Resolution Alley

Arbitration of Art and Cultural Heritage Disputes

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

The growth in art transactions around the world has led to a corresponding increase in the growth of art law as a field of expertise and a rise in art and cultural heritage disputes. For example, in 2015, *The New York Times* reported that Dmitry E. Rybolovlev, a Russian billionaire and owner of one of the world's most valuable art collections, was involved in "what has become perhaps the largest feud in the art world today" with Yves Bouvier, a Swiss businessman, who acted as a sort of broker to assist Rybolovlev in acquiring various pieces of art over the years.[1] Apparently, the two have been battling in courtrooms all around the world—in Paris, Monaco, Singapore, and Hong Kong—over accusations that Bouvier overcharged as much as $1 billion for multiple pieces of art. It began when Rybolovlev discovered that he had paid $118 million for a Modigliani painting, brokered through Bouvier, that the seller had sold for only $93.5 million—a difference of nearly $25 million.[2]

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Practitioners in art law will readily attest that the interdisciplinary nature of that field means that disputes over art and cultural heritage can involve a host of different subject areas. Such areas include the application of copyright law principles, ownership issues, the operation of contractual obligations, accusations of potential theft and misappropriation, discovery of forgeries, respect for cultural expression, and adherence to cultural property norms. In turn, these issues lead to a greater likelihood that art and cultural heritage disputes will involve complex legal issues. At their core, they can also involve other sensitive commercial, financial, cultural, ethnic, religious, spiritual, historical, and ethical issues. Moreover, art and cultural heritage disputes are diverse by their very nature and are nearly guaranteed to involve a variety of parties with multiple interests, such as artists and their families, auction houses, art collectors, art dealers, art brokers, archives, galleries, museums, libraries, universities, indigenous communities, anthropologists, banks, and even sovereign states.

Thus, resolving art and cultural heritage disputes is exceedingly challenging, especially with the global expansion of art transactions, in which the parties to the disputes hail from different countries, with markedly disparate jurisdictions and cultural backgrounds. As Rybolovlev and Bouvier are likely finding out, the choice of a particular country's court system in which to resolve the dispute is a daunting matter, publicly airing the dispute in an open forum presided over by an adjudicator who is unlikely to have any legal or other knowledge about art law, art and cultural heritage disputes, or perhaps even art and cultural heritage in general. These proceedings will likely also be costly, take an inordinate amount of time to conclude, require enormous investment of emotional capital, and, ultimately, take control away from the parties over how the ultimate resolution will be achieved.

One way to minimize or eliminate the drawbacks of relying upon traditional court litigation to address art and cultural heritage disputes is to consider arbitration as a mechanism to resolve them. Arbitration is well suited to addressing art and cultural heritage disputes where the parties anticipate requiring that the decision maker have specific subject matter and/or industry expertise.[3] The selection of an appropriate arbitrator (or tribunal) is critical to achieving a just result, because the parties typically want an arbitrator who can appreciate the legal issues and the technical, cultural, and other issues pertaining to art transactions, valuation issues, and other relevant norms. Like a judge in a court proceeding, the arbitrator (or tribunal) is tasked with determining the merits of the dispute, in a final and binding manner, according to rules and procedures that are agreed upon by the parties. Unlike in a court proceeding, however, the parties to an arbitration proceeding can choose the arbitrator (or tribunal) based upon relevant criteria, such as copyright expertise or prior art transaction experience. Moreover, if properly managed by the arbitrator (or tribunal), the parties, and their counsel, arbitration can result in a dispute resolution process that is fair, expeditious, and cost-effective. Through all of this inherent flexibility, the parties can better exercise control over how the resolution of their dispute will be achieved.

Arbitration is also generally a confidential process.[4] This tenet of confidentiality may be important in art and cultural heritage disputes as a way to preserve the parties' professional and personal reputations. (For Rybolovlev, however, because he views what Bouvier did as "a personal act of betrayal," for tactical reasons, out of

principle, or just plain spite, eschewing confidentiality in favor of a public trial may be exactly what he desires.) Confidentiality of the proceedings can also, in some cases, help protect the value of the art works themselves, which can suffer a decline as a result of being associated with a public dispute.

Additionally, the ability to secure a preliminary injunction or other interim relief in an arbitration setting is a valuable attribute for selecting this method of dispute resolution. All of the major international arbitration providers—the London Court of International Arbitration, the International Chamber of Commerce, the International Centre for Dispute Resolution, the CPR Institute, and JAMS—have emergency arbitrator provisions in their default rules. If the availability of preliminary remedies is a consideration in how to address an immediate concern—such as preventing works of art from being transferred overseas, attaching the pieces of art in question, stopping the sale of art over which ownership is being contested, or freezing the proceeds of art transactions—arbitration might be a viable option in some cases.

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When it comes to providers, another one to consider specifically for art and cultural heritage disputes is the World Intellectual Property Organization (WIPO), a self-funded agency of the United Nations that provides neutral, international, and non-profit alternative dispute resolution options. The WIPO Arbitration and Mediation Center (WIPO Center), which is based out of Geneva, Switzerland and has an outpost in Singapore, was established in 1994 to offer various such options, including arbitration, for the resolution of international commercial disputes between private parties.[5] The WIPO Center is widely recognized as particularly appropriate for technology, entertainment, and other disputes involving intellectual property, such as art and cultural heritage disputes.[6] Aside from administering art and cultural heritage disputes, the WIPO Center also maintains an extensive roster of highly qualified, independent, and specialized arbitrators who have demonstrated expertise in such disputes. Moreover, it stands ready to assist parties and their counsel in designing an arbitration process that is tailored to meet their needs and concerns, affording them guidance and training both before and after a dispute arises.

Perhaps of most significance to art and cultural heritage disputes is the advantage, in international arbitration proceedings, to resolve cross-border disputes and have the arbitration award recognized and enforced in most countries in the world through the operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is also known as the New York Convention.[7] This international treaty was adopted on June 10, 1958 by the United Nations Commission on International Trade Law (UNCITRAL) and entered into force on June 7, 1959. The United States ratified the treaty on September 30, 1970. As of March 2017, 157 state parties had become signatories to the New York Convention, including 154 of the 193 United Nations members. The treaty requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce—subject to certain, limited defenses—arbitration awards made in other contracting states. It is without question one of the driving forces behind the growth and stability of international arbitration as a means of resolving global and cross-border disputes.

One reason that the New York Convention has been so important in promoting international arbitration is that the United States is not a signatory to any convention or treaty that requires recognition or enforcement of foreign court judgments. Moreover, there is no federal law governing the recognition or enforcement of foreign court judgments; nor will foreign court judgments be recognized through the use of a letter rogatory or letter of request.[8] Instead, recognition of foreign judgments is provided by the laws of the individual states or by common law.[9]

Of course, all of this depends on whether the parties to the art and cultural heritage dispute have previously contracted to use arbitration to resolve their disputes or can now prospectively agree, in the face of the pending dispute, to arbitrate their matter. While the empirical evidence is elusive, there appears to be closer attention being paid, if not renewed emphasis, on arbitration clauses being included in international contracts pertaining to works of art, particularly in connection with loans (art works as collateral), sales and other transactions directly relating to pieces of art, and insurance of art works. In view of the advantages that arbitration affords, parties should be encouraged to consider this option more seriously lest their disputes overtake them and become the latest public "feud in the art world."

Endnotes

1. Doreen Carvajal and Graham Bowley, *The Billionaire, the Picassos and a $30 Million Gift to Shame a Middleman*, N.Y. Times (Sept. 23, 2015), *available at* https://www.nytimes.com/2015/09/24/arts/design/the-billionaire-the-picassos-and-a-30-million-gift-to-shame-a-middleman.html.
2. The article goes on to report that, in a ploy aimed at shaming Bouvier, Rybolovlev intended on returning two Picasso portraits, valued at $30 million, to the artist's stepdaughter, who had claimed that they had been stolen from her. Rybolovlev had also purchased the works from Bouvier, and, by returning them,

Rybolovlev was attempting to draw further attention to his dispute with Bouvier.

3. According to a study conducted by the Rand Institute for Civil Justice, the majority of the respondents found that arbitrators are more likely to understand the subject matter of the arbitration than judges because they can be selected by the parties. *See* Rand Institute for Civil Justice, *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, (2011) at 1-2, 32, *available at* www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf.
4. *See generally* Theodore K. Cheng, *Maintaining Confidentiality in Arbitration*, N.Y. State Bar Assoc. Entmnt, Arts and Sports L. J., Vol. 28, No. 2, at 25 (Summer 2017).
5. *See* WIPO Arbitration and Mediation Center, *available at* http://www.wipo.int/amc/en/center/background.html.
6. *See* WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage, *available at* http://www.wipo.int/amc/en/center/specific-sectors/art/.
7. *See* UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html; New York Arbitration Convention, *available at* www.newyorkconvention.org.
8. Each of these devices is a formal request from one court to a court in a foreign country requesting judicial assistance. For example, U.S. litigators often use them to effectuate service of process or the taking of evidence in other countries.
9. To address the concern that U.S. and foreign courts were not regularly recognizing each other's judgments, in 1962, the Uniform Law Commissioners promulgated the Uniform Foreign Money-Judgments Recognition Act (the 1962 Model Act). The 1962 Model Act generally codified the principles of comity (and, specifically, the recognition and enforcement of foreign judgments) previously set forth in *Hilton v. Guyot*, 159 U.S. 113 (1895) and has been adopted by 31 states (including New York), the District of Columbia, and the U.S. Virgin Islands. *See* Uniform Law Commission Legislative Fact Sheet—Foreign Money Judgments Recognition Act, *available at* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act. The Uniform Law Commissioners updated the 1962 Model Act in 2005 by promulgating the Uniform Foreign-Country Money Judgments Recognition Act, which has been adopted by 23 states and the District of Columbia, but not New York. *See* Uniform Law Commission Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act, *available at* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act.

Theodore K. Cheng is an arbitrator and mediator with the American Arbitration Association, the CPR Institute, Resolute Systems, and several federal and state courts, principally focusing on intellectual property, entertainment, technology, and labor/employment disputes. He is also an intellectual property and commercial litigation partner at the international law firm of Fox Horan & Camerini LLP in New York City. More information is available at www.linkedin.com/in/theocheng, and he can be reached at tcheng@foxlex.com.

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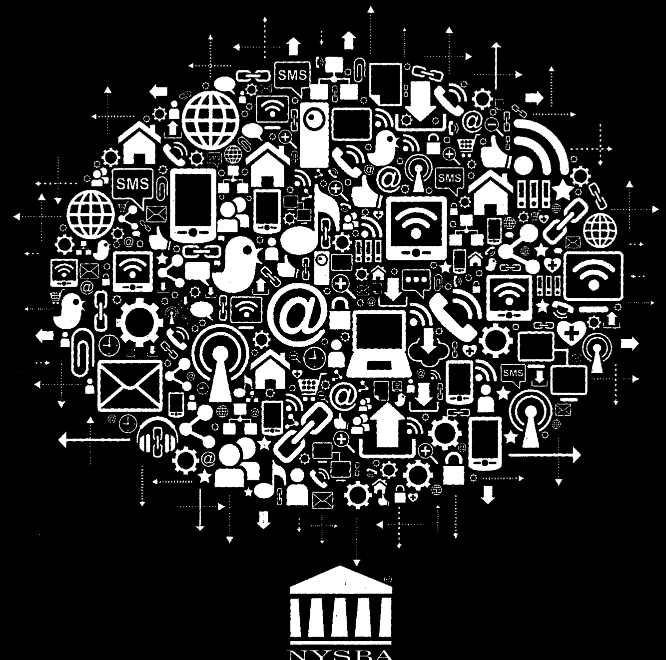

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