

# MEDIATE, Don't Litigate

Art disputes over ownership, provenance or accidents can be expensive and distressing. Richard Clark extols the art of mediation

The last thing most collectors want to think about in the context of their art collections is the unwelcome subject of disputes.

Unfortunately, however, problems and disputes in the art world do arise and cover a wide spectrum of issues including disputes about acquisition and sale, defective title and ownership, disputed provenance and attribution, art insurance, damage, storage and transportation, cultural property and

export licences, intellectual property and art lending.

These disputes can involve museums, private collectors, dealers and galleries, auction houses, artists, estates, insurance companies and other art market intermediaries, and some can be resolved amicably between the parties at an early stage, but this is not always possible and things can escalate rapidly. A small but significant number of disputes end up in

court being litigated at great expense, to say nothing of the huge consumption of time, energy and emotional stress which comes with litigation.

## NEUTRALITY

One way potentially to avoid an escalating and expensive public battle is for the parties to appoint a mediator. Mediation is a very common way of resolving commercial disputes and is increasingly being

used in various areas of the art market.

Mediation is a process whereby the parties to a dispute or problem come together under the auspices of an independent and neutral mediator who will be an expert in helping parties to navigate complexity and find ways around the issues which divide and separate them, suggesting and guiding the parties to solutions which lead to settlement. Mediation has many advantages over formal litigation and arbitration.

First, it is much cheaper and more efficient. Secondly, it is far more flexible than court or arbitration proceedings (where the slate of available formal, legal remedies is normally very limited). In addition, unlike court proceedings, mediation is completely confidential and private – this is often a very important consideration in art disputes.

Mediations can be in-person or online. During the pandemic, pretty much all mediations have been online (as indeed have court hearings and trials) and, provided the mediator is experienced in online dispute resolution ('ODR'), they are generally just as effective as in-person mediations.

Among the art disputes I have mediated online over the last year are a disputed title claim relating to a \$15m 20th century painting, a provenance and attribution dispute relating to an important old master painting, several art insurance disputes including accidental damage to a major impressionist painting, storage and transportation damage claims, export licence and provenance issues relating to the sale of an important antiquities collection, a multi-party art lending dispute, artist management and dealer/gallery disputes as well as auction house disputes and estate and inheritance disputes.

All these cases were settled at the end of a one-day mediation hearing, and the parties thereby avoided the deeply unattractive prospect of expensive and long running public litigation.

## SUCCESSSES

An additional advantage of ODR is the ability to have multiple parties in multiple jurisdictions participating without the costs of everyone flying to a central venue. Only recently, I mediated a dispute



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relating to an £8m painting which involved parties participating over Microsoft Teams from Switzerland, New York and London. Clients often worry about the technology but it is generally very good. All the major platforms such as Zoom, Teams, Skype and WebEx are suitable for multi-party mediation hearings and, of course, most people are now very familiar with and comfortable meeting in this way.

No doubt in-person mediations will return in a post-pandemic environment, especially for high value cases, but, as with so many other areas of life, ODR has received a huge boost as a result of our business lives being much more online than in-person, and this will likely continue after the pandemic is over.

The success rate for commercial mediations is high. I have kept a record of the result of every mediation I have ever conducted and the success rate of settlements on the day of the mediation is 97 percent. Of the three percent which did not settle on the day of the hearing, half settled within a month following the mediation which is almost certainly due

to the progress made at the mediation hearing in unblocking log jams and deadlock, helping all parties to see the real issues and navigate to a consensual solution.

With such high rates of success, the comparatively modest costs and the confidential nature of the process, many parties who find themselves in dispute feel there is little to lose and much to gain by engaging in mediation. In general, the earlier mediation takes place, the better. It is vital to select a mediator who has the requisite experience and knowledge to maximise the chance of settlement.

Mediation is as much an art as a science and the abilities of the mediator are key to optimising the time at the hearing. All the parties to a mediation need to come with a constructive attitude and a real wish to reach a fair settlement. When all these features are in place, the chance of resolving a dispute by mediation is very high. ♦

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