establish a panel of three Austrian arbitrators and to accept the decision of the panel as final and without any right of appeal. According to the arbitration agreement, the panel had to rule on whether, and in what manner, in the period between 1923 and 1949, or thereafter, Austria acquired ownership of the paintings, and whether, pursuant to the Restitution Act of 1998[42] the requirements were met for restitution of any of the paintings without remuneration to the heirs of Ferdinand Bloch-Bauer[43]. The parties further agreed that the arbitration tribunal was to apply Austrian substantive and procedural law. In legal terms, its decision was based solely on the facts presented to it by the parties. All costs were to be covered by the Republic of Austria.

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[41] An example given on a WIPO website.

[42] Austria's Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998. This law allows the restitution of works of art that owners had been forced to donate in exchange for export permits pursuant to the Annulment Act of 1946. It also set up an advisory body (the "Restitution Committee") that is tasked with the responsibility to respond to restitution requests. See: Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections of 4 December 1998, Federal Law Gazette 1998/181.

[43] The panel decided that the will of Adele Bloch-Bauer was not legally binding for her husband, Ferdinand. As a consequence, the National Gallery had no valid ownership of the paintings. However, the ownership title had passed to the Republic of Austria later, in 1948, when in the name of the heirs, a proxy donated the pictures to the Austrian Public Museum (in order to receive export permits for other valuable items, Jews leaving Austria had to "donate" valuable artworks). These "donations" were annulled through the Restitution Act in 1998.

2.2. Mediation

Mediation is another alternative method that can be used in disputes concerning cultural property. A mediator, who is an independent third person, moves between the parties, listening first to one and then to the other, and trying to persuade them to focus on their real interests rather than what they see as their legal rights[44].

Mediation is chosen by ICOM as the best suited method of solving disputes that arise over museum matters, among which disputes concerning the provenance, return, restitution, custodianship and ownership of objects in collections come into play[45]. There are also IP issues and claims concerning intangible cultural heritage. Such disputes, as are stated in the Introduction to the ICOM-WIPO Mediation Rules, may "further involve complex legal, as well as sensitive non-legal issues of a cultural, economic, ethical, historical, moral, political, religious or spiritual nature; they may combine tangible and intangible matters in a single case; they may present challenges in terms of evidence and statutes of limitations; they may raise questions of customary law; they may involve considerable legal and other expenditure; they are often international in scope; and reputations and long-term relationships may be at stake"[46]. When considering the high costs of litigation over the ownership title, and bearing in mind the risk of losing the cultural property, museums commence negotiations or mediation in order to preserve the exhibited objects in their possession, not necessarily to defend the title. This is also a contemporary issue of deposits in Polish museum collections, as was explained above[47].

When we analyze the ICOM-WIPO Mediation Rules, there are some specifics that relate to the subject matter. The List of Mediators from which parties can choose comprises mediators with specific expertise in art and cultural heritage and related cases (art. 6). Moreover, in the Rules, there is a reference to the ICOM Code of Ethics for Museums[48]. The recommended clauses, which take the typical form of ADR clause,

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[44] N. Blackaby, C. Partasides QC with A. Redfern, M. Hunter: *Redfern*..., p. 41.

[45] Mediation is recommended by the President of ICOM A. Cummins in a statement: Promoting the use of Mediation in Resolution of disputes over the Ownership of objects in Museum Collections, source: http://icom.museum/fileadmin/user_upload/pdf/Statements/ENG/mediation2006_eng.pdf, access: 30.10.2017.

[46] Introduction to the ICOM-WIPO Mediation Rules.

[47] See supranote 10.

[48] For the Polish translation see S. Waltoś: *Kodeks etyki ICOM dla muzeów*. Warszawa 2009.

can be used at the stage of the formation of the contract[49], as well as for an already existing dispute[50]. Referring to the specific rules of conduct is of great importance as an agreement to try to settle disputes by mediation may prove to be enforceable if there is sufficient certainty as to what procedure is to be followed[51].

There is no obligation, however, for the parties to request the assistance of an institutionalized mediator. The examples of cases that have been solved through *ad hoc* facilitators that are given below also show that a state (a confederation) as well as private entrepreneur (auction house) can act as a mediator. The first case is a dispute between two Swiss cantons, Saint Gallen and Zurich in 2006. As a result of religious wars in the 18th century, many cultural objects were transferred from Saint Gallen to Zurich. The basis of the peace treaty of Baden in 1718 was that Zurich would return most of the cultural objects, except for some items such as the Cosmographical Globe. In the years following the treaty, further requests for their return were denied. The debate over the ownership of the objects was "frozen" for almost two hundred years and was revived in a media debate in 1996. The parties attempted to negotiate their dispute for eight years. A mediation team that had been assigned by the Swiss Government[52] assisted in bringing about a settlement between political representatives from both Cantons and the responsible bodies of the concerned libraries[53]. In the mediation agreement[54]. Saint Gallen accepted Zurich's ownership, while the latter offered an unpaid and indefinite loan regarding 35 manuscripts. The Globe and the manuscripts were exhibited for some time in Saint Gallen. Zurich

[49] "Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the ICOM-WIPO Mediation Rules. The place of mediation shall be [specify place] The language to be used in the mediation shall be [specify language]".

[50] "We, the undersigned parties, hereby agree to submit to mediation in accordance with the ICOM-WIPO Mediation Rules the dispute set out below. [Brief description of dispute] The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language]".

[51] Because there is a provision for recourse to a recognized center. See: N. Blackaby, C. Partasides QC with A. Redfern, M. Hunter: *Redfern*..., p. 40.

[52] As provided by the Swiss Constitution of 1999, art. 44 (3).

[53] See: M. Cornu, M.A. Renold: *New developments in the restitution of cultural property: Alternative means of dispute resolution*. "International Journal of Cultural Property" 2010, 17, p. 18.

[54] Source: A.L. Bandle, R. Contel, M.-A. Renold: *Case Ancient Manuscripts and Globe — Saint-Gallen and Zurich*. Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

paid for the production of an extra replica of the Globe, which is now exhibited in Saint Gallen[55].

Another case worth mentioning is the one concerning the figure of St. Agatha[56] that was stolen from St. Martins Cathedral in the Netherlands in 1976. It traveled a long way through different countries to finally surface at Sotheby's auction. The auction house acted as a mediator between the church and the anonymous owner. It decided to remove the figure from the auction in order to sell it privately. If a lengthy court proceeding had been started, there would have been no chance to contest the due diligence during the acquisitions of the sculpture, as the vendor had made a good faith purchase. Instead of challenging the vendor's ownership, St. Martin's Cathedral simply repurchased the work.

2.3. Negotiations

Negotiations, which is another non-judicial method of solving disputes, does not involve any third party but is generally conducted between the parties to the dispute. The absence of a neutral third party can result in the parties being unable to reach an agreement as they may be incapable of defining the issues at stake, let alone making any progress toward a solution. On the other hand, the perspective of having a binding arbitral award sometimes deters the parties from becoming involved in more formalized ways of solving problems, as the outcome of a negotiation only binds those parties who were involved in the negotiation and cannot be enforced.

To illustrate an example of negotiations, I will use the case of an Auschwitz Suitcase[57] between the heirs of the Holocaust victim Pierre Levi and the Auschwitz-Birkenau State Museum in Oświęcim. The suitcase, which had belonged to Pierre Levi, a French Jew, was on loan in the Shoah Memorial Museum in Paris for the exhibition *The Fate of Jews from France during World War II*. After visiting the exhibition, Levi's heir,

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[55] For a more detailed description of the case see A.L. Bandle, S. Theurich: *Alternative Dispute Resolution and Art-Law — A New Research Project of the Geneva Art-Law Centre*. "Journal of International Commercial Law and Technology" 2011, vol. 6, Issue 1, p. 35.

[56] Source: M. Frith, A. Chechi, M.-A. Renold: *St. Agatha Statue — St. Martin's Church and Private Person*. Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

[57] See: M. Wojciechowski: *Problem muzealiów znajdujących się w polskich muzeach martyrologicznych*. In: *Prawo muzeów*. Eds. J. Włodarski, K. Zeidler. Warszawa 2008, p. 200 et seq.

Michel Levi-Leleu, made a request to the Auschwitz-Birkenau State Museum *via* the Parisian museum that the suitcase remain in Paris permanently. The director of the Auschwitz-Birkenau Museum, feared a "risk of precedent" — that the return of the suitcase might generate many other restitution claims[58]. The initial negotiations between the parties, which were conducted by the President of the Shoah Memorial Museum as an intermediary, failed. Finally, Michel Levi-Leleu brought an action for restitution before the Tribunal de grande instance in Paris. The court ordered the immediate confiscation and sequestration of the suitcase by the Parisian authorities pending a final court decision on the matter. According to the settlement, the suitcase will be loaned to the Shoah Memorial Museum in Paris where it was exhibited at the time of its discovery by Michel Lévi-Leleu on a long-term basis . In turn, he renounced all claims and the suitcase remains the property of the Auschwitz-Birkenau State Museum.

3. The benefits of alternative dispute resolution methods over litigation in art cases

The specifics of art-related disputes are connected with their subject matter — cultural objects, which have both a material and immaterial value, and most of all are significant to the environment from which they derive. The issues concerned are often very sensitive, as the parties involved are not only businesspeople or auction houses, but also cultural institutions, or the heirs of war victims. Most often, art cases cannot simply be resolved by adjudicating pecuniary compensation. The great majority of the cases of the restitution of cultural property can be qualified as hard cases, and are located in a space between morality, politics, law and economics[59]. In this part, the question of why alternative dispute resolution methods can be more advantageous to the parties will be discussed.

First of all, the majority of art disputes are international as they involve actors from two or more countries. Such cases may give rise to

[58] The International Auschwitz Council, in turn, insisted on reassembling everything left from the camp as an "inviolate and integral" whole, as communicated by a letter of the Council's chairman sent to Michel Lévi-Leleu.

[59] See K. Zeidler: *Restitution of Cultural Property. Hard Case. Theory of Argumentation. Philosophy of Law*. Gdańsk 2017, p. 14.

actions in the national courts of multiple jurisdictions. By choosing ADR methods, the parties can resolve a dispute in a single procedure that includes multiple jurisdictions. For example, the parties can agree to resolve a dispute involving intellectual property that is protected in a number of different countries in a single procedure, thereby avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results. In a case between a Russian art collector, Dmitry Rybolovlev, and an art dealer, Yves Bouvier, the two parties of the conflict could have avoided fighting their battle before the national courts in, *inter alia*, Monaco, Singapore, Hong Kong and France, by settling the dispute *via* ADR in one location[60]. Many of the cross-border issues can be resolved in advance by agreement as this is the result of the contractual autonomy of the parties.

Another manifestation of party autonomy is the choice of governing law, as involving parties from different countries entails the risk of the contradictory outcomes. For example, there are different approaches concerning the good faith acquisition of stolen cultural property in civil and common law countries[61]. There are also differences in calculating the statues of limitations, as was the issue of the van Gogh case[62]. In addition, in the context of folklore, there are diverse national attitudes toward the copyright requirement of fixation[63].

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[60] Dmitry Rybolovlev was the buyer of the painting by A. Modigliani from Yves Bouvier and had paid $118 million. Some time later, he accidentally became aware that the painting was bought by Bouvier for no more that 93.5 US million dollars, meaning that the price had been marked up by the dealers by more than $20 million. In early January, D. Rybolovlev responded by filing complaints against Y. Bouvier, accusing the art dealer of pocketing millions in secret profits from multiple sales.

[61] See W. Kowalski: *Purchase of a Stolen Work of Art*. In: *Legal convergence in the enlarged Europe of the new millennium*. The Hague, Kluwer, 2000.

[62] The question of the lapse of the statute of limitations arose in a dispute between the Detroit Institute of Arts and the heirs of a woman who sold *The Diggers* by van Gogh and *Street Scene in Tahiti* by Gaugin after the Second World War. The museum refused to arbitrate because it believed that the statute of limitations had lapsed. Instead the museum filed a declaratory action to quiet title to the above-mentioned masterpieces and ultimately won the case. For this and other examples of calculating the statutes of limitations see E. Varner: *Arbitrating…*, p. 520. More on the issue of statutes of limitations in cultural cases see: P. Gwoździewicz-Matan: *Przedawnienie roszczeń o zwrot dóbr kultury*. In: *Rynek sztuki. Aspekty prawne*. Eds. W. Kowalski, K. Zalasińska. Warszawa 2011, p. 214 et. seq.

[63] S. Theurich: *Alternative Dispute Resolution in Art and Cultural Heritage — Explored in the context of the World Intelectual Propoerty Organization's Work*. In: *Kulturgüterschutz — Kunstrecht — Kulturrecht: Festschrift für Kurt Siehr*. Eds. K. Odendahl and P.J. Weber. Baden-Baden 2010.

The courts function within the realm of strictly legal sources, while in many art cases, what matters more are trade customs, ethical guidelines and directives. For example, the parties can agree to apply the best practice guidelines for art authentication rather than using the fictional reasonable auctioneer standard to which the courts would refer[64].

Secondly, among the generally emphasized advantages of arbitration/mediation is the expert knowledge of the arbitrators. The chances of having a case judged by experts with relevant knowledge is crucial, as both legal and technical expertise is required in addressing these problems. For instance, parties deciding to settle their dispute in the ICOM-WIPO Mediation Centre can be certain that they will have experts "with specific expertise in art and cultural heritage and related areas"[65].

What is often emphasized as a feature of art cases is that the solutions are rarely black and white[66]. Most often, conventional court remedies such as damages are often not adequate in these cases. Choosing ADR to resolve a dispute permits the parties to reach creative non-monetary solutions. Among the non-typical but satisfactory results, M. Cornu and M. Renold indicate the provision of works of art in lieu of monetary damages, the conclusion of long-term loan agreements, donations, specific ownership arrangements (shared ownership or the creation of a trust), the creation of a copy of the disputed cultural object, the formal recognition of ownership or programs in exchange for lending an object[67].

Another factor in favor of solving disputes out of court is the confidentiality of the proceedings and of the outcome. One may ask, why is this so important? First of all, because any allegation of a work being inauthentic throws a shadow over a work of art[68]. This can result in lowering the market value even if the object was determine to be authentic by an expert in the end[69]. This throws a bad light on the entire collection of an art collector as suspicion arises about the authenticity of the others

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[64] A.L. Bandle: *The sale of…*, p. 325.

[65] Art. 6 of ICOM-WIPO Mediation Rules.

[66] A.L. Bandle (*The Sale of…*, p. 326) gives an example of an auctioneer's liability: "the auctioneer is either responsible for the misattribution and must pay damages to the consignor or he is not liable and therefore the consignor cannot recover his loss from the sale through litigation. In ADR proceedings, the parties can reach a financial settlement that is a compromise between each party's demands".

[67] M. Cornu, M.A. Renold: *New Developments in the Restitution…*, p. 18—23.

[68] A thorough analysis of this issue is presented by R.D. Spencer, in: *The expert versus the object: judging fakes and false attributions in the visual arts*. New York, Oxford University Press, 2004.

[69] For more on the topic of art experts see P. Gwoździewicz-Matan: *Ekspert muzealnik? Aspekty prawne*. In: *Kultura w praktyce: zagadnienia prawne*. T. 3: *Muzea a rynek sztuki*. Poznań 2014.

objects in the collection. This can also be quite damaging when an object is in the possession of a public entity such as a museum. Secondly, keeping a dispute out of the public eye plays a major role in so-called "sleeper disputes", that is cases in which the artworks or antiques have been undervalued and mislabeled due to an expert's oversight, and consequently undersold[70]. Confidentiality can protect the parties and cultural property from being burned and reduce the risk of other claims[71]. However, sometimes parties intentionally want to publicize the matter, as was observed in the above-mentioned Rybolovev-Bouvier case.

4. Final remarks

Solving disputes that arise over cultural property has never been easy. Therefore, in recent decades, the parties of so-called art cases are turning to alternative methods of solving problems more and more often[72]. There is a risk that judicial solutions simply do not fit the specifics of cultural property disputes. Most often, negotiation or mediation run parallel to the judicial proceedings in order to finally finish the process with a non-judicial solution. Citing A. Checi, ADR methods "are not concerned with strict legal interpretation and can focus on ethical and political concerns, fairness and common sense"[73], which are the critical features in art-related disputes.

In this context, the awareness of the parties is of crucial importance. With the precise formulation of an arbitration/mediation clause and reference to the proper institutionalized body and the rules recommended by it, the parties to the dispute can maximize the effectiveness of the ADR process, whilst minimizing the judicial intervention.

[70] Some examples of the "sleeper cases" that were amicably terminated right before the commencement of court hearings are given by A.L. Bandle (in: *The sale of...*, p. 321—322). One of these concerns the Onian heirs who initiated court proceedings upon discovering that the painting Sotheby's had cataloged as *The Sack of Carthage* by the Italian artist Pierto Testa (1611—1650) with an estimated value of 10,000—15,000 pounds was in fact a work by the French master Nicolas Poussin (1594—1665). The consignor asked for 4.5 million pounds from Sotheby's, but finally agreed to settle on the eve of the trial.

[71] E. Varner: *Arbitrating...*, p. 505.

[72] For the reasons why courts are not always regarded as ideal fora to decide disputes involving art and heritage see also Ch. Roodt: *Private International Law, Art and Cultural Heritage*. Edward Elgar Publishing, UK, 2015, p. 52—56.

[73] A. Checi: *ADR for looted art cases: problems and trends*. "Australian Alternative Dispute Resolution Bulletin" December 2016, p. 108—109.