

# Negotiation & ADR in Cultural Property Disputes

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**Manlio Frigo**

Focus Team Art and Cultural Property

**BonelliErede**

with LOMBARDI

# Art in Dispute

## Features of art law disputes

Multidisciplinary nature

Private and public parties  
involved

Cross-border implications

# Art in Dispute

## Drawbacks of lawsuit

**Litigation** may prove inappropriate as a way to solve art-law disputes:

- Effects on professional relationships
- Uncertainty of outcome
- Problem of enforcement of the judicial decision in foreign countries

# Art in Dispute

## Lawsuit as a non-viable option

Lawsuit may not always be a viable option, such as in case of:

Lack of jurisdiction

Expiry of limitation period

# Art in Dispute

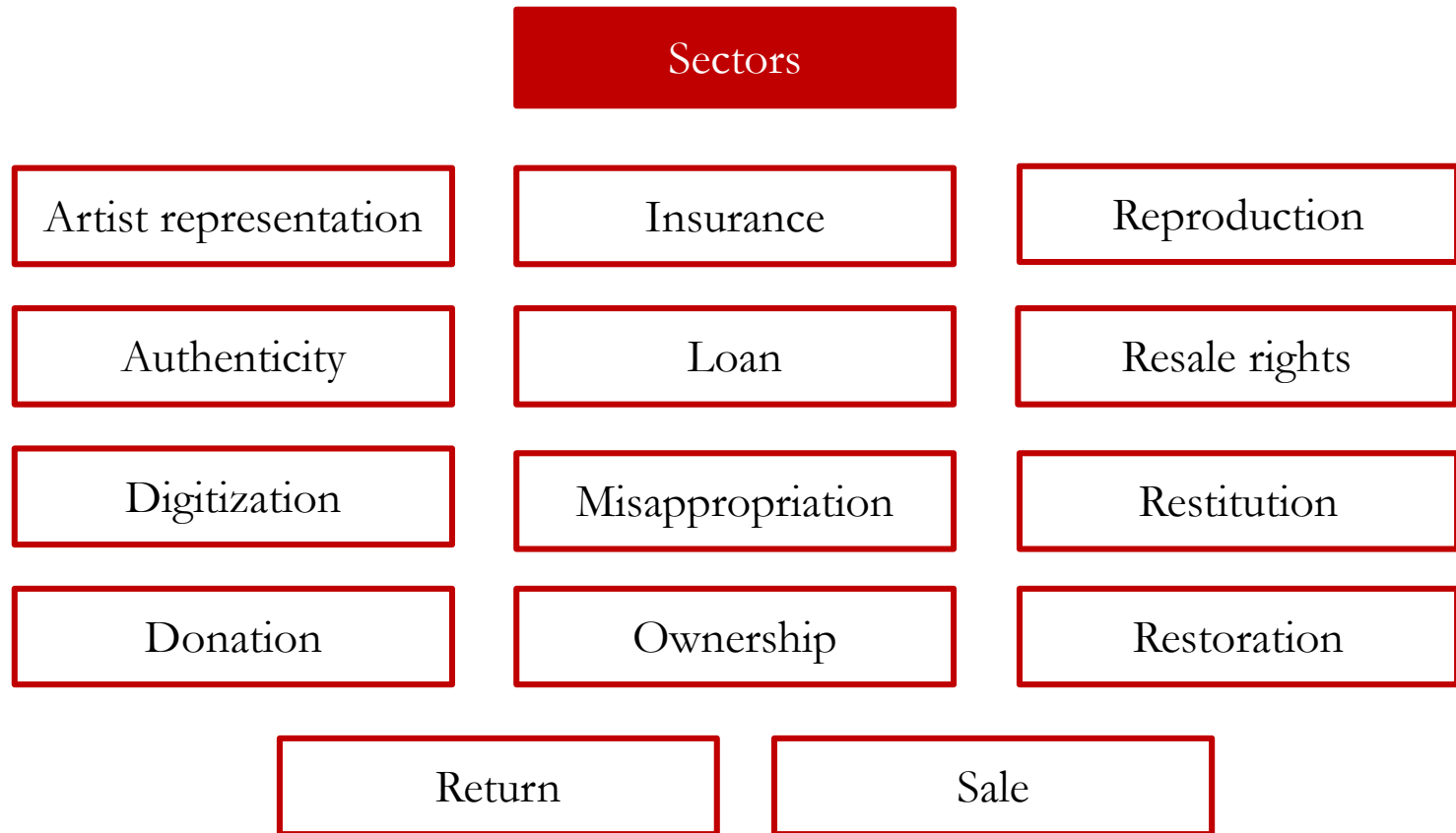
## ADR as an alternative

**ADR** is recognized to provide the following benefits:

- Estimate of costs
- Choice of law, location and language
- Choice of expert
- Flexibility, time efficiency, confidentiality
- Variety of remedies

# Art in Dispute

## Relevant sectors



# Art in Dispute

## Nature of claims

Claim

Contractual

Non-contractual

# Art in Dispute

## Institutional level

- **UNESCO** Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) (1978)
- **WIPO** Arbitration and Mediation Centre, Geneva (1994)
- **ICOM-WIPO**, Art and Cultural Heritage Mediation (2012)
- **Milan Chamber of Commerce**, ADR Art (2015)
- **NAI-AiA**, Court of Arbitration for Art (CAfA) (2018)



# Art in Dispute

## Institutional level

- **The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)**

Art. 14(6): “If, within a period of six months from the date of receipt of the letter of objection, the Director-General has not received from the High Contracting Party lodging the objection a communication stating that it has been withdrawn, the High Contracting Party applying for registration may request **arbitration** (...)”.

- **UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995)**

Art. 8(2): “The parties may agree to submit the dispute to any court or other competent authority or to **arbitration**.”

# Art in Dispute

## Institutional level

- **UNESCO Convention on the protection of the underwater cultural heritage (2001)**

Art. 25(2): “If those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for **mediation**, by agreement between the State Parties concerned.”

- **Directive 2014/60/EU (2014)**

Art. 5(6): “(...) the competent authorities of the requested Member State may, without prejudice to Article 6, first facilitate the implementation of an **arbitration procedure**, in accordance with the national legislation of the requested Member State and provided that the requesting Member State and the possessor or holder give their formal approval.”

# Art in Dispute

## Focus on arbitration

Some aspects deserve particular **attention**. These are mainly related to:

Nature of the claim

Parties involved

# Art in Dispute

## Arbitration clauses

- **Standard ICC Arbitration Clause**

“All disputes arising out of or in connection with the present contract shall be finally settled under the **Rules of Arbitration of the International Chamber of Commerce** by one or more **arbitrators** appointed in accordance with the said Rules.”

- **NAI-AiA, Court of Arbitration for Art**

“All disputes arising in connection with the present agreement, or further agreements resulting therefrom, shall be settled in accordance with the **Arbitration Rules of the Netherlands Arbitration Institute** supplemented and modified by the AiA/NAI Adjunct Arbitration Rules.”

# Art in Dispute

## Arbitration clauses

- **WIPO Arbitration and Mediation Centre**

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by **arbitration** in accordance with the **WIPO Arbitration Rules**. The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].”

# Art in Dispute

## The Italian experience

### Agreements between **Italy** and **Foreign Museums** (2006-2012)

- ⇒ Metropolitan Museum (2006)
- ⇒ Boston MFA (2006)
- ⇒ Getty Museum (2007)
- ⇒ Princeton University (2007)
- ⇒ Shelby White (2008)
- ⇒ Cleveland MFA (2008)
- ⇒ Tokyo Fuji Art Museum (2012)

Art in Dispute  
Metropolitan Museum (2006)



# Art in Dispute Getty Museum (2007)





Art in Dispute  
Cleveland MFA (2008)



Art in Dispute  
Cleveland MFA (2008)



# Art in Dispute Tokyo Fuji Art Museum (2012)



# Art in Dispute

## Formal features

- Out-of-court settlement
- Contractual nature (*Long Term Cultural Cooperation Agreement*)
- Problem of the applicable law
- Method for the settlement of disputes (ICC arbitration)

# Art in Dispute

## Material features

- Restitution of objects
- Long-lasting cultural cooperation (40 years, 25 years):
  - international free loans of equivalent items for 4 years
  - exchange of professionals/students
  - assistance in research
  - conservation, restoration
  - travelling exhibits

# Art in Dispute

## Recommended clauses

- **Waiver of sovereign immunity**

“The Republic hereby agrees that the execution, delivery and performance by it of this Agreement and all other agreements, contracts pertaining to it or to its implementation or otherwise, constitute private and commercial acts made by it in its commercial capacity (*jure gestionis*) and not public or governmental acts made in their capacity as authorities (*jure imperii*).”

## Art in Dispute Recommended clauses

- **Arbitration**

“Any dispute arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. The place of arbitration shall be Paris. The language of the arbitration shall be English.”