

# Symposium: ADR for Art and Cultural Heritage Disputes

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**SYMPOSIUM:  
ADR FOR ART AND CULTURAL  
HERITAGE DISPUTES**

3 October 2018

Anthony Misquitta

**V&A**

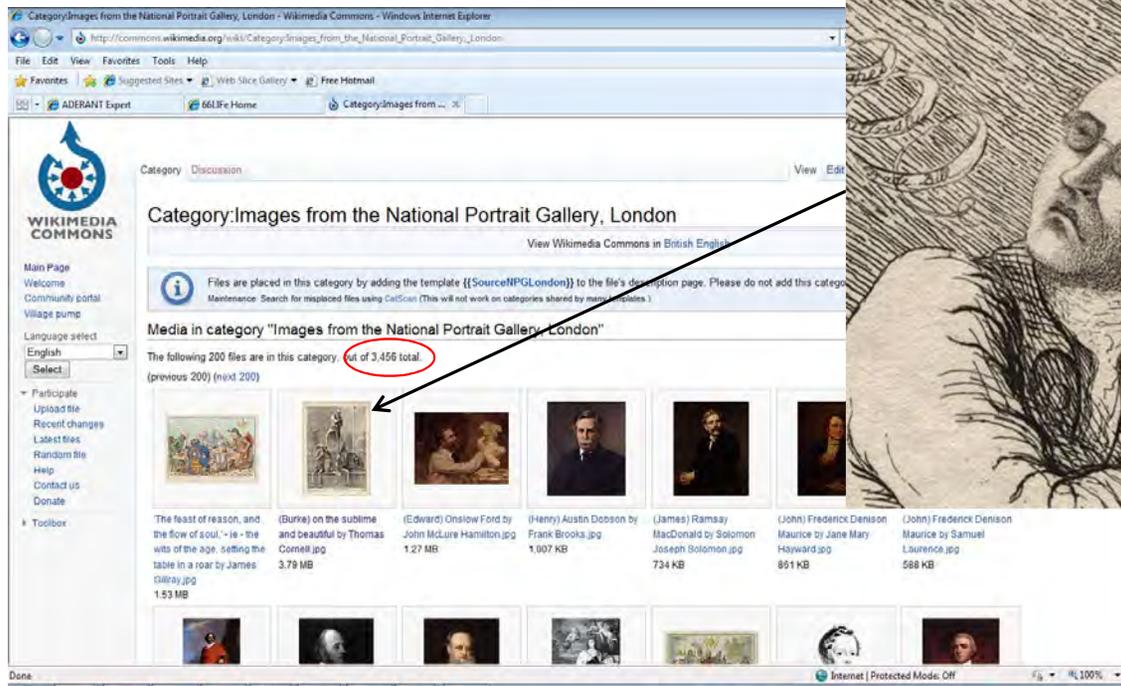
**KEYSTONE LAW**

(3) The Board may not dispose of an object the property in which is vested in them and which is comprised in their collections unless—

- (a) the disposal is by way of sale, exchange or gift of an object which is a duplicate of another object the property in which is so vested and which is so comprised, or
- (b) the disposal is by way of sale, exchange or gift of an object which in the Board's opinion is unsuitable for retention in their collections and can be disposed of without detriment to the interests of students or other members of the public, or
- (c) the disposal is by way of sale or gift made to, or exchange made with, any institution mentioned in subsection (4), or
- (d) the disposal (by whatever means, including destruction) is of an object which the Board are satisfied has become useless for the purposes of their collections by reason of damage, physical deterioration, or infestation by destructive organisms.



# NATIONAL PORTRAIT GALLERY V. WIKIMEDIA COMMONS (UNREPORTED)



# REISS ENGELHORN MUSEUM (REM) V. WIKIMEDIA FOUNDATION



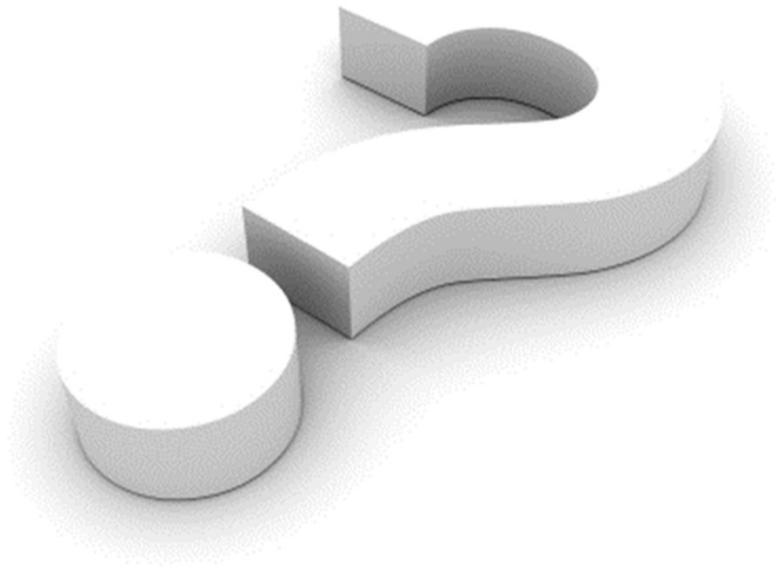
# REISS ENGELHORN MUSEUM (REM) V. WIKIMEDIA FOUNDATION

Portrait of Charles Theodore, Elector of Bavaria (1724-1799), painted by Anna Dorothea Lisiewska-Therbusch in 1763, and whose copyright is subject of the lawsuit

Anna Dorothea Therbusch - Sammelleidenschaft, Mäzenatentum und Kunstförderung. Kostbarkeiten aus dem Museum für Kunst-,

Public Domain





# Sotheby's

## REPATRIATION CLAIMS INVOLVING CULTURAL HERITAGE AND ANTIQUITIES: THE AUCTION HOUSE PERSPECTIVE

QMUL/WIPO SYMPOSIUM

3 OCTOBER 2018

Lena J. Wong  
VP, Compliance Counsel  
Sotheby's

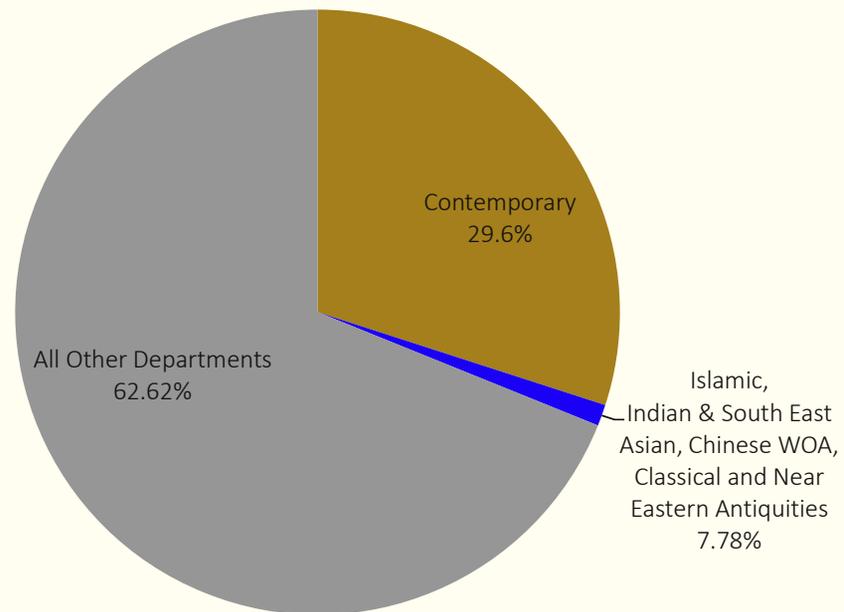




## ANCIENT ARCHEOLOGICAL OBJECTS CONSTITUTE A SMALL FRACTION OF SOTHEBY'S BUSINESS

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SOTHEBY'S AGGREGATE AUCTION SALES IN 2017



## ANCIENT AND ARCHEOLOGICAL OBJECTS CONSUME A SUBSTANTIAL FRACTION OF SOTHEBY'S COMPLIANCE RESOURCES

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- Difficult compliance area due to multiplicity of laws in multiple jurisdictions often directly in conflict
- Uneven, erratic, contradictory enforcement and application of the law and facts across offices within the US and internationally
- Important compliance area due to serious consequences of archeological site destruction and worldwide need to preserve and prevent further losses
- What does a responsible law abiding market player do to comply?

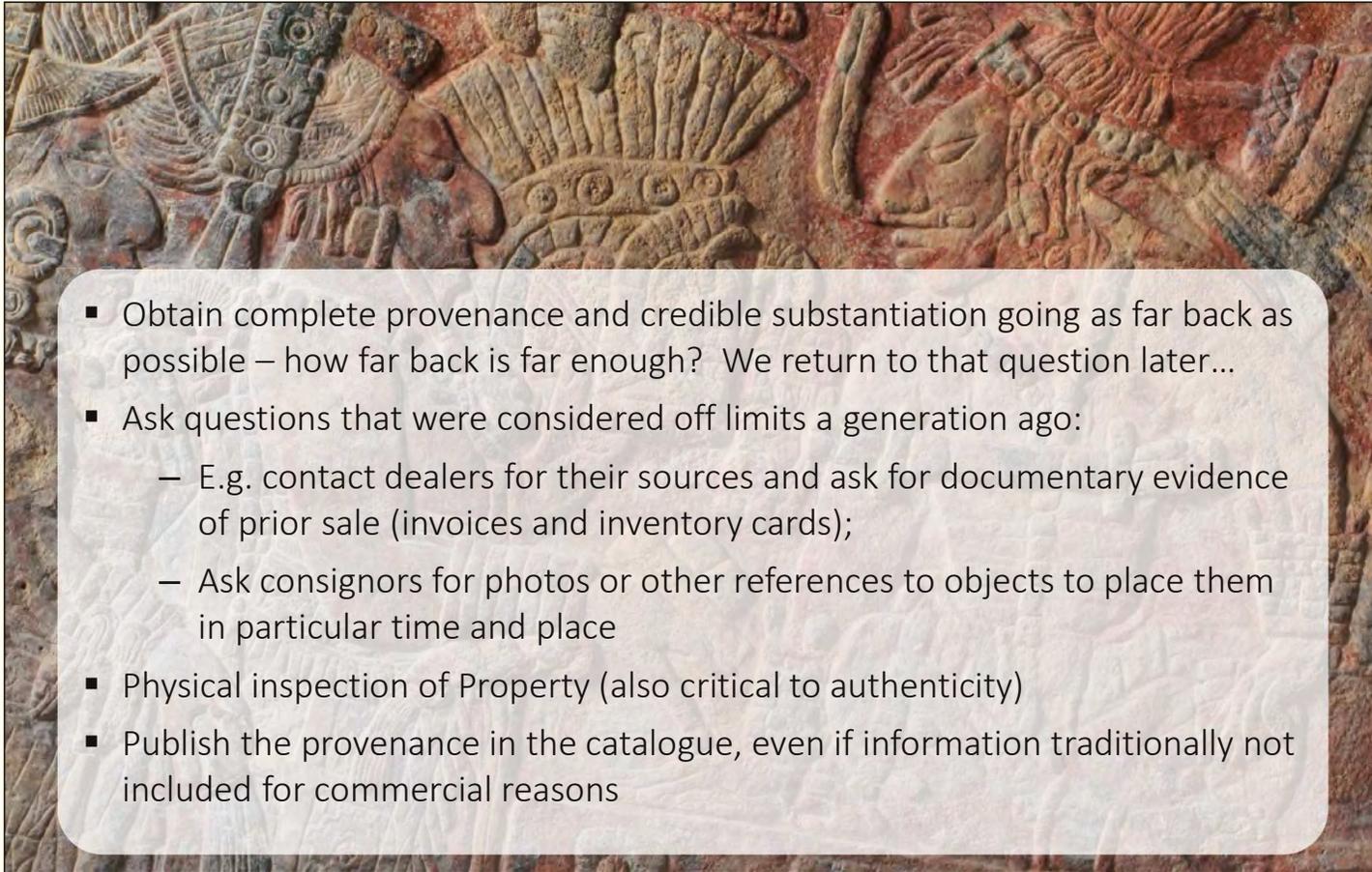
## THE COMPLIANCE BASICS

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- Sotheby's was first in the art industry to establish a global, full-time Compliance Department. We have compliance lawyers in NY, London and Hong Kong. 7 attorneys and 4 support staff dedicated to compliance.
- As in other global public companies, we create and implement corporate policy on wide range of regulatory issues: e.g. anti-corruption, AML, sanctions, movement of art, and endangered species – all of which impact on our ability to sell legally works of art, including ancient.
- Key compliance areas for Ancient and Archeological Objects:
  - Due Diligence re the Property Being Offered For Sale
  - Due Diligence re the Person(s) in the transaction (“Know Your Client”)
  - Policies, Controls and Procedures (checklists, questionnaires)
  - Legal expertise and cooperative relationships with regulators
  - Training and education

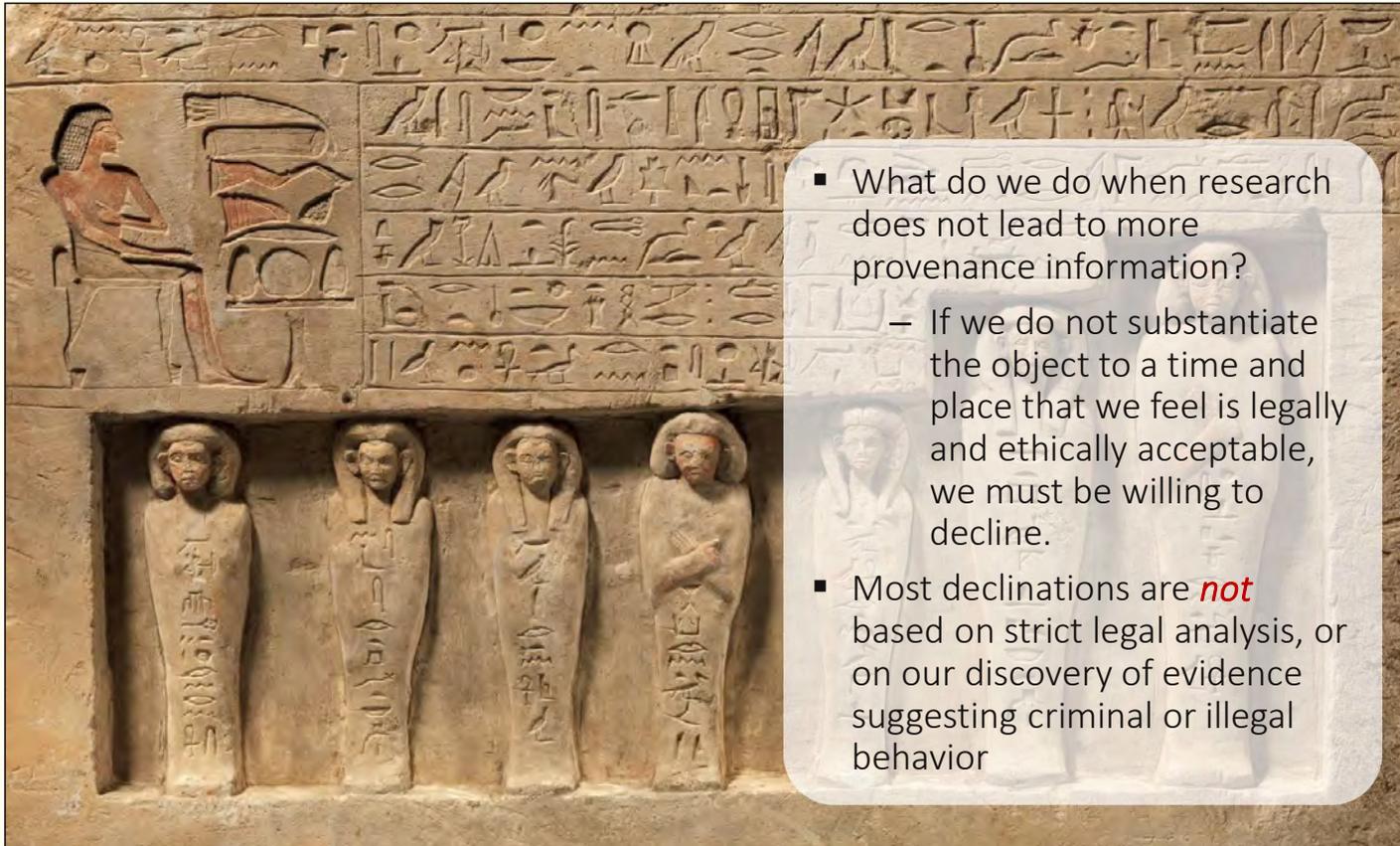
## DUE DILIGENCE: THE PROPERTY

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- Obtain complete provenance and credible substantiation going as far back as possible – how far back is far enough? We return to that question later...
- Ask questions that were considered off limits a generation ago:
  - E.g. contact dealers for their sources and ask for documentary evidence of prior sale (invoices and inventory cards);
  - Ask consignors for photos or other references to objects to place them in particular time and place
- Physical inspection of Property (also critical to authenticity)
- Publish the provenance in the catalogue, even if information traditionally not included for commercial reasons

## DUE DILIGENCE DOES NOT ALWAYS YIELD INFORMATION



- What do we do when research does not lead to more provenance information?
  - If we do not substantiate the object to a time and place that we feel is legally and ethically acceptable, we must be willing to decline.
- Most declinations are *not* based on strict legal analysis, or on our discovery of evidence suggesting criminal or illegal behavior

## SIGNIFICANT CHALLENGES IMPEDING COMPLIANCE

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- Material that would be helpful in conducting due diligence is not made available to the market
  - Pattern of keeping alleged evidence inaccessible to market, even under controlled circumstances such as confidential requests, makes due diligence impossible
  - Yet, claims and subpoenas routinely issued and allegations of “lack of due diligence” levied

## INTERNATIONAL LAW/U.S. FEDERAL LAW: MOVEMENT AND TRANSFER OF OWNERSHIP

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1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

- Directs Member States to protect cultural property

Cultural Property Implementation Act (“CPIA”) – enacted in the U.S. in 1983

- Implements UNESCO Convention
- Cultural Property Advisory Committee
- Memoranda of Understanding (MOUs) – bilateral treaties restricting import and export of protected cultural property

## U.S. FEDERAL LAW: OWNERSHIP/STOLEN PROPERTY

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*United States v. McClain*, 545 F.2d 988 (5<sup>th</sup> Cir. 1977)

*United States v. Schultz*, 333 F.3d 393 (2<sup>d</sup> Cir. 2003)

Antiquities taken in violation of a national patrimony law can constitute “stolen” property under the National Stolen Property Act, 18 U.S.C. §2314-2315

- Law must clearly & unambiguously vest title to undiscovered antiquities in the foreign State
  - Law must be actively enforced by the foreign government
  - Possessor must know that the property was stolen.
- Once Government satisfies its burden of proof that property is stolen and possessor knew it was, civil forfeiture is available as a mechanism to repatriate property to the foreign State.



## RECENT DEVELOPMENT: NY ENFORCEMENT

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- NY State District Attorney (“DANY”) investigating ancient works of art allegedly stolen from various foreign countries around the world
- December 2017 formation of the Antiquities Trafficking Unit
- According to the DANY, over the last six years, they have repatriated thousands of antiquities with a total value of more than \$150 million.



## What is the law relied on by DANY?

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### Criminal Possession of Stolen Property

- Novel application of NY criminal law in antiquities context.
- NY Penal Law § 165.40 et seq.
  - "[A] person is guilty of criminal possession of stolen property ... when he knowingly possesses stolen property."
- NY Penal Law §155.00(5)
  - For any property to be "stolen," it must have been "wrongfully take[n], obtain[ed], or with[e]ld from an owner thereof.
- DANY acknowledges that the People must prove the following:
  1. Property was exported from the country of origin after the date the applicable patrimony law was effective;
  2. Defendant possessed the property in New York County; and
  3. Defendant knew the property was stolen.

## Presumption of Knowledge

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- NY Penal Law § 165.55(2)
  - A person in the business of buying, selling or otherwise dealing in property who possesses stolen property is **presumed to know that such property was stolen** if he obtained it **without** having ascertained by **reasonable inquiry** that the person from whom he obtained it had a legal right to possess it.
  
  - 165.55 does not define “reasonable inquiry” and no NY courts have addressed it in the context of cultural heritage.
  
  - According to DANY, “reasonable inquiry” standard requires written documentation of provenance.

## Open Questions

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- How is the relevant ownership law determined?
  - According to DANY, “battle of the experts” is not appropriate in criminal context
  
- What facts need to be shown about when/how object left country of origin?
  - Sufficient to show that it was there and now is not?
  
- Who determines that something is stolen or who true owner is?
  - DANY?
  - Criminal Court Judge issuing search warrant?

“The Court notes that there is no criminal prosecution pending against [defendants]; no larceny or criminal possession of stolen property charges have been lodged. Nor do any appear to be forthcoming. Hence, this **[criminal] Court does not have jurisdiction to determine the issue of ownership.** *People ex rel. Simpson Co. v. Kempner*, 208 NY 16 (1913).”

(Decision and Order, *In the Matter of Persian Guard Relief*, SCID #30219/17 (Sup. Ct. N.Y. Cnty. filed Dec. 18, 2017).)

## CONTACT INFORMATION

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**Lena J. Wong**

VP, Compliance Counsel

**Sotheby's**

1334 York Avenue

New York, NY 10021

e: [Lena.Wong@sothebys.com](mailto:Lena.Wong@sothebys.com)

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**ADR for Art and Cultural Heritage Disputes -  
Benefits and Limitations**

London 3 October 2018

Gregor Kleinknecht LL.M. MCI Arb

## *Hunters - 300 Years of Forward Thinking*

Founded in 1715 and based in Lincoln's Inn, Hunters operates at the heart of legal London. The firm provides effective and discrete specialist advice to individuals, businesses, trusts, landed estates and charities in the art and cultural heritage sector, preserving and protecting our clients' interests and the art works with which they are concerned.

Hunters shares its clients' passion for art and is recognised as a leader in the field of art and cultural heritage law, bringing our lawyers' experience and expertise to bear when clients want to transition art to the next generation, undertake transactions or are involved in disputes both in the UK and international art markets.

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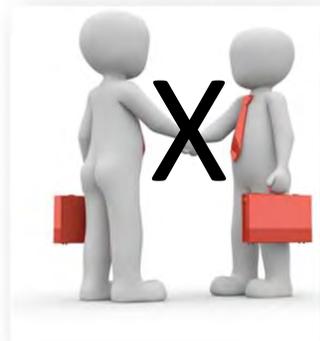
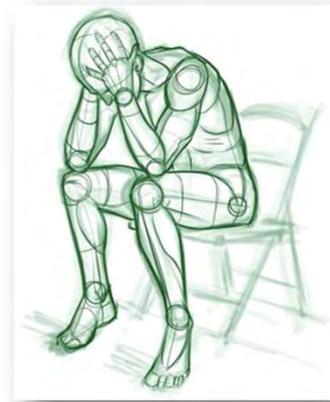
AR ART RESOLVE  
M E D I A T I O N

*“Efficient, private, out-of-court options for the resolution of disputes about works of art, objects of antiquity and historic sites.”*

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## The litigation headache



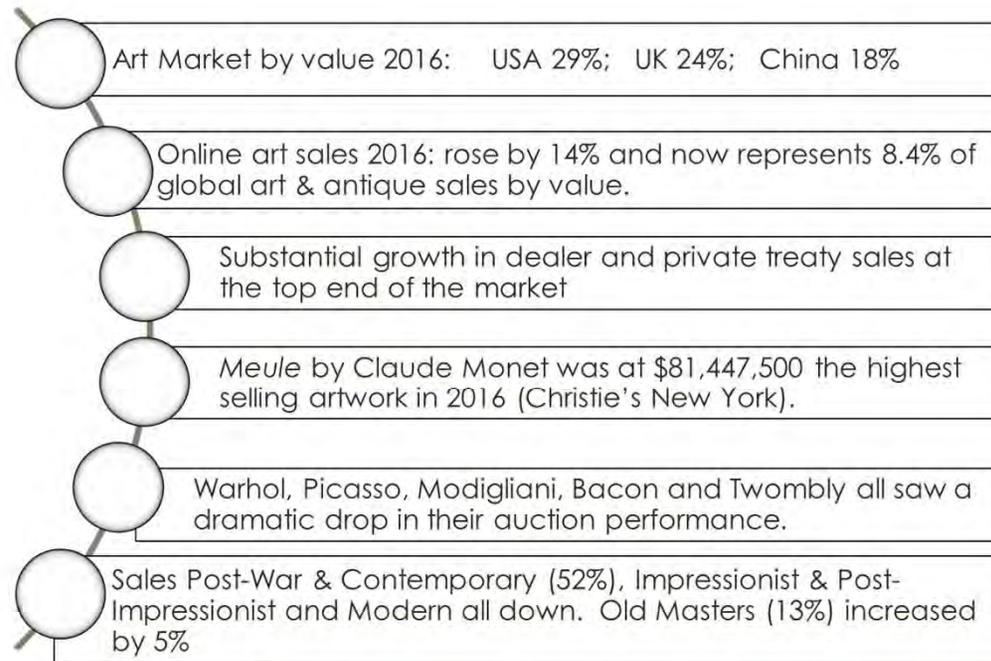
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*Tavoulaareas v Lau and another [2007] EWCA Civ 474*

Comments of Lord Justice Ward, on appeal:

*“The first extraordinary aspect of this bitterly-fought litigation is that the Claimant has spent some £60,000 on it to date, the Defendants £25,000; £85,000 in all, over a claim worth at most £23,500. Now, litigation must be fun if the parties are prepared to spend that much on a rollercoaster ride to judgment without pausing, either of them, to suggest that mediation would be a more sensible way to resolve their differences.”*

## \$50bn global sales of art and antiques in 2016



Sources: TEFAF Art Market Report 2017, Art Basel and UBS Global Art Market Report 2017, The Hiscox Online Art Trade Report 2017

## What types of disputes?

- Authenticity and attribution
- Liability for loss and damage
- Broken trusts and other promises
- Title, ownership, provenance
- Copyright and moral rights
- Historical claims
- Multi-cultural
- Contract disputes
- Insurance and indemnity
- Cross-border
- Multi-party

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“Tasmanians come home after a century away”



© Hunters/ArtResolve Photo AP

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'Namgis Transformation Mask (closed and open), c. 1910 C.E.,  
'Namgis Kwakwaka'wakw, wood, leather, British Columbia © Trustees of the British Museum

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Hrabalek v Hrabalek  
[2015] EWHC 1456 (QB)



Photo: Edd Ellison/James Granger/ 2005 Interfuture Media/Italiaspeed



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## 19 Blake illustrations for Robert Blair's poem *The Grave*



William Blake, *Death of the Strong Wicked Man*, 1806

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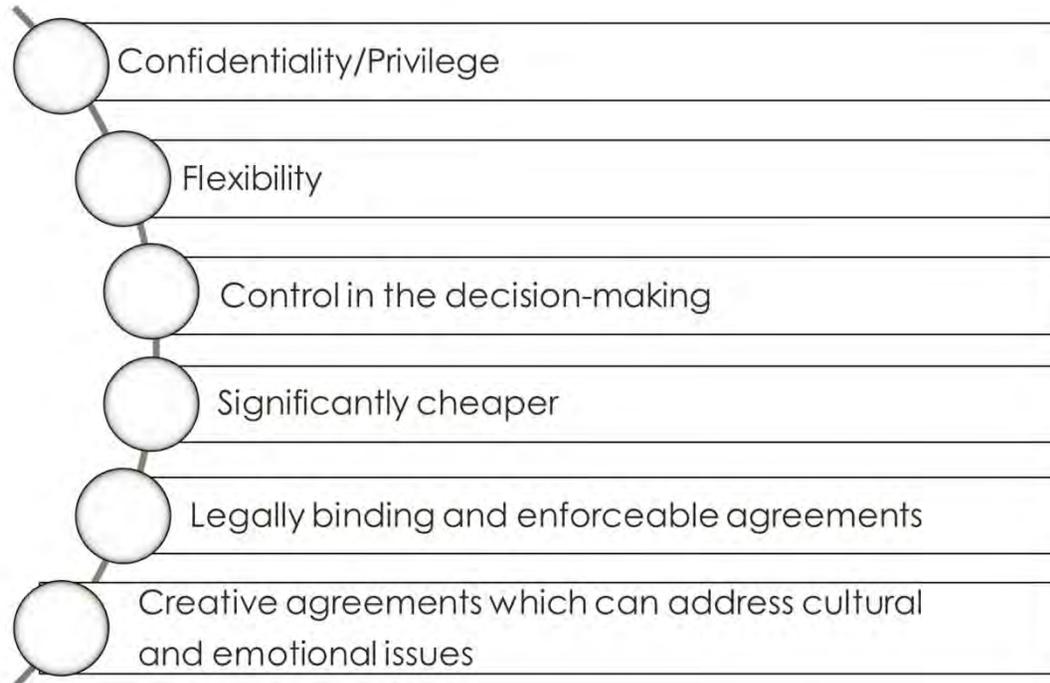
## Mediation

Mediation is a voluntary, flexible and confidential method of resolving disputes outside the court system with the help of a neutral third party. The role of the mediator is to assist the parties with their negotiations and to facilitate discussions enabling them to reach a mutually acceptable settlement. The mediator does not impose a result and the parties maintain control of the process and outcome of the mediation and whether or not a settlement is reached. The mediation is 'without prejudice' to the parties' legal position but, if a settlement is reached, it can be converted into a legally binding and enforceable agreement.

## Pathways to mediation

- Contract contains mediation clause
- Contract contains tiered dispute resolution clause (med/lit, med/arb)
- *Ad hoc* mediation
- Court recommends mediation at the case management stage

## Advantages of mediation



## Creativity in resolution

- Restitution of an Object
- Copies
- Financial compensation
- Shared ownership
- Permanent loan
- Ceremony to create a permanent record
- Some other form of acknowledgment
- Repair/restoration of damaged object

## Potential problems

- Is Mediation still a voluntary process? Is *de facto* compulsion through costs sanctions compatible with the ethos of ADR?
- Tactical abuse of the mediation process
- Additional cost without guarantee of success
- Disparate bargaining power of the parties
- Coalitions in multi-party disputes
- Appropriate in consumer cases?

## Arbitration

Arbitration is a formal (and in principle confidential) system of dispute resolution through one or more impartial arbitrators leading to a binding result which is similar to a court judgment and is known as an arbitration award. There are very limited grounds on which an arbitration award can be challenged. Arbitration is suitable for disputes of all kinds, particularly, where there are issues of fact and law, and where international enforcement is required. Arbitration awards are enforceable in over 150 countries world-wide whereas most English court judgments are readily enforceable only in the EEA and certain Commonwealth countries (but, notably, not for example in the United States).

## Early neutral evaluation

Early neutral evaluation is a voluntary, non-binding process by which the parties agree to obtain an opinion about their dispute from a respected neutral third party with relevant expertise. The neutral hears each party's submissions and then states his/her view on the likely outcome of the dispute or issue. The neutral can also give advice on how it could or should be resolved. The evaluation given by the neutral may well influence the parties to settle the dispute, either in accordance with the advice or in some other way, depending on subsequent negotiations between the parties. Early neutral evaluation is 'without prejudice' to the parties' legal position.

## Expert determination

Expert determination leads to a binding decision on the parties and can be an effective, quick and economic means of settling certain types of dispute. The process by which the decision is reached is informal. Expert determination is best used in cases where there is no conflict of factual evidence and where the issues concern questions of expertise and/or law. In international cases, expert determination should not be used unless there is a method for enforcement under the legal systems of both parties. The decision made by the expert is final and binding and can be challenged only on very limited grounds arising from its fundamental validity but not from differences on issues of fact, law, or professional opinion.

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Thank you

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[www.artresolve.org](http://www.artresolve.org)

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# Resolving Art and Cultural Heritage Disputes through ADR - Current Trends and Practical Tips

***SIA-WIPO Joint Symposium:  
ADR for Art and Cultural Heritage  
Disputes***

October 3, 2018

WILMERHALE 

WILMER CUTLER PICKERING HALE AND DORR LLP



## David W. Bowker

- WilmerHale – Chair, International Litigation
- Experienced in mediation, arbitration, litigation
- Based in Washington D.C., New York, California
- Served in White House and U.S. Department of State
- Represent museums, universities, auction houses, art advisory services, galleries, collectors



## 4 Topics

### **1. When to Use ADR**

- Types of disputes most appropriate for ADR

### **2. How to Use ADR**

- Tailoring ADR proceedings for particular cases

### **3. When *Not* to Use ADR**

### **4. Trends to Watch – a U.S. Perspective**



## Topic 1: When to Use ADR

- **Must distinguish between forms of ADR – focused here on MEDIATION, ARBITRATION**
- **MEDIATION may be appropriate if clients' goals include:**
  - Resolving a dispute by consent, with no binding decision
  - Maintaining confidentiality / avoiding publicity
  - Affording sensitivity to personal, cultural, historical issues
  - Preserving relationships
  - Minimizing costs (plus speed and efficiency)
  - Maintaining flexibility, party autonomy



## Topic 1: When to Use ADR (cont'd)

- **ARBITRATION may be appropriate if clients' goals include:**
  - Obtaining a binding decision by an authorized neutral
    - With findings of fact and conclusions of law set forth in reasoned opinion; enforceable as to the parties and their assets
  - Ensuring neutrality / avoiding national courts
  - Maintaining confidentiality / avoiding publicity
  - Preserving party autonomy and choice with respect to:
    - Applicable law, procedure, timetable, seat, arbitrator(s), etc.
  - Ensuring finality / avoiding appeal
  
- May or may not be faster, more efficient, less expensive



## Topic 1: When to Use ADR (cont'd)

### **Types of art-related disputes suitable for ADR**

- Ownership / title
- Authenticity / attribution
- Insurance / indemnification
- Damage / loss
- Copyright / fair use
- Contract
- Estates & trusts
- Cultural property / cultural heritage



## Topic 2: How to Use ADR

Tailor ADR to meet clients' goals, overcome obstacles

- Use dispute resolution clauses to tailor ADR choices to client needs
  - Choice of law, seat, institution/ad hoc, number of arbitrators, qualifications of arbitrator(s), special procedures, enforceability, etc.
- Consider a graduated approach
  - Start with good-faith negotiations, proceed to mediation, arbitration, litigation
- Appoint mediator / arbitrator(s) with particular skills, traits, expertise
- Adjust timeline and procedures, as appropriate



## Topic 2: How to Use ADR (cont'd)

Consider use of:

- Preliminary / interim measures
- Discovery / disclosure
- Fact declarations, testimony
- Expert reports/opinions, testimony
- Legal briefing (pre- and/or post- hearing)
- Hearings (live, video, telecon)
- Judicial process in aid of ADR
- Pauses to explore negotiated / mediated settlement



## Topic 2: How to Use ADR (cont'd)

### 3 recent examples of tailoring strategies:

- An “open book” approach in a highly sensitive Nazi-era dispute
  - e.g., U.S. museum voluntary discloses all facts/evidence as show of good faith
- A “start-over-again” approach in an emotional contract dispute
  - e.g., Art advisory service presents second “opening statement” after listening to collector’s opening in mediated contract dispute
- A “roundtable of experts” in a complex ownership dispute
  - e.g., mediator makes progress after parties hear from roundtable of historical experts in complicated Nazi-era dispute over ownership of artwork



## Topic 3: *When Not to Use ADR*

### **ADR may be less appropriate (or even inappropriate) if clients' goals are to:**

- Engage in robust fact-finding and discovery;
- Rely on forum-specific arguments such as laches, statutes of limitations, or public policy;
- Seek a public hearing or public decision;
- Establish, modify, or clarify legal precedent;
- Compel behavior through subpoena power;
- Seek participation or “joinder” of indispensable parties;
- Invite governmental intervention or participation; or
- Preserve the right of appeal



## Topic 4: Trends to Watch – a U.S. perspective

- U.S. skepticism of ADR, especially international arbitration
  - Sovereign concerns – U.S. jurisdiction, U.S. law, U.S. public policy
  - Constitutional concerns – due process (*stare decisis*), access to US courts, right to public hearing, right to jury trial
- Further restrictions on art-related immunity in U.S. courts
  - Foreign Cultural Exchange Jurisdictional Immunity Clarification Act
  - No immunity for Nazi-looted art (or similar discriminatory takings)



## Topic 4 – Trends to Watch – a U.S. perspective (cont'd)

- Pressure to “clean up” / regulate the art market
  - Increasing regulatory / law enforcement interest
  - Concerns re money laundering and terrorist financing
  - Calls for openness, transparency, accountability
  - Pressure on ADR



# Questions?

Thank you

David W. Bowker  
Partner  
WilmerHale

# ADR for Art and Cultural Heritage Disputes

RESOLVING COMMERCIAL DISPUTES IN ART -  
EFFECTIVE MEDIATION AND ARBITRATION

LONDON - 3 OCTOBER 2018

Peter Moody

Red Pie Consulting

BrookStreet des Roches LLP

Principal

Senior Consultant

# Getting to Mediate - Crafting a Better Solution

- ▶ ADR Contract clauses
- ▶ Submissions to ADR
- ▶ Mediation Agreements

## ADR Contract clauses

- ▶ A clear process, usually rules
- ▶ The starting point
- ▶ The time frame
- ▶ The procedure if no agreement on mediator
- ▶ Location and language
- ▶ Choice of law

## Model Clause examples

- ▶ ‘If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 days of notice of the dispute, the mediator will be nominated by CEDR.’

[https://cedr.com/about\\_us/modeldocs/](https://cedr.com/about_us/modeldocs/)

- ▶ “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 submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].”

<http://www.wipo.int/amc/en/clauses/mediation/>

# Is Art a special case?

- ▶ Crafting a custom clause
  - ▶ Mediator qualifications
  - ▶ Use of experts
  - ▶ Limitation periods and extensions
  - ▶ Confidentiality

# Submissions to ADR

- ▶ Contractual disputes with no ADR clause
- ▶ Non contractual disputes
- ▶ Getting the other party to agree
  - ▶ Autonomy
  - ▶ Mediation benefits
  - ▶ Confidentiality

# Mediation Agreements - Tailoring the Process

- ▶ Contractual arrangements with the Mediator
- ▶ Defining the Process
  - ▶ Party representation
  - ▶ Decision making authority
  - ▶ Party Statements
  - ▶ Experts
  - ▶ Exchange of documents

# Mediation Agreements - The Practical Issues

- ▶ Agreeing the ground rules
- ▶ Location
- ▶ Timings
- ▶ Facilities
- ▶ Contacts with the Mediator

# Mediation Agreements - The Start of the Mediation

- ▶ Using Mediation Agreements to build consensus and trust
- ▶ Establishing rapport
- ▶ Getting away from demonisation
- ▶ Getting away from positional bargaining

# ADR for Art and Cultural Heritage Disputes

LONDON - 3 OCTOBER 2018

Peter Moody

[peter.moody@redpie.co.uk](mailto:peter.moody@redpie.co.uk)

[peter.moody@bsdr.com](mailto:peter.moody@bsdr.com)

+447880 501 867



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