

# EVENTS AND CONFERENCES

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## *Art and Alternative Dispute Resolution* Rome, 12 October 2018

On 12 October 2018, the Italian Arbitration Association (Associazione Italiana per L'Arbitrato [AIA]) and the German Arbitration Institute (Deutsche Institution für Schiedsgerichtbarkeit [DIS]) hosted the conference *Art and Alternative Dispute Resolution* in Rome, Italy. This event was well-attended by professionals across different fields, not only attorneys. The panellists were equally professionally diverse and from various countries, bringing unique perspectives to the table. Moreover, the setting – Palazzo Firenze, the seat of the Italian National Commission for UNESCO – was particularly apt for a discussion on art law, as attendees and participants alike were surrounded by mythological frescoes dating back several centuries. There was a general spirit of collaboration and enthusiasm shared by everyone, which was reflected in the conference's dynamic presentations.

The opening remarks by Maria Beatrice Deli (AIA) and Francesca Mazza (DIS) focused on the benefits of alternative dispute resolution (ADR) methods in general and their special effectiveness in the field of art law, including: confidentiality; cost efficiency; the availability of various mechanisms; the ability to preserve business relationships; and the taking into account of the complex historical and ethical issues that may be present in a given case. The uncertainty surrounding

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the outcome of a judicial proceeding, the problem of judicial enforcement in other jurisdictions, and procedural matters in litigation (expiry of the statute of limitations, lack of jurisdiction, etc.) further bolster the argument in favour of ADR. These themes were to recur throughout the conference.

The first panel consisted of two leading academic speakers. Manlio Frigo (University of Milan) began by describing his experiences in the area of ADR. He pointed out that art law disputes share certain commonalities which make them difficult to litigate, such as: multidisciplinary issues, the involvement of both public and private parties, and cross border applications. Likewise, the drawbacks of pursuing litigation in these cases pertain to their complex nature. In addition, the negative effect of a public dispute over a work of art often results in strained professional relationships, which are key to the functioning of the art market. Prof. Frigo also pointed out that the receipt of an initial cost estimate before committing to an ADR procedure, their flexibility, and the ability to choose the applicable law as well as the location of the proceedings and experts were all points in favour of ADR. His analysis of the Italian state of affairs mentioned the fruitful cooperation between museums and other parties as a defining factor in the State's development of art law. This extends to the restitution of cultural property and out-of-court settlements, with Italy as a leading actor in such claims. The rate of success testifies to the efficacy of Italy's proactive and interdepartmental approach.

Matthias Weller (University of Bonn) continued the discussion by highlighting the German experience, particularly in disputes involving Nazi looted art. He initially focused on the economic aspects of art transactions. He indicated that sales and auction contracts do not usually include arbitration clauses, although related issues would benefit from a specialized bench and informal negotiations based on the principle of goodwill. Prof. Weller then gave the example of copyright disputes involving moral rights of artists, utilizing the recent shredded Banksy piece as an example; namely, how far do the artist's rights go, if he is allowed to destroy his work even after its purchase by a third party? Litigation in such an instance would bring added publicity, affecting the value of the artwork and leading to more complications. For Nazi looted art and restitution claims, on the other hand, the primary aim is to find just and fair solutions for the injured party. This will depend on the type of case, and whether the cultural property was obtained through direct seizure or via a forced sale. Having a designated body to adjudicate the dispute via agreement of the parties, such as in ADR, makes it possible to address the extra-legal matters in a more diplomatic way, leading to a mutually beneficial solution.

Next, Eleni Polycarpou (Withersworldwide, London), Mr. Lorenzo Attolico (NCTM, Rome), and Mr. Hannes Hartung (THEMIS Hartung & Partners, Munich) led a lively discussion on art law case studies. Ms. Polycarpou shared her experience in arbitrating art law cases, stating that these will usually benefit from creative and tailor-made solutions rather than a "one size fits all" approach. She believes that the historical nature of art market transactions – "handshake agreements" –

has resulted in confusion due to lack of paperwork, which means these cases are ripe for multi-party arguments and conflicting applicable laws. ADR mechanisms can compensate for this disorder, and in a more economical way. Arbitration clauses may be included in all types of agreements, such as consignment, artist, collateral, and post-dispute contracts. In Ms. Polycarpou's opinion, the high level of expertise as well as international enforcement tilt the balance towards ADR and against litigation, where certain details in the public record can prove devastating for the valuation of an object.

Mr. Attolico had a very different approach, focusing on art law within the body of intellectual property (IP) law, rather than as a separate category. He considers that multidisciplinary legal issues and the involvement of both public and private parties create obstacles for judicial proceedings. In particular, the length of the process, judges' cumbersome lack of technical expertise, and lack of confidentiality (especially in sensitive matters; i.e. authenticity disputes) make ADR a more viable avenue. In keeping with his focus on IP, Mr. Attolico mentioned the recent self-destructing Banksy case as an example of proposed limitations on artists' moral rights and the potential liability of Sotheby's. This was contrasted with a case from the Italian Supreme Court (Corte di Cassazione) – Decision 2039 of 26 January 2018 – where the court examined the liability of an art gallery on the grounds of plagiarism.

Finally, Mr. Hartung addressed the issue of restitution of Nazi looted art, which has received much attention in the past decade. Mr. Hartung stressed that the aim of applicable laws in these instances is to create fair and just solutions, taking into account the rights of the claimants and the parties' knowledge (or lack thereof) as to seizure and illicit sales. He used the case of the Munich Art Trove as an example of a confiscated degenerate art collection which received incredible amounts of publicity. This had a negative effect on the collector's reputation, and the prosecutor was criticized for not having sufficient legal grounds to seize the collection. Mr. Hartung's statement that "morality is stronger than the law" thus reflects the ethical dimension of law-making and enforcement in this area. In the absence of directly applicable statutes or treaties, soft law principles will be utilized to fill in the gaps. Due to the complex historical, social, and political concerns involved in Nazi looted art cases, ADR would allow the parties to pursue more creative solutions, such as compensation, restitution, a joint sale, or a combination of available remedies, away from undue interference and scrutiny.

The conference concluded with a round table discussion moderated by Miriam Mirolla (Academy of Fine Arts, Rome). The speakers were Sophie Delepierre (International Council of Museums [ICOM], Paris), Alessandra Di Castro (Antique Art Dealer, Rome), Fiaminia Gennari Santori (National Galleries Palazzo Barberini and Palazzo Corsini, Rome), Nicola Giudice (ADR Arte, Camera Arbitrale di Milano), Marina Schneider (UNIDROIT, Rome), and Leandro Toscano (World Intellectual Property Organization [WIPO], Geneva). These discussions had two themes: first,

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the current state of the art world; and second, specialized ADR bodies dealing with art and cultural heritage disputes.

Ms. Di Castro provided the perspective of the private art market, indicating that it has seen a rapid international shift as a result of globalization and the worldwide financial crisis. Italy has not been able to meet the increased demands of knowledgeable clients, which has led to a loss of talent to other countries. The prevalence of the black market and forgeries requires a well-organized response from authorities, who are however often mired in bureaucratic concerns. Ms. Gennari Santori countered by describing her experience in the Italian public sector. The connection between a country's art and its territory, the prioritization of public enjoyment of cultural heritage, museum reform, and the long-standing cooperation between private actors and the state must all be taken into consideration. Currently, the main preoccupation lies in ensuring that cultural heritage is acquired properly – respecting national and international obligations – while also allowing access and visibility. Ms. Schneider's presentation centred on the increase in looted art as a source of funding for terrorist and extremist groups within both the licit and illicit art markets. Article 8(2) of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects allows for arbitration, but requires further development in light of the recent interest therein. Previously, UNIDROIT suggested that an institutional tribunal be established to adjudicate cases related to cultural property. So far, the only movement in this direction was the creation of an informal United Nations task force in 2017. However, there are other institutions that have assumed this responsibility.

Mr. Giudice represented the Milan Arbitration Chamber's department dedicated to art law disputes, ADR Arte. He stressed that it is important to determine the appropriate tools and interests of the parties when choosing an ADR procedure. Mediation can be used to supplement other methods in order to provide a thorough resolution. Moreover, the higher levels of settlement rates in ADR when compared to litigation testify to the quality of the adjudicators' preparation and competence. Ms. Delepierre spoke about ICOM's pioneering work in the field of ADR through the organization's joint mediation programme with WIPO. Here an understanding of the legal and non-legal issues is key, as is the role of civil society and international cooperation. Good offices, facilitation, and expertise are the hallmarks of this programme. Mr. Toscano, representing WIPO, concurred with Ms. Delepierre while additionally providing information on the organization's other services. WIPO's expedited process for IP disputes, accompanied by a list of specialized providers and active case management, is very attractive for companies dealing with complex matters.

In sum, we can see that the panellists' opinions on the benefits of ADR overlapped in certain respects, while also calling attention to different areas of concern. Overall, they were mostly in agreement that ADR should be used more often in art law cases, and claimants should be made aware of their options when pursuing

a dispute. Given the recent increase in looting, repatriation, and Holocaust confiscation cases, ADR can provide solutions to better address the legal and non-legal matters (social, political, ethical, historical) that often arise, through the use of confidentiality, specialization, and enforcement of awards. Closing remarks by Ms. Korinna von Trotha (DIS) focused on the cooperative and international aspects of this conference, stating that it was the first of its kind, but would not be the last. This positive attitude was reflected by the audience, which enthusiastically and animatedly responded to Ms. von Trotha's statement.