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Mediation in cultural heritage disputes – *pro et contra*

1. Introduction

Imagine finding out that a painting that adorned the walls of your ancestral home has been 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 have been written and movies made about Mrs Altmann's struggle to get back the Gustav Klimt 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 BC 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, a cultural object with a dubious provenance, and a tiresome legal battle of a very public nature. As such, the two cases form a vivid background for analysing why mediation was not employed and what the possible benefits and limitations are of this alternative dispute resolution (ADR) in cultural heritage disputes.

This paper follows our two claimants on a journey through the mediation process, evaluating the aspects that speak in favour of it and those that impede its progress. The first part lists the institutions that provide mediation services, followed by a review of the approach taken in these proceedings and the role of the mediator. The next section discusses how the parties' nature and interests are connected with their choices. Part four analyses the barrier created by the absence of mediation clauses and how an imbalance of power is linked to such a state. Finally, the author explores the applicability of the United Nations Convention on International Settlement Agreements

resulting from Mediation, 20 December 2018 (hereinafter: Singapore Convention),¹ concluding with the appropriate steps mediation should take to improve its standing within cultural heritage concerns.

2. 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 developing 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 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 its provisions were limited to the wartime situations. From this point on, 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 Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. 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* possessor.²

Article 8(2) of the UNIDROIT Convention explicitly allows parties to submit a dispute to any court or other competent authority or to arbitration. According to art. 17(5) of the UNESCO Convention, the parties may call upon the institution to extend its good offices to facilitate a settlement. In the spirit of negotiation, a special intergovernmental committee was later formed to foster the implementation of UNESCO instruments,³ its Statute explicitly relying on mediation and conciliation.⁴ In line with the UNESCO – ICPRCP Rules of Procedure, this Committee has the 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.

¹ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf (accessed: 15.02.2021).

² It also remedies some of the problems in implementation of its predecessor, e.g. cultural property is no longer required to be defined as such by the state.

³ 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 resolution 20 C4/7.6/5 at the 20th Session of the UNESCO General Conference (hereinafter: ICPRCP).

⁴ See: art. 4(1) ICPRCP Statute, <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/> (accessed: 15.02.2021).

Additionally, there are procedures created by cooperation of highly specialized institutions such as the ICOM-WIPO partnership.⁵ Covering various types of disputes and offering its services to individuals and states alike, this forum draws on the considerable experience of the two partner institutions. General arbitration and mediation rules of arbitral institutions may also be adapted 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 by up to 55%, while an agreement was reached in 75% of cases that moved forward from the first session.⁶ As a welcome advancement, the 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.

3. 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 has vanished. The art world is largely based on trust and the personal connections of the parties; mediation can be recommended as a method that would take into account the emotions involved.⁷ Without any intention to label other disputes as lacking in sentiment, this observation does go to the heart of the problem – the particular sensibility of the parties in cultural heritage issues. Unlike court proceedings and arbitration, the guiding principle of mediation is to achieve 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 a concession from the other. From a psychological perspective, after mediation is concluded, each party leaves without the aura of being a loser, and, at the very least, with a feeling that the other party did not prevail. While it may be bold to claim that mediation is the only method in cultural property disputes where different sides may reach a consensus,⁸ it certainly cultivates a congenial atmosphere usually not present

⁵ This body has adopted special rules of procedure for mediation with regard to cultural heritage – ICOM-WIPO Mediation Rules, which directly incorporate the ICOM Code Ethics for Museums.

⁶ ADR Art & Cultural Heritage Statistics 2018 (1.01.2018–31.12.2018), Camera di Commercio Milano, <https://www.camera-arbitrale.it/upload/documenti/statistiche/adr-art-facts-figures-2018.pdf> (accessed: 1.02.2021).

⁷ N. Pitkowitz, A. Fremuth-Wolf, A.K. Radschek, “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. Ch. Klausegger *et al.*, Vien 2019, p. 563.

⁸ N. Mealy, “Mediation’s Potential Role in International Cultural Property Disputes”, *Ohio State Journal on Dispute Resolution* 2011, vol. 26, issue 1, p. 200.

in adversarial proceedings. In cases where the parties have not even had any contact before an object resurfaced, such an approach is not only recommended, but should also come as something natural. Prioritizing amicable solutions in cultural heritage matters is present even in its legislative history. According to the Explanatory Report of the UNIDROIT Convention, this instrument is a compromise itself.⁹ Hence, one should not hastily disregard mediation when there is no ill will between the parties, as its primary aim is to reach an agreement with and not a victory over the other party.

The question of certain concessions, such as admitting the ownership of the heir in return for permission publicly to display an object or in return for a partial restitution, are compromises that may lead to the resolution of a dispute. An excellent example for this is the partage process, where a 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 countries.¹⁰ Furthermore, mediation can be of particular use in disputes involving indigenous and traditional communities, as this ADR does not encounter legal obstacles when determining their identity and standing in general.¹¹ In the Victorious Youth case, negotiations between the parties did lead to the return of some artefacts in the Getty Museum's possession, although the core problem was left unresolved. The Altmann case saw the (unfortunately rejected) early proposition of Mrs Altmann, who suggested that Belvedere keep *The Woman in Gold*, if it conceded 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 undeniable that the complexity of cultural heritage cases, delineated by history and art, requires unique knowledge. In court proceedings, judges are often accused of relying too heavily on expert opinions or of having insufficient knowledge to grasp technical aspects of the case. The rise of arbitration can be to some extent attributed to this flaw in judicial proceedings, as the arbitrator is called an informed decision-maker.¹² Much in the same way, a mediator is nominated as an individual with 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/she is barred from making any kind of decision on the outcome of the dispute. The mediator, as suggested by the name, only helps parties in the process of resolving the dispute themselves. This does not mean that mediator's expertise is irrelevant or unused, as having comprehensive

⁹ 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, vol. 6, issue 3, p. 484.

¹⁰ N. Mealy, "Mediation's Potential Role..." p. 201.

¹¹ 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, New York 2006, p. 480. Interesting case law that supports the authors' position is provided in "Annex A", p. 481.

¹² N. Blackaby *et al.*, "An Overview of International Arbitration" [in:] *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, Oxford 2015, p. 22.

knowledge is a *conditio sine qua non* for successful assistance in mediation procedure. The higher degree of 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 in art cases, and their qualifications are subject to a detailed examination (articles 6 and 9 ICOM-WIPO Rules).

4. The parties and their interests

Disputes involving cultural heritage are heterogenic, which means that parties can be individuals, institutions, and countries. The Altmann case saw the heir of the Bloch-Bauer family facing the Belvedere Museum and the Government of Austria, while Italy was pitted against the 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 general (art. 2 UNIDROIT Convention). Christa 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 interest.¹³ Therefore, a dispute involving cultural heritage can revolve around a myriad of scenarios: the consequence of a theft, a failure of a museum to return or guarantee the security of an exhibit, or whether an object truly represents the cultural heritage of a community.

However, some common ground does exist, and that is the remarkably high attention given to these cases by a wider public. As is rightly observed by scholars, the art market is well-known to be an opaque world where reputational factors play a key role.¹⁴ The feeling that prevails once proceedings have ended can be decisive for the reputation of a museum, a government, and states that were involved. In both of our examples, the two museums faced unpleasant questions regarding the provenance of their exhibits; in the Altmann case these questions were even more serious, as they involved Nazi plunder. Therefore, a certain amount of discretion may be desired by the parties in cultural heritage disputes. At this point, mediation, the rules of which regularly contain a provision on confidentiality,¹⁵ can become useful. A relaxed atmosphere,

¹³ C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing Limited (Kobo Edition), Cheltenham, UK – Northampton, MA 2015, p. 5.

¹⁴ A. Trioschi, “Art-Related Disputes and ADR Methods: A Good Fit?”, *Kluwer Arbitration Blog*, 8.07.2018, p. 3, <http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/> (accessed: 12.03.2021).

¹⁵ For example, see: art. 10 CAfA Mediation Rules, art. 6 CAM Fast Track Mediation Rules, articles 17–21 ICOM-WIPO Mediation Rules.

which is not under the eyes of the media, can keep the minds 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 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.¹⁶ 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 within the Italian public; still, it may be argued that the USA as the country of the Getty Museum's legal headquarters should also have access to certain elements of the mediation. In the Altmann case, the final decision confirms that the Bloch-Bauer heirs had the law on their side, but in terms of transparency, the 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 customary borders and divisions. In addition, mediation can touch upon many issues connected to theft or war crimes, both of which demand an 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.

5. Concluding an agreement to mediate

The refusal of artefact holders to even enter into an ADR process is viewed as one of the main drawbacks in the relevant literature.¹⁷ While seeking justice before a court is a basic human right, ADR methods rely heavily on the agreement of the parties involved. However, in disputes involving cultural objects, often no prior agreement exists, as happened in both the Altmann and the 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 against theft or damage. No prior agreement is the consequence of there being no previous contacts between the parties, automatically excluding the possibility 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

¹⁶ A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford 2014, p. 183.

¹⁷ M. Shehade, K. Fouseki, K. Walker Tubb, "Editorial: Alternative Dispute Resolution in Cultural Property Disputes: Merging Theory and Practice", *International Journal of Cultural Property* 2016, vol. 23, issue 4, p. 344.

omitting negotiations.¹⁸ Once a dispute emerges, parties find themselves in the unpleasant legal situation of choosing between 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 must weigh up 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 to determine ownership, and an ADR agreement may be rescinded for this reason.¹⁹ This matter goes beyond 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. The absolute co-dependency of mediation on the agreement of the parties leaves its fate to other concerns, in which whether the parties will be able to agree to submit the dispute depends greatly on their comparative strength.

The already quoted CAM statistics show that in half of the cases related to art and cultural heritage one party had failed to attend the first session.²⁰ 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 cause 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 hire expensive and capable legal teams.²¹ If the other party is an individual, the obvious corollary is a financial gap, and this problem particularly resonates for cases similar to the Altmann case. Mr Randol Schoenberg, counsel for the Bloch-Bauer heirs, remarked that an “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”.²² While this observation may seem bleak, the fact remains that the US 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, 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 a country seeking restitution, 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

¹⁸ A. Chechi, *The Settlement...*, pp. 181–182.

¹⁹ C. Roodt, *Private International Law...*, p. 185.

²⁰ ADR Art & Cultural Heritage Statistics 2018..., p. 1.

²¹ A. Chechi, *The Settlement...*, p. 185.

²² Answers given to the author, in: *Art and Cultural Heritage...*, p. 463.

v. 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 resolutions²³ for a 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, which was favourably resolved following mediation,²⁴ while it is still working on the Parthenon Marbles case.²⁵ 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.²⁶

Such a turn of events sheds 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 UNESCO for the second time,²⁷ effective 31 December 2018, and Israel followed suit, both citing 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 a battleground for political agendas, and the protection of cultural heritage gets lost in the process.

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.

²³ See the 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> (accessed: 20.02.2021) 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> (accessed: 20.02.2021).

²⁴ 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.

²⁵ 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 (accessed: 20.02.2021).

²⁶ J. Woodhouse, S. Pepin, *House of Commons Library Briefing*, Paper No. 02075, 9 June 2017, p. 15, <https://www.parliament.uk/commons-library> (accessed: 20.02.2021).

²⁷ Previously, US President Ronald Reagan decided to withdraw in 1984 in an effort to thwart the recognition of Soviet historical sites.

6. 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 insofar 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 in court (presumably where the refusing party has assets), as with any other contract. The only way to bypass this procedure is to rely on national law or international treaty if signed by said country.²⁸ This has led some authors to observe that mediation falls short of advantages provided by arbitration, as no instrument comparable to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, prepared and opened for signature on 10 June 1958 (hereinafter: the New York Convention)²⁹ exists.³⁰ Such shortcomings have 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 to mediation agreements resolving cultural heritage cases, Austrian arbitration practitioners seem to have given it the green light.³¹ 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 the 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 Mediation,³² the Singapore Convention does not offer any examples of what commercial disputes are, and the

²⁸ Guide to WIPO Mediation, World Intellectual Property Organization 2018, p. 33, <https://tind.wipo.int/record/29081?ln=en> (accessed: 20.02.2021).

²⁹ <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> (accessed: 20.02.2021).

³⁰ I. Barker, "Thoughts on an International ADR Regime for Repatriation of Cultural Property" [in:] *Art and Cultural Heritage...*, p. 485. The author wrote this text before the Singapore Convention was adopted.

³¹ N. Pitkowitz, A. Fremuth-Wolf, A.K. Radschek, "The Vienna Innovation Propositions...", p. 563.

³² 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (accessed: 13.02.2021).

Model Law itself does not list cultural heritage disputes as an example.³³ Moreover, the Commentary of the Convention notes that it does not cover non-commercial matters that are more likely to clash with public policies specific to legal cultures and national circumstances.³⁴ What should be noted, however, is that classification of something as commercial or not only affects the applicability of the 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.

If we bear in mind the public interest in many disputes involving cultural objects (discussed above), it is evident that some cultural heritage disputes can hardly be considered as purely commercial. In order to ascertain whether a dispute would fall within the commercial category, and thus should not face any obstacles to being submitted to mediation, international commercial arbitration practice can to some extent provide guidelines. Following this lead, some aspects indisputably fall into the category of the commercial, as was true 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 arbitration.³⁵ 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 the Shaanxi Cultural Heritage Promotion Center. This led to arbitration proceedings and to the claimant’s winning the case. Therefore, proceedings involving inter-museum loans, in particular the failure of a party to insure an artefact or pay an 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 a court at all. The question whether the dispute requires significant transparency, judicial (national or international) determination, or is banned from the ADR framework for whatever reason, is the core issue here. Though it is hard to determine the exact pool of problematic cases because of 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 the place where enforcement is sought. The Singapore Convention itself offers two grounds for a country to refuse enforcement of a mediation

³³ See footnote in art. 1(1) UNCITRAL Model Law.

³⁴ N. Alexander, S. Chong, *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution*, vol. 8, Kluwer Law International 2019, p. 27. The authors further refer to the Working Group Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Third Session, A/CN.9/861 (2015), para. 42.

³⁵ *Shaanxi Cultural Heritage Promotion Center v. China Institute in America (Award)*, CIETAC Case No. DR-120228/C-USA-NTS, 31 March 2014.

settlement in art. 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 an ambiguous nature is the suitability of intellectual property rights to be submitted to ADR, a topic often intertwined with cultural objects.³⁶ On the subject of cultural heritage itself, it has been noted that specific issues of a public policy nature, or inalienable rights, may be difficult to submit to arbitration in certain jurisdictions.³⁷ In absolute terms, private ownership of a cultural object deemed inalienable by a country cannot be the subject of a dispute in any forum on its territory, stemming from its *extra commercium* status. Also, as has already been touched on above, when theft and illegal trafficking of cultural objects are involved, any parallel criminal proceedings can also affect some aspects of any mediation.

Finally, another problem raised by the Convention itself allows contracting states to put a reservation on its application in line with art. 8. If a 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 far.³⁸

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 the Singapore Convention seem to point to an unnerving answer – “maybe”.

7. Conclusions

While offering mediation to the other party should always be a 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 account can guide a party and even help avoid some obstacles.

Like any other method of dispute resolution, mediation has its down sides. It does not operate in a vacuum, removed from outside influences and, as such, it may not be able to remedy discrepancies in parties’ relative power. The 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 a court decision and being a winner may be the only mind set for some, weighing that option against publicly losing a prized exhibition item or a national symbol may dissuade others from attempting ADR first.

³⁶ 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, p. 41, http://unctad.org/en/docs/edmmisc232add25_en.pdf (accessed: 10.02.2021).

³⁷ S. Theurich, “Art and Cultural Heritage Dispute Resolution”, *WIPO Magazine*, July 2009.

³⁸ 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 (accessed: 10.01.2021).

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 produce 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 the 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 transparently to inform the parties what it has to offer. 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 simple barrier that creates unnecessary problems in practice, and this barrier 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. Bearing in mind that this is a novel instrument, it may be premature to predict how this relationship will 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 can be tested. This essentially means actualising the accountability of not only individuals, but also of museums and private collectors. Only through cooperation with the art community, that is legal scholars and practitioners who 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 is to build a solid practice which will recommend it to parties in the future.

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Summary

Milica Arsic

Mediation in cultural heritage disputes – pro et contra

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 permit 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 the 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, the Singapore Convention

Streszczenie

Milica Arsic

Mediacja w sporach dotyczących dóbr kultury – *pro et contra*

Powszechnie wiadomo, że z mediacji jako alternatywnej metody rozwiązywania sporów korzysta się w wielu rodzajach spraw, od gospodarczych po rodzinne, dzięki czemu można uniknąć utrudnień procesowych, przewlekłości i kosztów typowych dla spraw rozpoznawanych przez sądy. Metoda ta, przydatna w skomplikowanych i zarazem delikatnych sprawach, zyskuje zwolenników również wśród praktyków prawa ochrony dziedzictwa kultury. Jeżeli strony dążą do ugody zachowującej poufność, specyfika roszczeń dotyczących dziedzictwa kultury może osłabić, ale też może wzmocnić dobrodziejstwa płynące z mediacji. W niniejszym artykule przeanalizowano związki instytucji mediacji z dziedziną prawa ochronny dóbr kultury, ze szczególnym uwzględnieniem uregulowań niedawno przyjętej konwencji singapurskiej. Autorka rekomenduje poprawki w brzmieniu klauzul o mediacji jako warunek poprzedzający wszczęcie właściwego postępowania oraz omawia kwestie związane z wykonaniem i skutkami ugód.

Słowa kluczowe: dziedzictwo kultury, klauzula mediacyjna, mediacja, konwencja singapurska