INTRODUCTION

In 2006, a bitter dispute dating back to the Swiss religious wars of 1712 was finally and positively resolved. The case, which related to a number of culturally and historically significant objects, was settled not through battle in open court with an award of substantial damages but privately and amicably through a mediation process which culminated in the adoption of a novel and creative solution.

Resolving disputes in the courts is often a costly and stressful process; it is also very public. Alternative Dispute Resolution (‘ADR’), and mediation in particular, has become one of the most successful and effective ways to achieve amicable and confidential solutions to all kinds of disputes and its use as an effective mechanism in resolving art law and cultural property disputes is increasingly being recognised.

Mediation generally has a high success rate; one recent report indicated that around 75% of cases settle on the day of the mediation, with another 14% settling shortly thereafter, giving an aggregate settlement rate of 89%. Parties are generally highly satisfied with the mediation process, and its particular suitability to disputes involving art law and cultural heritage issues arguably makes the likelihood of settlement even greater.

ART LAW

While there is no standard definition of ‘art law’, it has effectively become a branch of law in and of itself. The term is now recognised to include all aspects of law concerned with the creation, exhibition, reproduction, sale and transfer of works of art and other cultural objects. Claims in this area can involve a variety of specific subject areas such as international law (both public and private), copyright, artists’ moral rights, artists’ resale rights (droit de suite), contracts, customs, tax and property law. All these issues can arise in areas as diverse as auctions, collecting, acquisitions, museums, marketing, insurance, authentication and forgeries.

Art and cultural heritage disputes raise a number of sensitive and complicated issues for legal and art world professionals alike, and have distinct characteristics for which ADR methodologies are often more appropriate than formal litigation. The stakeholders are broad and the subject-matter highly sensitive. Commercial, cultural, political, historical, ethical, moral, spiritual and religious considerations are frequently intertwined with complex national and international legal issues. Although litigation may be necessary where parties are uncooperative or a legal precedent is sought, in many cases the optimal solution is to be found outside the court room.
ADR

A number of professional bodies such as the World Intellectual Property Organisation (WIPO), the International Bar Association, and the Permanent Court of Arbitration, have indicated that traditional legal mechanisms are not always suitable to address specific problems associated with cultural property disputes. Due to their cross-border nature, and the fact that legislation in this field is not fully harmonised, complicated conflict of laws issues inevitably arise, together with the risk of contradictory outcomes. The multi-specialist nature of art law is such that both legal and technical expertise is often required in addressing these problems. The public nature of court proceedings can have a particularly damaging effect on the relationships and reputation of the parties involved. Further, the parties will frequently have contrasting legitimate interests and expectations, and conventional court remedies such as damages are often not adequate or appropriate in these cases.

The scope for the use of ADR in resolving art law and cultural property disputes is considerable. ADR options include arbitration, mediation, negotiation and expert determination and, provided the parties involved agree to submit to their chosen method, these private and confidential procedures can facilitate successful settlement of disputes in a more cost-efficient and timely manner.

MEDIATION

Mediation is very different from litigation or formal arbitration. Some key features and advantages of mediation include:

- Privacy – the mediation process is entirely confidential
- Flexibility – there is no fixed formula and each mediation can be designed around the parties and their dispute
- Control – the parties remain in control of the process and the decision-making
- Interest-focused – unlike litigation which focuses on legal rights and legal remedies, mediation is far broader and addresses the interests and needs of the parties
- Cost – mediation generally represents a modest cost in comparison to more formal dispute resolution such as litigation or arbitration
- Ensuring solutions – if a settlement is reached at the end of a mediation, it will be enshrined in a binding agreement. In addition, because mediation provides a mechanism for parties to ventilate their feelings and frustrations, and allows them fully to participate in the process, solutions tend to be respected and accepted. This reduces the risk of subsequent disputes.

It is worth examining in a little more detail some of the key features of mediation.

Cost
The costs of the mediation are usually a matter for agreement between the parties. Commonly the parties agree to share the mediator’s fees and expenses and other costs associated with the mediation such as the hire of the venue, and to bear their own legal costs in respect of preparation for, participation in and representation at, the mediation. However, other options are available, and occasionally one party will be willing to shoulder the entire costs of the mediator’s fees and expenses as an incentive to the other party to mediate. In all cases, a successful mediation will represent a very large saving in costs over a contested litigation or arbitration.
Solutions
As highlighted above, one important difference is that formal litigation involving a trial or arbitration hearing necessarily focuses on the legal rights and liabilities of the parties and the legal remedies for breach of such rights. In mediation, while the legal rights of the parties are far from irrelevant, the focus is on the interests and needs of the parties. This means that sensitive non-legal issues that may arise, such as moral or ethical considerations and customary laws and protocols can be accommodated within the process. The mediator can identify and address particularly delicate issues with the parties, which can enable them to find a mutually acceptable solution that helps to preserve long-term relationships and maintain the parties' own reputations in the international art market. An experienced mediator can work effectively with the parties to help them find the right solution to their dispute.

The ability of the mediation process to encourage creative solutions and remedies that are bespoke to the particular issue in dispute allows the parties to preserve their reputations and relationships going forward, providing a basis for future collaboration. In addition, settlements achieved in mediation can encompass much wider issues and take into account the specific personal and commercial interests at stake. In disputes concerning art and cultural assets, particularly creative solutions can be adopted. Examples include restitution, the provision of works of art in lieu of monetary damages, long-term loans of works of art, providing formal recognition of ownership, donations, and the agreement of specific ownership arrangements, such as shared or trust ownership.

In 2011 a new initiative at the Geneva Art Law Centre was established to create and maintain comprehensive records of disputes in the art and cultural heritage sector which have been resolved through ADR. It is hoped that this database will provide a valuable resource demonstrating the application of legislative provisions and case law precedent to art law claims, as well as providing a basis for comparison and categorisation of the outcomes of mediation and other ADR solutions.

Process
Parties are free to appoint a mediator of their choice with expertise in the specific legal area and subject matter of art or cultural heritage at issue. The parties may also choose the location, language and applicable law by which the process should be governed thereby preventing any perception of bias that could arise in certain national court litigation.

The mediator will work to help the parties in moving towards a negotiated settlement of their dispute, with the parties retaining ultimate control over any decision to settle and on what terms. Unlike a judge or arbitrator, the mediator will not issue a decision or judgment but rather will work to facilitate agreement between the parties. The parties themselves will usually attend the mediation, generally (but not necessarily) accompanied by their lawyers or other representatives.

One of the great advantages of mediation is its flexibility as there is no set formula. However, the mediator will usually open the mediation with a joint session, attended by all parties and their lawyers. He or she will provide an overview of the process, the mediator's role and the procedure. Each party will then be given the opportunity to make an opening statement, putting forward their perspective on the dispute and highlighting points of particular concern. Following this, the mediator may then meet privately with each party to discuss the issues confidentially. This allows each party to be open and frank, and to undergo a realistic assessment of their case in private, without fear of exposing any weakness or other concerns to the other party. It can be difficult for parties to be objective about the strengths and weaknesses of their case, and the mediator, as a neutral third party, can test each party's understanding, as well as the potential for loss, expense, time, distraction and uncertain court outcomes. During these private sessions with the mediator, the parties have an opportunity to review their case, and to consider various alternatives and proposed solutions.
Whilst the mediator will control the procedure and ensure that it is structured in a fair way, he or she will remain impartial throughout, and will not act as an advisor to any of the parties. The mediator has no authority to impose any binding decisions on the parties; there will only be a binding settlement if the parties reach agreement.

A party may withdraw from the mediation process at any time and initiate proceedings if a settlement looks impossible to achieve. However, the mediation agreement will usually require the parties to treat all discussions and documents as confidential and ‘without prejudice’ so nothing said or disclosed in the mediation can ever be disclosed or referred to in court proceedings. This can be particularly advantageous where confidentiality and reputation are key, as is often the case in sensitive art and cultural property disputes.

CONCLUSION

For the vast majority of participants in the international art market, becoming embroiled in expensive time-consuming and public litigation is highly unattractive. The advantages of mediation in this sector are gaining recognition and traction at the level of governments and institutions, as well as private owners, dealers and collectors, and other stakeholders in the art and cultural property world. Mediation is an appealing alternative for parties who wish to reach a settlement swiftly and without reputational damage, who seek to maintain control over the dispute settlement process, value confidentiality and who place a premium on the preservation or enhancement of their relationships.

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