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Mediation in Cultural Heritage Disputes: Pro et Contra

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Abstract

It is common knowledge that mediation is available for various types of disputes ranging from commercial to family matters, avoiding the formalities, delays, and cost of court proceedings. Suitable for complicated yet delicate conflicts, this dispute resolution mechanism has become increasingly attractive for cultural heritage disputes. With parties aiming for compromise that may preserve confidentiality, the distinct features of the claims involving cultural heritage may impair as well as allow for the traditional benefits of mediation. This paper aims to examine the relationship between cultural heritage and mediation while paying attention to its prospects under the auspices of the newly adopted Singapore Convention. The author recommends several possible improvements relating to the mediation clause as a prerequisite to the proceedings, as well as the enforcement of the parties' agreement as their outcome.

Keywords: Cultural Heritage; Dispute Resolution Clause; Mediation; Singapore Convention.

Introduction

Imagine finding out that a painting that adorned the walls of your ancestral home gets stolen, and somehow finds its way to a world-famous museum, adorning its central exhibition. Alternatively, you may work for the ministry of culture of a country demanding the return of a statue fished from its territorial waters and illegally transported to another continent. In both cases, the other party is rejecting the request for restitution. If these scenarios seem somewhat familiar, it is because they are based on two exceptionally famous cases: *Altmann vs Austria* and *Italy vs Getty*. Books were written and movies made about Mrs Altmann's struggle to bring back the Gustav Klimt's portrait of her aunt, Adele Bloch-Bauer, known as *The Woman in Gold*, looted by the Nazis from her family home in Vienna and exhibited in the Belvedere Museum. No less attention was given to the case of the *Atleta di Fano*, or *Victorious Youth*, a Greek bronze statue made between 300 and 100 BCE and found in the sea off the Adriatic coast of Italy in 1964, which controversially found its way to the Getty Museum in California. While these cases were not resolved in mediation, both can serve as textbook examples of the elements present in a cultural heritage dispute: different types of parties pitted against each other, cultural object with a dubious provenance and a tiresome legal battle of a very public nature. As such, the two cases form a picturesque background for analysing why mediation was not employed and what are the

possible benefits and limitations of this ADR in cultural heritage disputes.

This paper follows our two claimants on the journey through mediation process, evaluating the aspects that speak in favour and those that impede its progress. The first part lists the institutions that provide mediation services, followed by the review of the approach taken in these proceedings and the role of the mediator. The next section discusses how parties' nature and interests tie into their choices. Part four analyses the barrier created by the non-existence of mediation clauses and how the power imbalance attributes to such state. Finally, the author explores the applicability of the Singapore Convention, concluding with the appropriate steps mediation should take to improve its standing in cultural heritage.

1. Mediating Cultural Heritage Disputes: Available Fora

Mediation is not unheard of in cultural heritage disputes, it is not even novel. International organizations and private institutions have been working over the years on development of appropriate ADR mechanisms, resulting in a broad range of possibilities offered to the parties in cultural heritage disputes.

Our discontented owners belong to a common category of cases involving illegal trafficking of art, or the so-called 'artnapping'. On a global scale, the issue of illegal misappropriation of cultural objects was addressed in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, including its First (1954) and Second (1999) Protocol, albeit limited to the wartime situations¹. From this point on, the instruments have been developed to encompass the protection of heritage regardless of the immediate circumstances, the primary instruments being the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property² and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects³. Notably, UNIDROIT builds upon the ideas of the UNESCO Convention by introducing the duty to return the stolen cultural objects, outlining the prerequisites for potential compensation claimed by the *bona fide* possessor⁴.

Art. 8 (2) of the UNIDROIT Convention explicitly allows parties to submit the dispute to any court or other competent authority or to arbitration. According to the Article 17 (5) of the UNESCO Convention, its parties may call upon the institution to extend its good offices to facilitate a settlement. In the spirit of negotiations, a special intergovernmental committee was

¹ http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html

² http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html ("UNESCO Convention").

³ <https://www.unidroit.org/instruments/cultural-property/1995-convention> ("UNIDROIT Convention").

⁴ It also remedies some of the problems in implementation of its predecessor, e.g. the cultural goods are no longer required to be defined as such by the state.

later formed to foster the implementation of UNESCO instruments⁵, its Statute explicitly relying on mediation and conciliation⁶. In line with the UNESCO-ICPRCP Rules of Procedure, this Committee has a role of an intermediary that facilitates the negotiations between the parties. Any mediation and other ADR proceedings are further conducted on an *ad hoc* basis. Therefore, the true nature of this body is advisory and its recommendations on dispute resolution are not legally binding.

Additionally, there are procedures created by cooperation of highly specialized institutions such as the ICOM-WIPO partnership⁷. Covering various types of disputes and offering its services to individuals and states alike, this forum draws from the considerable experience of the two partner institutions. General arbitration and mediation rules of arbitral institutions may also adapt to cultural heritage. For instance, Camera Arbitrale di Milano, distinctly recommends using its Fast Track Mediation Rules for art disputes. From 2015 to 2019, the number of art and cultural heritage mediations before this institution increased up to 55%, while an agreement was reached in 75% of cases that moved forward from the first session⁸. As a welcome advancement, Court of Arbitration for Art (CAfA) was recently established as a unique institution for art disputes, offering both mediation and arbitration.

All the effort put into the advancement of mediation in cultural heritage is admirable, leaving our parties with many options to choose from. However, making the right choice is dependent upon adapting mediation to better fit cultural heritage cases.

2. The Amicable Approach and the Role of a Mediator in Heritage Disputes

It may seem far-fetched at first glance, but the parties in cultural heritage disputes need not be natural enemies. On many occasions, a museum, state, and previous owner can find themselves tricked by the same criminal who vanished. The art world is largely based on trust and personal connections of the parties, recommending the mediation as a method that would take into the account emotions involved⁹. Without any intention to label other disputes as lacking in sentiment, this observation does go to the heart of the problem - a particular sensibility of the

⁵ The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, created in 1978 by the resolution 20 C4/7.6/5 at the 20th Session of the UNESCO General Conference, "ICPRCP".

⁶ See Art. 4 (1) ICPRCP Statute, <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/>.

⁷ This body has adopted special rules of procedure for mediation of cultural heritage - ICOM-WIPO Mediation Rules, which directly incorporate ICOM Code Ethics for Museums.

⁸ ADR Art & Cultural Heritage Statistics 2018 (01.01.2018 – 31.12.2018), Camera Arbitrale di Milano, <https://www.camera-arbitrale.it/upload/documenti/statistiche/adr-art-facts-figures-2018.pdf>.

⁹ N. Pitkowitz, A. Fremuth-Wolf, et al., *Chapter V: The Vienna Innovation Propositions, The Vienna Innovation Propositions: Venturing into New Fields and New Ways of Arbitration – Revisiting Traditional Ways of Arbitration*, in "Austrian Yearbook on International Arbitration", eds. Christian Klausegger, Peter Klein, et al, Vol. 2019, p. 563.

parties in cultural heritage. Unlike court proceedings and arbitration, guiding principle of mediation is a win-win outcome. This ADR is based upon the idea of concessions, where each party forgoes some of its interests in order to receive from the other. Speaking from a psychological perspective, after mediation is concluded each party leaves without the aura of a loser, and at the very least with a feeling that the other one did not prevail. While it may be bold to claim that mediation is the only method in cultural property disputes where sides may reach a consensus¹⁰, it certainly cultivates a congenial atmosphere usually not present in adversarial proceedings. In cases where the parties have not even had any contact before an object resurfaced, such approach is not only recommended, but should also come as natural. Prioritizing amicable solutions in cultural heritage is present even in its legislative history. According to the Explanatory Report of the UNIDROIT Convention, this instrument is a compromise in itself¹¹. Hence, one should not hastily disregard mediation when there is no ill will between the parties, as its primary aim is reaching an agreement with and not a victory upon the other party.

The question of certain concessions, such as admitting the ownership of the heir in return for public display of an object or a partial restitution, are compromises that may lead to the resolution of a dispute. An excellent example for this is the partage process, where source nation permits market nation archaeologists to excavate archaeological sites and share their finds with source nation museums in exchange for the right to keep a portion of what they find for museums and private collectors in their home countries¹². Furthermore, mediation can be of particular use in disputes involving indigenous and traditional communities, as this ADR does not suffer legal obstacles when determining their identity and standing in general¹³. In *Victorious Youth* case, negotiations of the parties did lead to the return of some artefacts in Getty's possession, although the core problem was left unresolved. *Altmann* case saw the unfortunately denied early proposition of Mrs Altmann, who suggested that Belvedere may keep *The Woman in Gold*, if it concedes her ownership. Regardless of the final outcome, what should be taken from these examples is the fact that concessions were offered and considered, with a partial success in the first case.

It is irrefutable that the complexity of the cultural heritage cases, delineated by history and art, requires unique knowledge. In court proceedings, judges are often accused of relying too heavily on the expert opinions or having insufficient knowledge to grasp technical aspects of the case. The rise of arbitration can be to some extent attributed to this flaw of judicial proceedings, as the

¹⁰ N. Mealy, *Mediation's Potential Role in International Cultural Property Disputes*, "Ohio State Journal on Dispute Resolution", 2011, p. 200.

¹¹ M. Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report* (prepared by M. Schneider on behalf of UNIDROIT Secretariat), "Uniform Law Review", 2001-3, p. 484.

¹² Mealy, p. 201.

¹³ C. Wichard, W. B. Wendland, *Mediation as an Option for Resolving Disputes Concerning Traditional Knowledge in Art and Cultural Heritage: Law, Policy and Practice*, ed. B. Hoffman, Cambridge University Press, 2006, p. 480. Interesting caselaw that supports authors' position is provided in the 'Annex A' on p. 481.

arbitrator is called an informed decision-maker¹⁴. Much in the same way, a mediator is nominated as an individual with a knowledge relevant for a complete understanding of the case at hand. Still, the task of a mediator differs from that of an arbitrator, as he is barred from making any kind of decision on the outcome of the dispute. Mediator, as suggested by his name, only helps parties in the process of resolving the dispute themselves. This does not mean that mediator's expertise becomes irrelevant or unused, as having comprehensive knowledge is a *conditio sine qua non* for successful assistance in mediation procedure. Higher specialization of a mediator in cultural heritage disputes and an adequate level of understanding of the non-legal issues involved means that the individual is more likely to be successful in this role. This is reflected in the work of mediation providers such as ICOM-WIPO, which keeps a list of persons that can mediate the art cases, and their qualifications are subject to a detailed examination¹⁵.

3. The Parties and Their Interests

Disputes involving cultural heritage are heterogenic, which means that parties can be individuals, institutions, and countries. Altmann case saw the heir of the Bloch-Bauer family facing the Belvedere and the Government of Austria, while Italy was pitted against Getty Museum in the Victorious Youth case. It is not unusual to find states, museums, cultural institutions, representatives of traditional communities and individuals mixed up in the same case. Diversity of the parties is at least partially caused by the terminology woven around 'cultural heritage'. UNIDROIT has adopted a flexible approach, linking cultural objects to the significance they have for states, sub-national groups or art and science in general¹⁶. Prof. Roodt suggests that the term 'cultural objects' can be understood to mean the physical remains of the past, man-made objects that are of archaeological, historical, pre-historical, artistic, scientific, literary or technical interest¹⁷. Therefore, a dispute involving cultural heritage can revolve around a myriad of scenarios: a consequence of a theft, a failure of a museum to return or secure the exhibition or whether an object truly represents the cultural heritage of a community.

However, the common ground does exist, and that is the remarkably high attention given to these cases by a wider public. As rightly observed by scholars, the art market is renown to be an opaque world where the reputational factor plays a key role¹⁸. The feeling that prevails once the proceedings have ended can be decisive for the reputation a museum, government and states that were involved. In both of our examples, the two museums faced unpleasant questions regarding

¹⁴ N. Blackaby, C. Partasides et al., *Chapter 1. An Overview of International Arbitration*, in *Redfern and Hunter on International Arbitration*, Sixth Edition, Kluwer Law International 2015, p. 22.

¹⁵ See Arts. 6 and 9 ICOM-WIPO Rules.

¹⁶ Art. 2 UNIDROIT Convention.

¹⁷ C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing Limited (Kobo Edition), UK 2015, p. 5.

¹⁸ A. Trioschi, *Art-Related Disputes and ADR Methods: A Good Fit?*, Kluwer Arbitration Blog, 2018, p. 3.

the provenance of their exhibits, in the Altmann case even more serious, as it involved Nazi plunder. Therefore, a certain amount of discretion may be desired by the parties in cultural heritage disputes. At this point, mediation, whose rules regularly contain a provision on confidentiality¹⁹, can become useful. The relaxed atmosphere, which is not under the auspices of the media, can keep the eyes of the parties open for all available possibilities. However, it is important to stress that mediation should in no way serve as an escape route for offenders, nor become a mechanism for misuse of entrusted powers. It is conceivable that the confidentiality in mediation can be viewed as disrupting public access to information. Therefore, it is vital to maintain a certain level of transparency, especially in cases involving the return of national cultural heritage.²⁰ The request for transparency is not a straightforward one, as multiple parties may have an interest in the proceedings. In our example, Victorious Youth obviously sparked legitimate concern for the Italian public; still, it may be argued that the US as the country of the museum's seat should also have access to certain elements of the mediation. In the Altmann case, the final decision confirms that Bloch-Bauer heirs had the law on their side, but in terms of transparency, Austrian public also had a right to know what was happening with the nationally celebrated Klimt portrait. Furthermore, there is always a certain level of international concern of a more abstract nature, tied to the notion that heritage is a right that transcends the usual borders and divisions. In addition, mediation can touch upon many issues connected to a theft or war crimes, both of which demand appropriate response from the national and international authorities in a different kind of proceedings.

While this suggests cultural heritage cases deserve a cautious evaluation, significant hurdles still lie ahead and the primary problem revolves around the agreement of the parties to submit their dispute to mediation.

4. Concluding an Agreement to Mediate

Refusal of artefact holders to even enter into an ADR process is viewed as one of the main drawbacks acknowledged in the relevant literature²¹. While seeking justice before court is a basic human right, ADR methods rely heavily on the agreement of the parties. However, in disputes involving cultural objects, often no prior agreement exists, as it happened in both Altmann and Victorious Youth cases. Being unable to find a dispute resolution clause is symptomatic for most disputes that do not involve inter-museum loans or securities. No prior agreement is the consequence of no previous contacts between the parties, automatically excluding the possibility

¹⁹ For example, see Art. 10 CAfA Mediation Rules, Art. 6 CAM Fast Track Mediation Rules, Arts. 17-21 ICOM-WIPO Mediation Rules.

²⁰ A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, 2014, 183.

²¹ M. Shehade et al., *Editorial: Alternative Dispute Resolution in Cultural Property Disputes: Merging Theory and Practice - Introduction*, "International Journal of Cultural Property", 2016, p. 344.

of a dispute resolution clause. Even in inter-museum loans, parties rarely conclude detailed contracts, in this way cutting the expenses of their drafting. It is noted that the art community mainly avoids dealing with legal issues, so the contracts are often concluded without any dispute resolution clauses, even omitting the negotiations²². Once the dispute emerges, parties find themselves in an unpleasant legal situation of choosing between the court proceedings and attempting to agree on a mediation compromise. The setup is similar to arbitration compromises, as the commencement of any proceedings depends on the ability of the parties to agree on anything after the atmosphere turns hostile. Each party decides upon evaluating which type of proceedings speaks in its favour now that the subject of the dispute is known. For instance, when gaps become apparent in the provenance of an artwork, a party may prefer to pursue court action for its competency to determine ownership, and an ADR agreement may be rescinded for this reason²³. This matter goes beyond the procedural considerations, as choosing a forum in an international dispute ultimately means choosing the applicable law, where differences in the law itself can influence the outcome drastically. Absolute co-dependency of the mediation on the agreement of the parties leaves its fate to the other concerns, where whether the parties will be able to agree to submit the dispute depends greatly on their comparative strength.

Already quoted CAM statistics show that in half of the cases related to art and cultural heritage a party had failed to attend the first session²⁴. The equality of the parties is a fundamental principle of every legal mechanism, and here it arises before the dispute even gets to the mediator, and the main culprit again stems from the diversity of the parties in art disputes. Different entities on the side of claimant and respondent generate an inherent inequality in bargaining power. Some institutions in possession of artworks, especially when backed up by their native country, can engage quite expensive and capable legal teams²⁵. If the other party is an individual, the obvious corollary is the financial gap, and this problem particularly resonates for cases similar to Altmann. Mr Randol Schoenberg, counsel for Bloch-Bauer heirs, remarked that “...*international arbitration court for art claims would be a good idea. (...) it would be a great idea, which is why it will never happen. The defendants would rather waste their money litigating procedural battles in the hope that they can wear down the plaintiffs and settle the matter without handing over their looted art*”²⁶. While this observation may seem bleak, the fact remains that U.S. 9th Circuit Court of Appeals ordered both parties in the Altmann case to attend a court supervised mediation, which yielded no apparent results. It was only after the unfavourable decision of the American Supreme Court which created a separate incentive for Austria to turn to other venues

²² Chechi, pp. 181-182.

²³ Roodt, p. 185.

²⁴ CAM ADR Art & Cultural Heritage Statistics, p. 1.

²⁵ Chechi, p. 185.

²⁶ Answers given to the author B. Hoffman, *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, 2006, p. 463.

that alternative dispute resolution was accepted.

On the other hand, the Victorious Youth case embodies a dispute with an average balance of strength. In cases involving a museum and country seeking restitution, the power is on a relatively equal footing, as countries usually back up their prominent cultural institutions. This means that the international community may take on a more active role. A fine example is the ICPRCP which had significant success in Turkey vs Germany cases. In 1915, two sphinxes were transported by a group of German archaeologists to Germany for a restoration. While one was returned, it has taken almost a hundred years and two ICPRCP resolutions²⁷ for the bilateral agreement on restitution of the other to be reached. Following the 1987 restitution of 7,000 cuneiform tablets by the German Democratic Republic to Turkey, the Boğazköy Sphinx was also returned in 2011. The Committee also notably provided support in the 1986 USA vs Jordan dispute that was favourably resolved following mediation²⁸, while it is still working on Parthenon Marbles case²⁹. Unfortunately, the UK Government sternly responded to the Greek request for mediation in the following manner:

*“We have seen nothing to suggest that Greece’s purpose in seeking mediation on this issue is anything other than to achieve the permanent transfer of the Parthenon sculptures now in the British Museum to Greece and on terms that would deny the British Museum’s right of ownership, either in law or as a practical reality. Given our equally clear position, this leads us to conclude that mediation would not carry this debate substantially forward.”*³⁰. Such a turn of events shed a negative light on the limits of international intervention in cultural heritage disputes. Regrettably, this was followed by another blow when the United States decided to withdraw from the UNESCO for the second time³¹, effective 31 December 2018 and Israel followed suit, both citing the alleged anti-Israel resolutions. Thus, there is little room for doubt that the weakest aspect of ICPRCP is that states too often perceive the UN as the battleground for political agendas and the protection of cultural heritage gets lost in the process.

²⁷ See Final Report By The Intergovernmental Committee For Promoting The Return Of Cultural Property To Its Countries Of Origin Or Its Restitution In Case Of Illicit Appropriation, Sixth Session UNESCO Headquarters, Paris 1989, <https://unesdoc.unesco.org/ark:/48223/pf0000083117.page=10> and Intergovernmental Committee For Promoting The Return Of Cultural Property To Its Countries Of Origin Or Its Restitution In Case Of Illicit Appropriation, Sixteenth session Paris, UNESCO Headquarters, 21-23 September 2010, <https://unesdoc.unesco.org/ark:/48223/pf0000189639.page=2>.

²⁸ Within the framework of an exchange, and following a request submitted by Jordan in 1983 to the ICPRCP, the Cincinnati Art Museum and the Department of Antiquities of Amman decided in 1986 to jointly exchange moulds of the respective parts of the sandstone panel of Tyche with the zodiac in their possession, in order to be able to present the work in its entirety.

²⁹ Information Kit on the 1970 Convention, 2014/WS/7/REV –May 2018, p. 6, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/movable/pdf/Infokit_en_final_March_2018rev_05.pdf.

³⁰ J. Woodhouse, S. Pepin, *House of Commons Library Briefing*, Paper No. 02075, 9 June 2017, p. 15, <https://www.parliament.uk/commons-library>.

³¹ Previously, USA’s President Ronald Reagan decided to withdraw in 1984 in an effort to thwart the recognition of Soviet historical sites.

Thus, regardless of the type and support behind the parties, it is crucial not to lose track of their relative power when evaluating chances of success of mediation compromise in cultural heritage cases.

5. Enforceability of the Agreement Reached in Mediation

Finally, if the parties agree on mediation, what remains is the question of its ultimate result. Any type of proceedings is only beneficial as much as its final decision can be effectively enforced. A successful mediation indisputably ends with the parties reaching an agreement, but the nature of this document is elusive. While it definitely has an *inter partes* effect, its enforceability in reality depends on the law of the country where the enforcement is sought. An agreement reached in mediation binds the parties to perform their obligations under civil law rules, which means that if one party should refuse to comply the other may only seek enforcement before the court (presumably where the refusing party has assets), as with any other contract. The only way to bypass this procedure is to rely on the national law or international treaty if signed by said country³². This had led some authors to observe that mediation falls short of advantages provided by arbitration, as no instrument comparable to the New York Arbitration Convention³³ exists³⁴. Such shortcomings led to the recent adoption of a new instrument which tries to mimic not only the benefits, but also much of the structure of the New York Convention. Signed in Singapore in 2019, its main goal is to ensure direct enforceability of agreements concluded in mediation (called settlement agreements).

When assessing whether the Singapore Convention can be applied on mediation agreements resolving cultural heritage cases, Austrian arbitration practitioners seem to have given it the green light³⁵. Additionally, the 2020 WIPO Mediation Rules have been updated in several respects so that parties may benefit from provisions of the Singapore Convention, although the special ICOM-WIPO Rules remain unchanged. Nevertheless, there are a few reasons to be vigilant when approaching the subject. What may stand in the way of cultural heritage disputes benefiting from Singapore Convention is deeply tied to their heterogenic nature. The very first article of the Convention clearly outlines two crucial conditions for this instrument to apply: the dispute must contain an international element and, more importantly, be commercial in character. Unlike its counterpart, the UNCITRAL Model Law on Mediation³⁶, Singapore Convention does not offer

³² Guide to WIPO Mediation, 33.

³³ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Singapore Convention”), <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

³⁴ I. Barker, *Thoughts on an International ADR Regime for Repatriation of Cultural Property*, in *Art and Cultural Heritage: Law, Policy and Practice*, ed. B. Hoffman, Cambridge University Press, 2006, p. 485. The author wrote this before Singapore Convention was adopted.

³⁵ Pitkowitz, Fremuth-Wolf, et al, p. 563.

³⁶ 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation,

any examples what commercial disputes are, and the Model Law itself does not list cultural heritage disputes as an example³⁷. Moreover, the Commentary of the Convention notes that it does not cover the non-commercial matters are more likely to clash with public policies specific to legal cultures and national circumstances³⁸. What should be noted, however, is that classification of something as commercial or not purely affects the applicability of Singapore Convention; mediation as an alternative dispute resolution method is not limited to commercial disputes, and it is much more versatile than international commercial arbitration, and it can even be called upon in criminal and family matters. Therefore, disputes falling outside the commercial category can still be settled in mediation, but the parties cannot hope to benefit from the direct enforcement provided in the Convention.

Having in mind the discussed prevalence of public interest in many disputes involving cultural objects, it is evident that some cultural heritage disputes can hardly be considered as purely commercial. In order to ascertain whether a dispute would fall in commercial category, and thus should not face any obstacles to be submitted to mediation, international commercial arbitration practice can provide guidelines to some extent. Following this lead, some aspects indisputably fall into the category of commercial, as it was in the case *Shaanxi Cultural Heritage Promotion Center v. China Institute in America*, where the loan agreement did contain a dispute resolution clause providing for CIETAC arbitration³⁹. Following the "China's Terracotta Army" exhibition of 111 Chinese terracotta warriors, Discovery Times Square Museum and China Institute in America failed to pay the third instalment of the agreed inter-museum loan price to Shaanxi Cultural Heritage Promotion Center. This had led to arbitration proceedings and claimant winning the case. Therefore, proceedings involving inter-museum loans, in particular a failure of a party to insure the artefact or pay agreed amount are not likely to raise classification concerns.

Disputes pertaining to other matters should be reviewed carefully. This is a step further from the mere question of categorization, as it affects the suitability of a dispute to be submitted to any other forum except court at all. The question whether the dispute requires significant transparency, judicial (national or international) deciding or is banned from ADR playground for whatever reason is the core issue here. Though it is hard to determine the exact pool of problematic cases due to the national divergences in approach to cultural heritage, some general rules can be observed. It seems that at least two legal systems must be considered when evaluating whether cultural heritage disputes are capable of settlement by mediation: the place where mediation is held and where the enforcement is sought. Singapore Convention itself offers two

https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation.

³⁷ See footnote in Art. 1(1) UNCITRAL Model Law.

³⁸ p. 27, cites Working Group Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Third Session, A/CN.9/861 (2015) at ¶42.

³⁹ *Shaanxi Cultural Heritage Promotion Center v. China Institute in America* (Award), CIETAC Case No. DR-120228/C-USA-NTS, 31 March 2014.

grounds for a country to refuse enforcement of a mediation settlement in Article 5 (2), if it is contrary to public policy or if its subject matter is not capable of settlement by mediation. One particularly discussed field of ambiguous nature is the suitability of intellectual property rights to be submitted to ADR, a topic often intertwined with cultural objects⁴⁰. On a subject of cultural heritage itself, it was noted that specific issues of a public policy nature, or inalienable rights, may be difficult to submit to arbitration in certain jurisdictions⁴¹. In absolute terms, private ownership of a cultural object deemed inalienable by a country cannot be subject of a dispute in any forum on its territory, stemming from its *extra commercium* status. Also, as already touched upon above, when theft and illegal trafficking of cultural objects are involved, any parallel criminal proceedings can also affect some aspects of the mediation.

Finally, another problem raised by the Convention itself allows contracting states to put a reservation on its application in line with the Article 8. If the reservation is put in place, a country can choose not to apply the Convention to settlement agreements to which it is a party, or to apply it only to the extent that the parties to the settlement agreement have agreed to such application. Belorussia, Iran and Saudi Arabia have opted for the reservation so far⁴².

If one were to be asked the “yes” or “no” question on the subject, these remarks on the potential of cultural heritage disputes to be covered by Singapore Convention seem to point to an unnerving answer – “maybe”.

Concluding Remarks

While offering mediation to the other party should always be the preliminary step, its success will depend on numerous factors. One cannot rely on an infallible checklist when it comes to human relations, good or bad; but knowing what to take into the account can guide a party and even help prevent some obstacles.

Like any other method of dispute resolution, mediation has its downsides. It does not operate in a vacuum, removed from outside influences and, as such, it may not be able to cure discrepancies in parties’ relative power. Political background of a case such as a state supporting its museums, or the financial capability of an individual requesting restitution still have a significant bearing on the outcome. While obtaining court decision and being a winner may be the only mindset for some, weighing that option against publicly losing a prized item of exhibition or a national symbol may divert others to attempt ADR first.

⁴⁰ D. Plant, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (prepared on behalf of UNCTAD), United Nations Conference on Trade and Development: Dispute Settlement, 2003, http://unctad.org/en/docs/edmmisc232add25_en.pdf, p.41.

⁴¹ S. Theurich, *Art and Cultural Heritage Dispute Resolution*, “WIPO Magazine”, 2009, ¶26.

⁴² As of 29 November 2020, fifty-three states have signed the Convention, and six states have ratified it. https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

Believing that participants in international fora will suddenly become less political and more interested in the restitution of foreign cultural heritage is somewhat unrealistic. Different interests will always exist and sometimes yield negative results in terms of reaching a settlement. However, it is important not to concentrate only on the less productive attempts of international bodies such as ICPRCP, but also to give credit where it is due, acknowledging their success in a variety of other cases.

In order for mediation to become a reliable tool, it would have to work harder to adapt its mechanisms to cultural heritage and to inform the parties what it has to offer transparently. Once it gets familiar with the scope of this ADR, the art community should work toward including mediation clauses in contracts on cultural heritage. A lack of dispute resolution clauses is a simplistic barrier that creates unnecessary problems in practice, and it can be easily bypassed in pre-existing legal relationships. In disputes with no previous contact between the parties, advertising mediation requires highlighting the amicability of the proceedings and the expertise of the mediator.

Finally, if mediation wants to beat court and arbitration to the finish line, it has to clearly state its position regarding the Singapore Convention. Having in mind that this is a novel instrument, it may be premature to predict how will this relationship unfold. However, parties will always demand a degree of legal certainty, wanting to know how and where their mediation settlement can be enforced. A structured, well thought out system must be built before it could be tested. This essentially means actualising accountability of not only individuals, but also museums and private collectors. Only through cooperation with the art community, legal scholars and practitioners that deal with cultural heritage and mediation can the optimum results be achieved. Ironically, a more aggressive approach must be taken by the alternative dispute resolution method famous for its compliant nature if it were to build a solid practice which will recommend it further on.

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