

In Conversation with **Camilla Perera-de Wit** **and Bert Demarsin**

Elliot Wright

Camilla Perera-de Wit is the Secretary-General and Director-General of the Netherlands Arbitration Institute (NAI). Her previous experience in dispute resolution includes her work at the Permanent Court of Arbitration (PCA) and at P.R.I.M.E. Finance. She is a board member of the Court for Arbitration of Art (CAfA) in Rotterdam.

Bert Demarsin is a law professor at KU Leuven, who has conducted extensive work on art disputes. His work particularly focuses on provenance and authenticity disputes. He is also a board member of CAfA.

I spoke in December 2020 with two of CAfA's board members, Camilla Perera-de Wit and Bert Demarsin. We spoke about the nature and current state of art law, including difficulties in recent years, and the role CAfA can play in this field, as well as arbitration more generally.

Art law

Demarsin started by explaining that 'there are actually four big fields within art and cultural heritage law'. First, art has to be created—so there can be issues with attribution and copyright. Second, art has to be preserved—this is not so true for contemporary art perhaps, but for cultural heritage there are a whole host of regulations, for instance on whether it can be exported or on how it should be restored or preserved. Third, circulation, which Demarsin describes as being the basis of the art business. This field covers auctions, authenticity, theft, and smuggling and other issues relating to the movement of art. Fourth, and finally, is the field Demarsin calls valorisation—which is how one can take advantage of one's ownership of art, and realise its value through exhibitions or merchandising, and the conflicts that might arise from this.

Whilst conflicts can, and do, arise in all these areas, most arise in respect of circulation, as this is where the business of art trading is carried out. The vast capital in this market means disputes are more likely to arise from any disagreement, and the number of transactions means disagreements are not uncommon. There are also circulation issues in respect of restitution of art, and questions of looted art and cultural heritage. Even now there are cases arising from asserting ownership of art which was unlawfully confiscated in the Second World War, as well as ongoing disputes in relation to cultural heritage such as that surrounding the Elgin Marbles, and more recent

debates on the restitution of colonial heritage. Here, Demarsin refers to his native Belgium's colony in the Congo, but of course other European states, such as the UK, similarly seized art in that period. These are the disputes which feature more prominently in the public press, and therefore also the public conscience more generally, but for art dealers authentication is a more common and important problem.

Perera-de Wit then spoke about some of the features of art law which present unique challenges in dispute resolution. Speaking from her experience in dispute resolution, including at the Permanent Court for Arbitration (PCA) and at P.R.I.M.E. Finance, she pointed to the increasing complexity and globalisation of disputes, including in the art world. In the art world, parties are increasingly likely to be based in different jurisdictions, and traceable agreements documenting the transactions are not always in place. Where disputes arise, they can be technical in nature. They benefit from specialist legal knowledge as well as expert factual analysis. That expertise is not always readily available in the local courts, which makes alternative dispute resolution an attractive option in the art world. This also led to the founding of CAfA, to prevent such disputes being resolved by what could be 'a roll of the dice', as Perera-de Wit put it, as to whether the dispute was resolved in a time-efficient manner with an outcome that the markets can rely upon.

The Court of Arbitration for Art

CAfA was founded in 2018, through a collaboration of the Foundation of Authentication in Art and the NAI. Their arbitration and mediation rules are therefore based on the standard NAI rules, which have been developed since the NAI's establishment in 1949. Being in the Netherlands puts it in a unique position: although the Netherlands does not have so large an art market as Paris or

London, it has a certain pedigree, and it is a traditional art market. As Demarsin describes, ‘the Netherlands is historically seen as a great nation from an artistic point of view’. We spoke about the Dutch Golden Era and the Dutch masters, and I told them how I had been lucky enough to live in the Netherlands for a number of years and visit museums such as the Mauritshuis and the Rijksmuseum. These, and other, world-renowned art museums in the Netherlands, show the strength of its position in the art world, as does the holding of The European Fine Art Fair in Maastricht. The strength of this reputation gives CAfA access to a wide range of international experts and arbitrators. This is further helped by its being situated in The Hague, where other well-known world courts, such as the ICJ and the PCA, are situated. The Hague’s position as an international city of peace and justice made it an ideal place for CAfA, and the expertise provided by the NAI, which Perera-de Wit heads, further cemented the decision to base CAfA in the Netherlands. Indeed, the NAI was founded by Professor Pieter Sanders, who was one of the principal drafters of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which has been adopted in the vast majority of states.

The reason for its founding, as suggested above, was the specific needs of the art market with regard to disputes. ‘The market craves decisions rendered by recognised art and dispute resolution experts with credentials in relevant specialties’, as Perera-de Wit put it. She suggests the global art market can rely on such dispute resolution by CAfA. It offers specialist adjudication, aiming to contribute to legal certainty and market stability. CAfA offers this expertise, with a carefully vetted list of expert arbitrators, but also wants to develop the rule of law more generally. In principle, CAfA arbitrations and mediations are confidential, however where parties do not opt out, CAfA publishes anonymised reports of arbitrations, to provide greater legal knowledge and certainty to the art market.

Further, whilst foreign court judgments can be enforced with relative ease within the EU under the Brussels I Recast Regulation,¹ outside the EU they can be more difficult to enforce than arbitral awards under the New York Convention, with its 168 signatories worldwide.² There are therefore a number of incentives which make arbitration, particularly under CAfA’s rules, an attractive choice for parties in the global art market. One further distinct feature is the CAfA Expert Pool, which includes experts with proven experience in issues of forensic science or the provenance of an art object. These experts can give expert evidence in cases administered under the CAfA rules.

The specialisation of such markets is even a fact which is recognised by the judiciary, as we discussed. For instance, in *Halliburton v Chubb*,³ the UK Supreme Court recognised the specialist nature of ‘maritime, sports and commodities arbitrations’⁴ such as under the LMAA or GAFTA rules, or indeed Bermuda Form Insurance arbitration as in that case.⁵ In the art world, CAfA offers a response to the commercial desire for a similar specialist institute.

CAfA’s offering doesn’t end there though. It also provides mediation services, which have two particular advantages in the art world. ‘If you want to maintain business relationships’, Demarsin explains,

‘mediation is indeed an added value’. This is one aspect in which mediation trumps the option of adversarial arbitration. Another is the fact that many art disputes are not purely commercial in nature. The sensitivities of collectors, as Demarsin phrased it, are also better respected by mediation, as collectors will likely have attachments to the artwork beyond financial ones. These emotional connections can be strained by adversarial dispute resolution, and are difficult to grapple with in those contexts. Where disputes are of this sort, mediation can provide an excellent opportunity to deal with this emotional value productively and so reach a mediated settlement, saving time, money, and pain for both parties.

Having discussed quite comprehensively the work of CAfA, we turned to the current state of the art market and art dispute resolution, considering of course the ever-present market influence which has defined the start of this decade.

Art and disputes in the past year

Whilst colonial art and restitution have been big themes in the art world in recent years, even forming a specialist area of law, the movement in the art market in the last year has been defined by the slate of national lockdowns and travel restrictions in response to the COVID-19 pandemic.

The obvious effects of the pandemic have been numerous: cancelled art fairs, less access to auctions, an inability to properly see art before purchasing. There is the added problem that in times of economic difficulty art is an insecure market, and amongst the first markets to suffer as art is a luxury commodity. As Demarsin succinctly put it, ‘I don’t think we can call 2020 a great year for legal disputes and dispute solving and not for the art market either’. Art experts have been unable to travel, which has caused some disputes to grind to a halt. When markets recover, there may be a boom in the art market given this prior unavailability, particularly as many of those purchasing art are likely not to have been as adversely affected economically.

Yet, as Perera-de Wit highlighted, the difficulties in dispute resolution did show the advantages of arbitration and its flexibility. Whilst court systems seemed to struggle to cope with restrictions and attempts to move online, leading to backlogs in certain instances, CAfA is perfectly fit for digital/electronic filing and virtual hearings. Perera-de Wit was responsible for organising some of the shift online, which required establishing clear guidelines for practice and communication in this new system. The NAI already had rules facilitating digital communications, and so CAfA was able to adapt better than court systems were. These changes not only represent the norm given the continued restrictions in various countries, but may also show the path forward. Where an art expert can appear virtually, there may be no need to fly them in, savings costs as a result. Demarsin also described how the new ‘webinar culture’ means that art experts can more easily contact CAfA’s neutral experts and arbitrators. Previously it was quite difficult to bring them all together in one place. Such advantages of the systems which have been put in place in the last year will likely keep emerging.

Final words

Having discussed the various defining features of art law, and what makes CAfA uniquely placed to deal with these features, I wanted to ask what it was about art law which made Demarsin and Perera-de Wit decide it was an exciting and interesting area to work in. ‘I think the story that is behind the object makes it wonderful time and

1 Regulation 1215/2012 of the European Parliament and of the Council, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

2 As of March 2021.

3 *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

4 *ibid* [87].

5 *ibid* [91] and [93].

again to me', was Demarsin's eloquent response. The subjectivity in the appreciation of art makes it fascinating, and Demarsin remarked that the objects in some disputes he has worked on are certainly not ones he would want in his own home. The opportunity to work with interesting individuals, outside of the legal world, is another draw of art law. Working with these people and being able to help them in cases with strong emotional attachments make it uniquely rewarding. He also described his intellectual interest in not only the legal but factual disputes, with the ever-developing science being able to establish more and more through laboratory tests.

Having spent time discussing these fascinating issues with Bert Demarsin and Camilla Perera-de Wit, I came away fully supporting this sentiment.

Elliot Wright is a third-year undergraduate in Law at St John's College, Cambridge. He is the Law Section Editor of *CJLPA*. He has explored dispute resolution in niche contexts, having a paper accepted to a conference on this topic, which interest led him to conduct this interview.
