

A NEW INSTITUTION DESIGNED EXCLUSIVELY FOR RESOLVING ART-RELATED DISPUTES THROUGH ARBITRATION LAUNCHES IN THE HAGUE

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Parties in the art world have a new tool at their disposal for resolving disputes outside the courtroom. In June, the non-profit Authentication in Art (“AiA”) foundation and the Netherlands Arbitration Institute (“NAI”) jointly launched the Court of Arbitration for Art (“CAA”) as a platform for resolving art-related disputes through arbitration and mediation. The AiA/NAI Adjunct Arbitration Rules (the “Adjunct Rules”), which supplement the NAI Arbitration Rules, will apply in disputes administered by the CAA. The Adjunct Rules are tailored to address the perceived need for art-related disputes to be resolved by decisionmakers familiar with the industry and whose decisions are more likely to be respected by the art market.

THE PERCEIVED NEED FOR THE ART WORLD TO HAVE ITS OWN DISPUTE RESOLUTION FORUM

The CAA was born out of concern that courts were particularly ill-equipped for satisfactorily resolving disputes over the authenticity of artworks. The judicial decision-making process differs significantly from how authenticity is established in the art world – through some combination of provenance, connoisseurship, and scientific testing.

Judges typically lack background knowledge or experience in how the industry works, which means more time and cost must be spent by the parties in educating the court, and ultimately, judges decide by weighing competing expert evidence to decide if “more likely than not” an artwork is authentic. The art market may not accept judicial decisions reached in this way, particularly if leading experts, or even an artist herself, disagrees with the outcome. Parties want certainty for purposes of transacting in the art market, but a judicial decision that sits uncomfortably with the art market could leave a cloud over the artwork.

The CAA’s proponents hope that, because the procedures under the Adjunct Rules more closely align with industry practice, outcomes will better conform to party expectations and have more chance of market acceptance. Although the CAA arose out of concerns about authenticity disputes specifically, the Adjunct Rules are designed to accommodate all variety of art-related disputes, including contract disputes and those relating to copyright, fraud, or rightful ownership.

SIGNIFICANT FEATURES OF THE ADJUNCT RULES FOR ART DISPUTES

Submission of Disputes under the Adjunct Rules

Like other arbitral rules, the Adjunct Rules will apply only if the parties agree to refer their disputes to the CAA. Reference can be made in advance by choosing the Adjunct Rules in the dispute resolution clause of a parties’ contract. Alternatively, and of importance in the art market where parties often transact without

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a formal written contract, parties may agree once a dispute arises to refer it to arbitration under the auspices of the CAA. Either way, both parties must agree.

It will be interesting to observe if, and how quickly, parties begin to opt for CAA arbitration in their contracts. If regular art market players like auction houses adopt CAA arbitration in their dispute resolution clauses of their standard contracts, the new forum could quickly become busy and gain wider market acceptance. However, such large industry players may wait to see the CAA's new offering well tested before deciding whether to incorporate the Adjunct Rules in their contracts.

The Arbitrator Pool

The default under the Adjunct Rules is the selection of arbitrators from an 'Arbitrator Pool' published by the AiA Board and NAI. Although other arbitral institutions offer lists of recommended arbitrators to choose from, the Arbitrator Pool will include primarily international lawyers with experience in art law disputes or international arbitration. The default is for three arbitrators to decide disputes involving claims of EUR 500,000 or more, with lesser value disputes heard by a single arbitrator.

Having a pool of experienced lawyers should help parties to quickly identify willing arbitrators with the expertise desired to hear their case, although parties may continue to quarrel over precisely what experience is needed. It is hoped that arbitrators with relevant expertise will not only issue decisions more acceptable to the market but will also save the parties the time and cost of educating a decisionmaker on the background. The AiA and NAI are in the process of compiling the initial Arbitrator Pool, and much of the success of the CAA will depend on whether the persons identified are viewed by market participants as better able to handle these types of disputes.

The Expert Pool

Perhaps the most significant aspect of the Adjunct Rules is that, rather than the parties presenting competing expert evidence as to forensic science or the provenance of an object, the tribunal will appoint an expert from within an Expert Pool to provide the only evidence on those issues. On all other issues, the parties may present their own expert evidence.

Parties familiar with the adversarial common law practice of each side presenting its own expert evidence may chaff at this aspect of CAA arbitration, which will be more natural for parties used to similar practices in civil law courts. The promulgators of the Adjunct Rules argue that forensic science and provenance evidence should be less controversial and that it will be more efficient to have a single expert, rather than duelling party-appointed experts whose evidence may be viewed as more biased. However, the individuals in the Expert Pool and their methods will need to be sufficiently accepted in the market for both parties to be willing to sign up to a dispute resolution method that puts this expert evidence beyond their control. Moreover, there is foreseeable scope for argument as to precisely what constitutes an issue of "forensic science" or "the provenance of an object" as opposed to another issue on which a party-appointed expert may give evidence.

Application of Statutes of Limitations and Other Time Bars to Claims

A potential weakness of the Adjunct Rules is their treatment of claims brought out of time. The Adjunct Rules provide that "the arbitral tribunal shall ... respect applicable periods of limitation, prescription, and repose as well as similar time-bar principles when claims or defences have not been acted on within a reasonable time".

There is some ambiguity as to how this provision interacts with the applicable law governing the parties' dispute. Many jurisdictions' laws already provide relief from time bars in circumstances when, for example, the claim could not have been discovered sooner despite due diligence. It is unclear whether the limitation in the Adjunct Rules on when time bars should be respected is intended to supplant or work in tandem with such relief under the applicable law. Moreover, if the applicable law does not provide such relief, it is not clear whether the Adjunct Rules are intended to provide a free-standing defense to a time bar the claim

was “acted on within a reasonable time”. Nor do they provide guidance as to what is a “reasonable time”, a question that has proved controversial in the court.

Confidentiality and Privacy

One of the main attractions of arbitration is that parties can have their disputes heard in a private and confidential forum. This aspect of the CAA should have particular appeal for art market participants for whom market disclosure of a dispute can have significant reputational consequences as well as affect the value of an artwork. At the same time, for parties who want to make a public statement and build public pressure on their opponent, litigation is likely to remain a better option.

The Adjunct Rules appear to balance art market participants’ sensitivity to public disclosure with the desire to have case precedents available for both the market and future decisionmakers to know how other cases have been decided. The Adjunct Rules provide that either the NAI or the AiA may publish an arbitral award in a format with the parties’ name and other information that might identify them redacted. Importantly, the name or identity of the object in question may be revealed, which may be desirable for a party that wants, for example, a decision about the authenticity of a work to be accepted in the art market. A party can object to publication, which a party might choose to pursue given that the market likely will be able to trace an object back to an individual or entity even when the latter’s information is redacted.

CONSIDERING ARBITRATION AS AN OPTION FOR ART DISPUTES

It remains to be seen whether the Court of Arbitration for Art (“CAA”) will satisfy parties’ concerns about the suitability of traditional litigation, or other methods of alternative dispute resolution, for resolving common art industry issues. In addition to providing an industry-tailored and confidential dispute resolution forum, arbitration can be quicker and more efficient for parties who want to have their dispute resolved swiftly.

The efficiencies of arbitration can be overstated, particularly if one party wishes to draw out the decision. Art-related disputes can invoke strong emotions, and parties with deep convictions about their case may fight ‘tooth and nail’ whether they are in front a judge or an arbitrator. However, arbitration offers another option that parties at least should consider when drafting the dispute resolution provisions of their art-related contracts, as well as when contemplating how to resolve a dispute after it arises.

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