

# ARBITRATING CULTURAL PROPERTY DISPUTES

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#### ABSTRACT

Years drag by, vicious allegations fly across the world stage, parties die frustrated. While cultural property disputes are frequently arbitrated internationally, arbitration is not often used in domestic cultural property disputes. One of the paradoxes of cultural property disputes is the need to resolve the issue while not harming the parties' reputation or devaluing the cultural property. While scholars have shown much interest in arbitrating cultural property disputes in the United States, maximizing the potential of arbitration in cultural property disputes has largely been ignored.

Rejecting the acceptability of litigating cultural property disputes in the battlefield of the courtroom, this Article illuminates cultural entities' interest in pursuing arbitration and the benefits of arbitrating cultural property disputes. Examining how arbitration

can facilitate resolution of cultural property disputes in the United States, this Article exposes the inherent inadequacies of litigating cultural property disputes and reveals how parties can tailor superior arbitration agreements for maximum benefit in cultural property disputes and can craft creative remedies to help the parties.

## I. DESIRABILITY OF ARBITRATING CULTURAL PROPERTY DISPUTES

### A. *Interest in Arbitrating Cultural Property Disputes*

Years drag by, vicious allegations fly across the world stage, parties die frustrated. While cultural property disputes are frequently arbitrated internationally, they are not often arbitrated domestically.

Many United States cultural entities' have advocated arbitration of cultural property disputes, however. Glenn Lowry, the director of the Museum of Modern Art, asked for "a process, a way to resolved [*sic*] these complicated situations in a non-confrontational, non-emotionally charged way."<sup>2</sup> The Association of Art Museum Directors' (AAMD) Task Force, that was created to develop principles to assist museums in resolving art claims, recommended "the creation of a mechanism for the fair resolution of these claims, such as mediation, arbitration or other forms of alternate dispute resolution."<sup>3</sup> United States cultural entities' have even requested permanent arbitration tribunals that exclusively hear cultural disputes.<sup>4</sup> U.S. Ambassador Eizenstat suggested the creation of a formal U.S. panel to resolve artwork disputes.<sup>5</sup>

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<sup>2</sup> Judith Dobrzynski, *How Did You Get that Art in the War, Daddy?*, N.Y. TIMES, Jan. 25, 1998, at D4.

<sup>3</sup> AMERICAN LAW INSTITUTE, CULTURAL PROPERTY AND WORLD WAR II: IMPLICATIONS FOR AMERICAN MUSEUMS PRACTICAL CONSIDERATIONS FOR THE MUSEUM ADMINISTRATOR 56 (1998). Anne Webber, co-chair for Commission on Looted Art in Europe, also advocated arbitration in art title claims as arbitration could accommodate the moral complexities of the dispute better than litigation. Rebecca Keim, *Filling The Gap Between Morality And Jurisdiction: The Use Of Binding Arbitration To Resolve Claims Of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295, 313 (2003).

<sup>4</sup> Ronald S. Lauder, Chairman of the Commission for Art Recovery, asked for a "mediation mechanism for resolving disputes over looted art. . . . It would develop solutions acceptable to good faith purchasers while seeking the restitution of looted art for the families that have been deprived of so much." AMERICAN LAW INSTITUTE, *supra* note 3, at 78.

<sup>5</sup> Stuart E. Eizenstat, Head of the U.S. Delegation to the Prague Holocaust Era Asset Conference, *Open Plenary Session Remarks at Prague Holocaust Era Assets Conference* (June 28,

Despite the use of arbitration in international cultural disputes and cultural entities' interest in arbitration, arbitration is not used extensively in cultural property disputes in the U.S.<sup>6</sup>

Rejecting the acceptability of litigating cultural property disputes in the battlefield of the courtroom, this Article highlights the benefits of arbitration that are specific to cultural property disputes in Section I. Examining the perceived barriers to arbitrating cultural property disputes, Section I also exposes the inadequacies of litigation in cultural property disputes and illuminates how arbitration provides a superior dispute resolution process for cultural property. Then, in Section II, this Article reviews issues that an arbitration agreement should address to facilitate resolution of cultural property disputes and, in Section III, explains how parties can tailor arbitration agreements for maximum benefit in cultural property disputes and what arbitration options can further parties' goals. Section IV explores using post-dispute arbitration agreements in cultural property disputes and how to obtain an agreement to arbitrate post-dispute. Finally, in Section V, this Article offers suggestions on how to expand potential resolutions in cultural property disputes.

### B. *In the Balance: Benefits of Arbitration over Litigation*

Arbitration is better suited for the art world and cultural property disputes than litigation.<sup>7</sup> Scholar Norman Palmer noted,

The art world places much reliance on confidentiality, on close personal relations, and a corpus of grey letter law: ethics, guidelines, conventions and codes rather than legal rules. To these

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2009), available at <http://www.state.gov/p/eur/rls/rm/2009/126158.htm> ("I believe that the U.S. should work with all interested stakeholders, including museums, auction houses, dealers, attorneys, art experts, and Holocaust survivors, in creating formal group [*sic*] to provide assistance to claimants and current holders of artworks in determining their proper ownership. The new UK spoliation advisory commission can serve as model.").

<sup>6</sup> Alexander Ritchie, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L.J. 325, 370 (2009).

This Article recognizes that many cultural disputes will be of an international nature. However, there is a considerable portion of cultural property disputes that occur in the U.S. Accordingly, this Article focuses on revealing how arbitration is a beneficial dispute resolution for a variety of domestic cultural property disputes.

<sup>7</sup> *But see* Norman Palmer, *Arbitration and the Applicable Law*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR 291 (2004).

factors are added, in the case of public museums, a vulnerability to political change, a pre-occupation with scholarship, and (perhaps) a desire to be seen to act elegantly or fashionably as well as honorably.<sup>8</sup>

Many cultural property disputes would benefit from arbitration including disputes over conservation, loans, image reproduction, donations, sales contracts, authenticity, sales and title issues.<sup>9</sup> Arbitration is generally cheaper and quicker than litigation. Parties can choose arbitrators with expertise in the area of the dispute. Arbitration proceedings are also private and can be confidential, parties can better preserve relationships and there is more flexibility and control over the outcome than in litigation.

Arbitration is better suited to cultural property disputes than litigation because arbitration generally costs less than litigation.<sup>10</sup> Litigation of cultural property disputes “often turn into ‘show trials’” that “can easily exceed a million dollars per party”.<sup>11</sup> The cost of the litigation can be more than the disputed cultural property or other subject of the dispute,<sup>12</sup> which is not economically sound.

When government and public museums are involved in cultural property disputes the economic considerations are even greater as museums spend public funds when they finance these show trials. Some scholars have suggested that museums might have a duty to the public not to waste public funds in costly litigation.<sup>13</sup>

Moreover, the fiscal expenditure of litigation is not the only cost to consider. The negative publicity from show trials can lower the cultural property’s value, especially if there is any resulting cloud on the title or authenticity.<sup>14</sup> Consequently, the parties must include the devaluation of the cultural property and associated damage to the parties’ reputation with court costs, attorney fees and damages when considering the cost of litigation. Thus, arbitra-

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<sup>8</sup> Norman Palmer, *Litigation: the Best Remedy?*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR 290 (2004).

<sup>9</sup> Pierre Valentin, *Arbitration and Mediation for Auction Sales*, in RESOLUTION METHODS FOR ART-RELATED DISPUTES 221 (1999).

<sup>10</sup> AMERICAN LAW INSTITUTE, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 273 (1994).

<sup>11</sup> Daniel Bender, *An Alternative Approach to Settling Disputes Over Stolen Art*, N.Y. L.J. 1 (1998).

<sup>12</sup> Daniel Shapiro, *Litigation and Art-Related Disputes*, in RESOLUTION METHODS FOR ART-RELATED DISPUTES 22 (1999).

<sup>13</sup> Shirley Foster, *Prudent Provenance-Looking Your Gift Horse in The Mouth*, 8 UCLA ENT. L. REV. 143, 145 (2001).

<sup>14</sup> Bender, *supra* note 11, at 1.

tion is better suited to cultural property disputes than litigation because the overall cost of arbitration is generally less than litigation.

Another benefit to arbitrating cultural property disputes is that arbitration is usually quicker than litigation. Timely responses can keep relationships from devolving, which in turn can promote more amicable resolutions.<sup>15</sup> Parties can arbitrate their disputes as soon as the parties can agree on a date. Conversely, courts are frequently backlogged with other cases, and it can take several months or even years before the case goes to trial.<sup>16</sup>

Moreover, once a case is before the court, a trial can take a long time, which is undesirable.<sup>17</sup> Cultural property is unique and will frequently stir emotions resulting in a likelihood of drawn out litigation. Litigation over cultural property has previously lasted seven to twelve years.<sup>18</sup> Thus, the speed with which arbitration can begin and conclude is a benefit over litigation, particularly if the cultural property involved is to be sold, exhibited or leave the United States.<sup>19</sup>

The availability of arbitrators with experience in the area of dispute is another benefit of arbitration over litigation in cultural property disputes. Parties can choose arbitrators that are experts in the area of the particular cultural property dispute whether it involves title, conservation, authenticity or other cultural property issues.<sup>20</sup> As Rebecca Keim noted, “having arbitrators selected as a result of their knowledge and understanding of the constraints, needs, ethics, and practices of the art community, [ ] allow[s] the arbitrators to provide a resolution that best suits the desires of both parties.”<sup>21</sup> Furthermore, Isabelle Gazzini stated:

In such a particular and highly specific field as cultural property disputes, which usually involve various parameters (cultural, economic, ethical, etc.) and raise technical questions (cultural significance of a given object, age and authenticity, provenance,

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<sup>15</sup> See Palmer, *Litigation: The Best Remedy?*, *supra* note 8, at 289 (citation omitted). Joan Troccoli, Deputy Director of the Denver Art Museum, which returned Gerard Terborch’s painting *The Letter* noted, “We felt we had a moral responsibility to be responsive to claims, which was just as important as our legal obligation.” *Id.*

<sup>16</sup> 2 DOMKE ON COMMERCIAL ARBITRATION Appendix F-3 (2009).

<sup>17</sup> Bender, *supra* note 11, at 1.

<sup>18</sup> Madeline Chimento, *Lost Artifacts of the Incas: Cultural Property And The Repatriation Movement*, 54 LOY. L. REV. 209, 223 (2008).

<sup>19</sup> Alan Scott Rau, *Resolution Methods for Art-Related Disputes: Mediation in Art-Related Disputes*, in RESOLUTION METHODS FOR ART-RELATED DISPUTES 175-76 (1999).

<sup>20</sup> Thomas Stipanowich, *Arbitration And Choice: Taking Charge Of The “New Litigation”*, 7 DEPAUL BUS. & COMM. L.J. 383, 405 (2009).

<sup>21</sup> Keim, *supra* note 3, at 313.

date of its excavation and/or export, standards for due diligence, evaluation of what would be a fair and equitable compensation), experts assume a decisive role, not least in the qualification of the cultural item at stake and hence the determination of the applicable substantive law. The particular *expertise* of arbitrators, not only in the technique of arbitration but also in the particular area concerned by the dispute, may contribute to increase the expeditiousness—and possibly reduce the costs—of arbitration proceedings insofar as no supplementary external expertise would be needed.<sup>22</sup>

In litigation, however, most judges and juries do not have an in-depth knowledge of cultural property or art market customs.<sup>23</sup> Daniel Shapiro noted, “Given the lack of experience of judges and juries in art matters, the arcane nature of art and the art market, and the difficulties often inherent in explaining art-related disputes, the outcome of art litigation is highly unpredictable, which should create hesitancy in bringing a lawsuit.”<sup>24</sup>

While experts are available in court proceedings to explain the cultural property dispute to the judge and jury, this patch disregards the complexities of cultural property disputes and overlooks<sup>25</sup> the difference between the arbitrator having expertise and someone who is an expert answering questions in court. Litigation frequently devolves into a battle of the experts, with both sides procuring an expert that the judge or jury may or may not believe. The problem with having an expert testify in litigation was highlighted in *Greenberg v. Bauman*, where one of the preeminent Calder experts testified that the mobile sold to the plaintiff was not an authentic Calder mobile.<sup>26</sup> While the “judge found that the expert had not convinced him that the work was fake,”<sup>27</sup> if that Calder expert had been an arbitrator the outcome would likely have been different. Thus, there is a vast difference in art experts deciding art market issues and art experts trying to convey that information to a decision-maker that has no art market experience. Consequently,

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<sup>22</sup> ISABELLE F. GAZZINI, *CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES* 118-19 (2004).

<sup>23</sup> Shapiro, *supra* note 12, at 22. Art market customs are typically unregulated and generally without detailed documentation. Chimento, *supra* note 18, at 223.

<sup>24</sup> Shapiro, *supra* note 12, at 22.

<sup>25</sup> Lawrence Kaye, *Disputes Relating to the Ownership and Status of Cultural Property*, in *RESOLUTION METHODS FOR ART-RELATED DISPUTES* 47 (1999).

<sup>26</sup> Shapiro, *supra* note 12, at 23; see *Greenberg v. Bauman*, 817 F. Supp. 167 (D.C. 1993).

<sup>27</sup> *The Point of View of Professionals Involved in the Art Trade*, in *RESOLUTION METHODS FOR ART-RELATED DISPUTES* 106, 109 (1999).

having an expert as an arbitrator is a benefit of arbitration over litigation in cultural property disputes.

Another benefit of arbitration over litigation is that the cultural property dispute can be private and confidential in arbitration. It can be private as the parties can restrict the people in attendance to those that the parties' consent to be present.<sup>28</sup>

Confidentiality is also available in arbitration to protect the parties' reputation and the value of the cultural property.<sup>29</sup> Given the contractual nature of arbitration, parties can agree on what must remain confidential and who must maintain the confidentiality.<sup>30</sup>

Confidentiality in arbitration protects the parties' reputation. Given the immense public interest in stolen, fraudulent or damaged cultural property, parties will benefit from avoiding negative public scrutiny.<sup>31</sup> Parties may also desire confidentiality to avoid publicly airing their records and personal history.<sup>32</sup> Palmer noted:

Litigation might indicate a gap between an industry's public stance and its technical legal position; or family differences; or hyperbole on the part of an over-enthusiastic trader; or damage to the credibility of witnesses. One result may be recrimination and the creation of rifts among members of the same side. Where litigation . . . induces a public institution to take some "technical" defense independent of the merits of the claim, the damage to the credibility of the defendant may far outweigh the benefits of forensic success.<sup>33</sup>

Confidentiality in arbitration also protects the value of the cultural property. Litigation, however, with its attendant negative publicity, "burn[s]" an artwork, substantially reducing one's ability to sell it or otherwise adversely affect its value."<sup>34</sup> For example, when purchasers of the Calder mobile sued the seller in court claiming the mobile was not authentic, the value of the mobile de-

<sup>28</sup> GAZZINI, *supra* note 22, at 67 n.10.

<sup>29</sup> Gazzini noted:

The implications of confidentiality are essentially three-fold: (1) it restricts the disclosure of the existence of arbitration proceedings; (2) it restrains [*sic*] the liberty of the parties, the arbitrators and any other person involved in the proceedings to disclose information for other purposes than that of the arbitration; and (3) it bars the parties from publicly disclosing the final award unless specific agreement to the contrary.

GAZZINI, *supra* note 22, at 67 n.11.

<sup>30</sup> GAZZINI, *supra* note 22, at 76.

<sup>31</sup> Keim, *supra* note 3, at 313.

<sup>32</sup> *Id.*

<sup>33</sup> Palmer, *Litigation: The Best Remedy?*, *supra* note 8, 272 (citation omitted).

<sup>34</sup> Shapiro, *supra* note 12, at 23.



creased as the art market knew that the owner of the mobile and the Calder expert did not believe it was authentic.<sup>35</sup> Thus, confidentiality is an important benefit of arbitration that is not available in litigation.

Arbitration is also better suited to cultural property disputes because it increases the likelihood of preserving relationships, and, in the case of third parties, builds new relationships unlike litigation, which pits parties against each other. Arbitration is less adversarial than litigation.<sup>36</sup> Given the small size of the art market and the potential for ongoing business relationships, parties tend to tread carefully with lawsuits, which creates a niche for arbitration in cultural property disputes.<sup>37</sup>

A final, important benefit of arbitration over litigation is that arbitration is a flexible, contractual method of resolving disputes that gives the parties more control to structure the process and outcome.<sup>38</sup> In arbitration, the parties can tailor their agreement to fit their situation prior to arbitration, which can facilitate agreement and less hostile negotiations. The arbitrator can simply determine the issues the parties are interested in resolving rather than having to litigate every issue surrounding the cultural property dispute. Parties can dictate what rules will be used in arbitration including a body of guidelines promoted by cultural property entities or equitable principles.<sup>39</sup>

The parties can also draft their remedy instead of risking the courts giving both sides an unfavorable outcome. Parties can obtain remedies not available to a court. Conversely, in litigation the parties have little control over the process and outcome. Courts are limited in the remedies they can prescribe while arbitrators can generally take a more equitable approach subject to the terms of the arbitration agreement. Moreover, in court, the claimant risks a “Pyrrhic victory: . . . where a claimant establishes liability but fails to show loss, or fails to collect the damages awarded, or fails to recover its full costs.”<sup>40</sup> Thus, the flexibility of arbitration is a benefit over litigation in cultural property disputes.

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<sup>35</sup> *Id.*; see *Greenberg v. Bauman*, 817 F. Supp. 167 (D.C. 1993).

<sup>36</sup> 2 ДОНКЕ, *supra* note 16, at Appendix F-3.

<sup>37</sup> Shapiro, *supra* note 12, at 22.

<sup>38</sup> Stipanowich, *supra* note 20, at 436.

<sup>39</sup> Palmer, *Arbitration and the Applicable Law*, *supra* note 7, at 301.

<sup>40</sup> Palmer, *Litigation: The Best Remedy?*, *supra* note 8, at 272 (citations omitted).

C. *Perceived Benefits of Litigation over Arbitration*

While there are many benefits to arbitrating cultural property disputes many cling to litigating cultural property disputes claiming that arbitration is consensual, expensive, takes longer than expected, deprives a party of publicity and results in a loss of standard rights in litigation. However, most of these perceived detriments of arbitration are a result of improper drafting of the arbitration clause or trying to force litigation into an arbitration framework.

One oft cited impediment to arbitration is that the parties have to consent to arbitrate.<sup>41</sup> Norman Palmer noted that consent was one detriment to arbitration as arbitration “in the case of a third-party title claim would require an *ad hoc* agreement, at a time when the parties’ relations might be less than cordial.”<sup>42</sup> However, there are incentives to bring parties to the table such that it is usually worth trying to get parties to agree to arbitrate.

Arbitration can take longer than expected if parties incorporate litigation-like procedures in arbitration.<sup>43</sup> To avoid this problem, Professor Stephen Ware suggested creating arbitration agreements that “plan ahead to avoid the problem of too much discovery, too much delay, too much of a litigation-like process.”<sup>44</sup> Lengthy proceedings can be avoided with the proper arbitration clause.

Some argue that arbitration can be just as expensive as litigation. This expense occurs if parties draft an arbitration clause that calls for litigation-like procedures, such as broad discovery, or if the parties go to court for interpretation of the arbitration clause. Longer proceedings will increase expenses in arbitration. Parties can lower expenses by reducing discovery, duration of arbitration

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<sup>41</sup> *Id.* at 268.

<sup>42</sup> *Id.* at 279; see also GAZZINI, *supra* note 22, at 124. Gazzini noted:

By definition, cultural property restitution cases . . . do not occur in the wider context of a pre-existing contractual relationship that the parties would have an interest to preserve. Most commonly, the relationship between the parties is the consequence of the restitution claim, and is indeed confined thereto, and the only contractual element between the parties might well be the submission agreement. It is undoubtedly easier to secure an agreement to arbitration prior to the occurrence of a dispute – generally by means of standard clause inserted in the general conditions of a contract – than it is after; in that case, some particular incentives ought to drive the parties to arbitration.

GAZZINI, *supra* note 22, at 124-25.

<sup>43</sup> Stipanowich, *supra* note 20, at 395-96.

<sup>44</sup> Chimento, *supra* note 18, at 222.

and the number of arbitrators and by clarifying the arbitration clause so there is no need for judicial interpretation.

Other proponents of litigation do not want the confidentiality offered by arbitration as they wish to wage a public relations battle or seek public vindication.<sup>45</sup> Proponents of litigation claim that confidentiality can inhibit public vindication of claims of theft, inauthenticity, fraud and bad faith.<sup>46</sup>

[W]here reputation, personal involvement, or moral principles are involved, 'vindicating' oneself and 'teaching the other side a lesson,' may be paramount. Judicial vindication can be rationalized by some museums as a beneficial business justification since donations and revenue depends on the museum's reputation for honesty and dealing with authentic, non-stolen work.<sup>47</sup>

However, despite these arguments, arbitration does not prevent public vindication. Confidentiality is only required by the arbitrators and the arbitral institute. Parties can choose whether they want the proceedings or the award to be confidential. Thus, arbitration can still be beneficial to parties seeking public vindication.

Others worry that parties might lose some standard rights of litigation by arbitrating their cultural property disputes. First, parties lose the right to a jury trial and the right to an appeal in arbitration.<sup>48</sup> Second, arbitration decisions do not create precedent.<sup>49</sup> Isabelle Gazzini noted, "not only are the arbitration tribunal's reasoning and solution not necessarily suitable to other similar cases; there is also the risk that coherency and proper application of the law be sacrificed to equitable considerations."<sup>50</sup> Moreover, Norman Palmer noted, "A judgment at law generally affords a decisive resolution of issues and a strong barrier against re-litigation."<sup>51</sup> Thus, if a party anticipates much litigation on the same topic, that party might prefer litigation if that party believes that it will win. A loss in court, however, will set a public precedent that can be used against the party. "In [ ] complex and uncharted areas, litigants may come to regret having precipitated the creation by judgment of an uncomfortable precedent, or of troublesome judicial speculation, where uncertainty had hitherto left room for negotia-

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<sup>45</sup> *Id.*

<sup>46</sup> Shapiro, *supra* note 12, at 18.

<sup>47</sup> *Id.* at 19.

<sup>48</sup> John Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, AM. ARBITRATION ASS'N., Feb.-Apr. 2003, at 1-6.

<sup>49</sup> Ritchie, *supra* note 6, at 370.

<sup>50</sup> GAZZINI, *supra* note 22, at 108.

<sup>51</sup> Palmer, *Litigation: The Best Remedy?*, *supra* note 8, at 268.

tion.”<sup>52</sup> Thus, the benefits of setting a precedent in court must be weighed against the risk of losing.

Finally, some cite concerns that resolution of cultural property disputes should not be private as they frequently concern a public matter—cultural heritage of mankind. Ultimately, some attorneys are more comfortable with court proceedings and want the difficulty of litigation to impede claims.<sup>53</sup>

The decision to arbitrate or litigate is largely a strategic one that should be made after weighing the benefits and detriments of arbitration or litigation in each case.<sup>54</sup>

## II. ARBITRATING CULTURAL PROPERTY DISPUTES

### A. *Threshold Concerns*

#### 1. Intersection of Contract and Statute: Contractual and Statutory Concerns

As a threshold matter, arbitration is a creature of contract such that the contract controls the arbitration.<sup>55</sup> The arbitration clause must be in writing since contractual considerations apply.<sup>56</sup> The drafters who create the arbitration clause should have experience in arbitration and cultural property transactions.<sup>57</sup> Many of

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<sup>52</sup> *Id.* at 272.

<sup>53</sup> Shapiro, *supra* note 12, at 18.

<sup>54</sup> While arbitration is ideally suited to many cultural property disputes, Palmer notes, “[i]n recounting the hazards of art litigation we must keep a sense of proportion. In particular, we must resist the fallacy that changing the mode of dispute resolution is a universal cure. For many art disputes there is no universal substitute for court proceedings.” NORMAN PALMER, *REPATRIATING AND DEACCESSIONING OF CULTURAL PROPERTY: REFLECTIONS ON THE RESOLUTION OF ART DISPUTES*, CURRENT LEGAL PROBLEMS 480 (2001).

<sup>55</sup> 1 DOMKE ON COMMERCIAL ARBITRATION § 8:8 (2009).

<sup>56</sup> Townsend, *supra* note 48, at 1-6. *See also* COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING § 5.04 (Morton Moskin, ed. 2008). Under the FAA,

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1925).

<sup>57</sup> Stipanowich, *supra* note 20, at 434.

the perceived detriments of arbitration arise because the drafters do not have this experience.<sup>58</sup>

The parties should draft the arbitration clause in a manner to avoid judicial interpretation.<sup>59</sup> Failing to use specific language, state that arbitration is required, include compatible clauses, specify how to conduct arbitration or name the arbitral institution might result in judicial intervention, which will take additional time, resources and lead to surprise.

Arbitration clauses must use specific language to avoid judicial intervention and should include explicit, mutually agreed upon terms in the arbitral clause.<sup>60</sup> Conflicting provisions in the arbitral clause will delay proceedings since the court or arbitrator will have to determine the meaning of the provisions before addressing the dispute.<sup>61</sup>

In addition to contractual concerns, arbitration agreements also have statutory considerations. The arbitration clause should indicate whether the parties intend for the Federal Arbitration Act (FAA) or state arbitration law to apply.<sup>62</sup> The FAA will apply to most arbitrations involving cultural property disputes as the FAA applies if the subject matter of the arbitration “involves [interstate] commerce”.<sup>63</sup> Most cultural property disputes involve multiple transactions across multiple states and frequently across nation States.<sup>64</sup>

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<sup>58</sup> Stephen Hayford, Symposium, *Winds of Change: Solutions to Causes of Dissatisfaction with Arbitration: Building a More Perfect Beast: Rethinking the Commercial Arbitration Agreement*, 7 DEPAUL BUS. & COM. L.J. 437, 438 (2009).

<sup>59</sup> Ritchie, *supra* note 6, at 419.

<sup>60</sup> Ernest Legier, AAA Vice President, ADR Benefits Advocacy Effective Drafting of Arbitration Clauses, Address Before Tulane Advanced American Arbitration Law Seminar (Spring 2010).

<sup>61</sup> *Id.*

<sup>62</sup> 2 DOMKE, *supra* note 16, § 48:1.

<sup>63</sup> 1 DOMKE, *supra* note 55, § 48:1.

<sup>64</sup> While cultural property disputes, such as Nazi-looted works, frequently involve international aspects, this Article will focus on domestic cultural property disputes.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”) governs arbitration where recognition and enforcement of arbitration awards were made in a territory of a State other than the State where recognition and enforcement of the award was sought. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 202 (1958). The Convention also applies to awards granted in the same Nation State where recognition and enforcement is sought if there are two foreign parties in the United States or if there are two U.S. citizens but the dispute is from events in another State under the nondomestic exception. *Id.* Under § 202,

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Con-

The parties should note if they want the FAA to apply. For example, the American Arbitration Association's (AAA) model clause states:

The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.<sup>65</sup>

A similar clause could be crafted to indicate that state arbitration law applies.

## 2. Types of Arbitration Agreements: Pre-dispute Arbitration, Post-dispute Arbitration and Step-arbitration Agreements

### i. Pre-dispute Arbitration Agreement

Parties must determine what kind of arbitration agreement to use for their cultural property disputes. Two options are a pre- or post-dispute arbitration agreement. Pre-dispute arbitration agreements are drafted prior to a cultural property dispute and post-dispute arbitration agreements are drafted after the dispute has occurred. Arbitration agreements can be included in a contract as an arbitration clause or can stand alone as an entire arbitration contract.<sup>66</sup>

While pre-dispute arbitration agreements are generally a clause in a contract for a transaction, pre-dispute arbitration agreements can also be a stand-alone contract.<sup>67</sup> Pre-dispute arbitration

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vention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

UNCITRAL (UN Commission on International Trade Law) Model Law on International Commercial Arbitration of 1985 complements the NY Convention.

<sup>65</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE* 27 (2007).

<sup>66</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5.04.

<sup>67</sup> *Id.* An arbitration clause can also be inserted into a settlement agreement, which is a new contract to resolve disputes arising from the settlement agreement as seen in the Metropolitan Museum of Art's (Met) contract with the Italian Ministry for Cultural Assets and Activities over a group of disputed Italian artifacts. *The Metropolitan Museum of Art-Republic of Italy Agreement of February 21, 2006*, 13 INT'L J. CULTURAL PROP. 427, 427-34 (2006). Any future arbitrations of disputes "arising from or related to the interpretation and performance of this Agreement that may arise between the parties" will be "settled in private by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce

clauses can be used in most cultural property contracts, especially conservation contracts, loan contracts, image reproduction contracts, donation or sales contracts and insurance contracts. They are often more efficient and economical than those that are drafted post-dispute.<sup>68</sup> Pre-dispute arbitration clauses are frequently not properly developed, however, because parties do not want to address potential conflicts at the beginning of a relationship when the contract is formed.<sup>69</sup> Moreover, pre-dispute arbitration clauses are typically not tailored to the particular dispute as the exact issue usually cannot be predicted when the parties draft the arbitration agreement.

## ii. Post-dispute Arbitration Agreement

Parties can arbitrate a cultural property dispute without a pre-dispute arbitration agreement<sup>70</sup> by using a post-dispute arbitration agreement, which is generally a stand-alone contract.<sup>71</sup> Post-dispute arbitration agreements are useful in title disputes, third party disputes, failed cultural property transactions and most disputes that do not already have a pre-dispute agreement. The post-dispute arbitration agreement can be more tailored to the dispute than a pre-dispute arbitration agreement as the parties know the specific issues in post-dispute arbitration agreements.<sup>72</sup>

Post-dispute arbitration, though ideal for cultural property disputes, can be difficult to orchestrate since cultural property disputes necessitating a post-dispute arbitration agreement often arise between parties that do not have a preexisting relationship.<sup>73</sup> Moreover, there may be difficulty agreeing after a dispute has arisen because of hostilities between the parties.<sup>74</sup>

An artist or a collector in particular may be unwilling—or may find it difficult—to draw clear distinctions between the subject matter of the dispute (e.g., a particular work of art) and his own persona. And when a dispute has been festering for some time,

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by three arbitrators appointed in accordance with said Rules.” *Id.* While this agreement was an international agreement a similar clause could be crafted for domestic agreements.

<sup>68</sup> Ritchie, *supra* note 6, at 419.

<sup>69</sup> Stipanowich, *supra* note 20, at 390.

<sup>70</sup> 1 DOMKE, *supra* note 55, at § 8:17.

<sup>71</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5.04.

<sup>72</sup> *Id.*

<sup>73</sup> E-mail from Jeffrey Cunard to Elizabeth Varner (Feb. 21, 2010) (on file with author).

<sup>74</sup> Valentin, *supra* note 9, at 220. For example, when the San Francisco Museum of Modern Art (SFMOMA) sued the Madeleine Haas Russell Revocable Trust over a failed attempt to buy a Picasso, the Trust refused SFMOMA’s request to arbitrate the dispute. Carol Vogel, *Inside Art*, N.Y. TIMES, Apr. 7, 2000, at E.

personal elements arising out of the dispute itself—such as the need to vindicate one’s honor and integrity—may well have been added to the original subject matter, giving rise to mutually reinforcing spirals of self-righteousness and resentment.<sup>75</sup>

Disputes involving cultural property associated with war or genocide, such as the Holocaust, are very emotional.<sup>76</sup> The claimants can feel that the cultural property is a “tangible connection to those who perished in the Holocaust and to the suffering they endured”<sup>77</sup> such that the dispute is about providing an emotional as well as a legal resolution. However, “[s]uch animosity does not provide a very good basis on which to agree on a rational course of action—but that is what arbitration is all about: agreement on procedures, fees, scope, and the like.”<sup>78</sup>

Parties have even greater difficulty in agreeing to arbitrate after a cultural property dispute has arisen if there are multiple parties to the dispute, such as a series of sellers, purchasers or insurance companies, which is typical in the art market.<sup>79</sup>

### iii. Step-arbitration Agreement

Step-arbitration is another option to consider including in an arbitration agreement for cultural property disputes. In step-arbitration the parties negotiate or mediate their dispute before going to arbitration if the dispute is still unresolved.<sup>80</sup> A step-arbitration clause can settle disputes before the parties launch a full legal battle<sup>81</sup> and can also preserve relationships.<sup>82</sup>

A step-arbitration clause would be particularly useful in emotional cases because a step-arbitration clause provides an opportunity for parties to talk directly to each other before involving arbitrators.

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<sup>75</sup> Rau, *supra* note 19, at 187.

<sup>76</sup> Jennifer Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 44 (2009).

<sup>77</sup> Owen Pell, *The Potential For A Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen Or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 45 (1999).

<sup>78</sup> Kaye, *supra* note 25, at 45.

<sup>79</sup> Valentin, *supra* note 9, at 220.

<sup>80</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 38.

<sup>81</sup> 1 DOMKE, *supra* note 55, § 8:14.

<sup>82</sup> Townsend, *supra* note 48, at 1-6.



A step-arbitration clause can provide for negotiation and then arbitration. For example, a contract for a traveling exhibition provides that:

For a period of at least 30 days, Organizer and Participant will use reasonable, good faith efforts to resolve any dispute between them in connection with this Agreement and/or the Exhibition at the Facility. If they are unable so to resolve any such dispute, then such dispute will be settled by arbitration . . . .<sup>83</sup>

Other step-arbitration clauses provide for mediation before arbitration commences. One auction house's arbitration clause specifies:

(a) Within 30 days of written notice that there is a dispute, the parties or their authorized and empowered representatives shall meet by telephone and/or in person to mediate their differences . . . . Any communications made during the mediation process

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<sup>83</sup> Traveling Exhibition Contract (between an organizing museum and a foreign lender/venue) (on file with author). The AAA recommends the following step clause for negotiations:

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.

AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 10. One step arbitration clause that was used in a contract for art loans and exhibitions provides:

In the event of a dispute arising out of or in connection with the present contract, the Organizers will make every effort to resolve their differences amicably.  
[ ] Should efforts at resolution be exhausted without success, any dispute 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 and the law of the State of [venue 2].

AMERICAN LAW INSTITUTE, *LEGAL PROBLEMS OF MUSEUM ADMINISTRATION*, *supra* note 10, at 283. The arbitration clause for the Met settlement agreement states:

9.1. The Parties shall make their best efforts to resolve and settle amicably any dispute between the Ministry for Cultural Assets and Activities of the Italian Republic and the Commission for Cultural Assets of the Region of Sicily and the Museum arising from or related to the interpretation and performance of this Agreement that may arise between the parties.

9.2 If the Parties are unable to reach a mutually satisfactory resolution to their dispute, the disputed issues shall be settled in private by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce by three arbitrators appointed in accordance with said Rules.

*The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34.

shall not be admissible in any subsequent arbitration, mediation or judicial proceeding.

(b) If mediation does not resolve all disputes between the parties, or in any event no longer than 60 days after receipt of the written notice of dispute referred to above, the parties shall submit the dispute for binding arbitration before a single neutral arbitrator.<sup>84</sup>

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<sup>84</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). This clause is useful as it provides deadlines to aid in resolving cultural property disputes timely. This clause also provides methods for confidentiality of communications in mediation which will leave parties free to make a good faith attempt at resolution.

The AAA suggests the following step clause with mediation:

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules . . . .

AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 38. One of JAMS's step clauses states:

Prior to the appointment of the arbitrator(s), and within 10 days from the date of commencement of the arbitration, the parties shall submit the dispute to JAMS for mediation . . . . If the dispute is not resolved within 30 days from the date of the submission of the dispute to mediation (or such later date as the parties may mutually agree in writing), the administration of the arbitration shall proceed forthwith. The mediation may continue, if the parties so agree, after the appointment of the arbitrators . . . .

JAMS, *JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS* (2006), available at <http://www.jamsadr.com/rules-adr-clauses>. Another JAMS's step clause provides:

The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration pursuant to the arbitration clause set forth above . . . . Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or 45 days after the date of filing the written request for mediation, whichever occurs first. The mediation may continue after the commencement of arbitration if the parties so desire . . . .

*Id.* For arbitrations in California, AAMS's arbitration clause states:

All disputes arising out of this Agreement shall be submitted to mediation in accordance with the rules of Arts Arbitration and Mediation Services, a program of California Lawyers for the Arts. If mediation is not successful in resolving the entire dispute, any outstanding issues shall be submitted to final and binding arbitration in accordance with the rules of that program and subject to the laws of the State of California.

E-mail from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (citing creator of clauses as Co-board President, Art Arbitration and Mediation Services of California Lawyers for the Arts). For arbitrations outside of California, AAMS provides:

Under this form of step-arbitration, the mediator should not be the arbitrator if the cultural property dispute progresses to arbitration because it would impede resolution of the dispute. The parties might not tell the mediator important information to prevent the mediator's knowledge from being used against them in arbitration.<sup>85</sup> Judicial Arbitration and Mediation Services, Inc. (JAMS) suggests that "[u]nless otherwise agreed by the parties, the mediator shall be disqualified from serving as arbitrator in the case."<sup>86</sup> The AAA model clause provides that "[i]f all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator."<sup>87</sup> The parties can determine if having the same person as mediator and arbitrator would impede their resolution efforts and manifest their decision in the arbitration clause.

Step-arbitration can also provide for negotiation, then mediation if negotiation fails and finally arbitration if the first two steps fail. One AAA clause states:

(a) If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, before resorting to arbitration.

(b) Any dispute arising out of or relating to this contract, or the breach thereof, that cannot be resolved by mediation within 30 days shall be finally resolved by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules . . . .<sup>88</sup>

Thus, there are a plethora of dispute resolution options that parties can include in the arbitration agreement.

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All disputes arising out of this Agreement shall be submitted to mediation in accordance with the rules of Judicial Arbitration and Mediation Services (JAMS). If mediation is not successful in resolving the entire dispute, any outstanding issues shall be submitted to final and binding arbitration in accordance with the rules of that program and subject to the laws of the State of California.

*Id.*

<sup>85</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 38.

<sup>86</sup> JAMS, *supra* note 84.

<sup>87</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 38 (emphasis added).

<sup>88</sup> Townsend, *supra* note 48, at 1-6. This clause would benefit from including a time period for negotiation.

### 3. Agreement to Arbitrate

Certain clauses help the arbitration agreement to survive in a cultural property dispute.<sup>89</sup> Arbitration agreements generally include clauses that address: an agreement to arbitrate, scope of arbitration, waiver of sovereign immunity, arbitral institution the parties want to use, rules to govern arbitration, location of arbitration, substantive law, number of arbitrators, method to choose the arbitrators and entry of judgment.

The AAA, JAMS and California Lawyers for the Arts offer basic model arbitration clauses the drafter can use to guide the drafting process.<sup>90</sup>

The arbitration agreement should explicitly state that the parties agree to binding arbitration<sup>91</sup> and not include vague language that could permit parties to avoid arbitration later.<sup>92</sup> Permissive or contradictory language in the arbitration agreement may require

<sup>89</sup> Many of the considerations in drafting a pre- and post-dispute agreement are the same and will be treated accordingly in this Article unless otherwise noted.

<sup>90</sup> One AAA model clause that has withheld judicial scrutiny states:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Optional Rules for Emergency Measures of Protection], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 7. Another AAA model clause notes:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

*Id.* Finally, the JAMS model clause provides:

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its (Comprehensive Arbitration Rules and Procedures) (Streamlined Arbitration Rules and Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

(Optional) Allocation of Fees and Costs: The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party.

JAMS, *supra* note 84.

However, the drafter should not merely use one of these model clauses as their final arbitration agreement. Each arbitration requirement included in the agreement should meet clients' needs and maximize clients' positions.

<sup>91</sup> Townsend, *supra* note 48, at 1-6. COMMERCIAL CONTRACTS, *supra* note 56, at § 5:04.

<sup>92</sup> 2 DOMKE, *supra* note 16, § 48:1.

the parties to litigate the meaning of the arbitration clause.<sup>93</sup> For example, the parties should not consent to arbitration and a court's jurisdiction.

There are several ways to explicitly state that the parties agree to binding arbitration. An arbitration clause in a contract for a traveling cultural property exhibition stated that arbitration "will be the sole and exclusive procedure for the resolution of any such dispute."<sup>94</sup> A model arbitration clause drafted by the Art Arbitration and Mediation Services of California Lawyers for the Arts (AAMS) states that "any outstanding issues shall be submitted to final and binding arbitration . . . ."<sup>95</sup>

The arbitration agreement should also clearly indicate the scope of the arbitration—both as to what claims and cultural property the arbitration clause will cover.<sup>96</sup> The arbitration clause can be broad or narrow. More claims will be arbitrable under a broad arbitration clause than a narrow arbitration clause. The terms "arising out of" are frequently employed in broad arbitration agreements. A broad arbitration agreement can include clauses such as "[a]ny claim or controversy arising out of or relating to th[e] agreement."<sup>97</sup> One broad arbitration clause that was used in a contract for art loans and exhibitions provided for arbitration "[i]n the event of a dispute arising out of or in connection with the present contract."<sup>98</sup> Another broad arbitration clause in an auction house's contract covered "[a]ny dispute, controversy or claim arising out of or relating to this agreement, or the breach, termination or validity thereof."<sup>99</sup>

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<sup>93</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5.04.

<sup>94</sup> Traveling Exhibition Contract (between an organizing museum and a foreign lender/venue) (on file with author). The arbitration agreement can include a clause that the dispute "shall be finally resolved by arbitration." Townsend, *supra* note 48, at 1-6.

<sup>95</sup> E-mail from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (citing creator of clauses as Co-board President, Art Arbitration and Mediation Services of California Lawyers for the Arts).

<sup>96</sup> Townsend, *supra* note 48, at 1-6.

<sup>97</sup> 1 DOMKE, *supra* note 55, at § 15:6.

<sup>98</sup> AMERICAN LAW INSTITUTE, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION, *supra* note 10, at 283.

<sup>99</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). AAMS's arbitration clause states that "[a]ll disputes arising out of this agreement shall be submitted to final and binding arbitration." Email from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (attaching Arts Arbitration and Mediation Services, Brochure).

A narrow arbitration agreement can include clauses such as “arising under this agreement.”<sup>100</sup> For example, the arbitration clause in a contract for art exhibition services provides that “[a]ny dispute or controversy arising hereunder shall be submitted to arbitration . . . .”<sup>101</sup> An arbitration clause to purchase a collection of artworks stated, “[a]ny dispute arising under this Agreement shall be settled by binding arbitration.”<sup>102</sup>

Courts are split on whether “arising from” is a narrow or broad arbitration clause.<sup>103</sup> The split gives parties leeway to later decide whether to arbitrate certain claims, but will also require judicial interpretation before the dispute is addressed if the parties later disagree on the scope. While there is uncertainty in what claims are covered using the terms “arising from”, museums have used it in their arbitration agreements. A Metropolitan Museum of Art’s (Met) arbitration clause provided for arbitration of “any dispute . . . arising from or related to the interpretation and performance of this Agreement that may arise between the parties.”<sup>104</sup>

Narrow or split arbitration clauses that relegate some issues in a cultural property dispute to arbitration while reserving others for litigation risk the parties becoming embroiled in concurrent arbitration and court proceedings.<sup>105</sup> The court in *Estate of Andy Warhol* noted that “[a] party who consents to the inclusion in a contract of a limited arbitration clause does not thereby waived his right to a judicial hearing on the merits of a dispute not encompassed within the ambit of the clause.”<sup>106</sup> Issues that are included in the arbitration clause will go to arbitration and all other issues will go to court. Parties should consider this before using a narrow or split arbitration agreement.

In addition to specifying the scope of arbitration, parties should specify what individual works of cultural property are cov-

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<sup>100</sup> 1 DOMKE, *supra* note 55, § 15:6.

<sup>101</sup> National Building Museum, Standard Agreement Letter Format Exhibition Consultants (1998) (on file with author).

<sup>102</sup> LACMA Contract (on file with author). This clause was intended to include “breaches of representations as to title, nonpayment of amounts due (which would be payable in installments), confidentiality, etc. etc.” *Id.*

<sup>103</sup> 1 DOMKE, *supra* note 55, §15:6.

<sup>104</sup> *The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34 (emphasis added).

<sup>105</sup> Townsend, *supra* note 48, at 1-6.

<sup>106</sup> *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 764 F. Supp. 43, 46 (1991) (*citing* *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981)). The court found that since the parties had agreed to claim splitting in their agreement, the parties could raise claims in both forums arising out of the same transaction. *Id.* at 47.

ered by the arbitration clause. Parties will have difficulty determining what cultural property is covered by the arbitration agreement years later when memories are clouded. The arbitration agreement should not list a collection because it will be difficult to determine which works are covered by the arbitration agreement as cultural property is frequently sold and the inventory of collections can be subjective if not specified.<sup>107</sup> Rather, each work should be listed and described individually as “[m]eans of establishing ownership and questions of good faith may ultimately rest upon an accurate and comprehensive description of the object in question.”<sup>108</sup> Parties should provide an image of the cultural property and other identifying information so that it will be clear what cultural property is covered by the arbitration agreement. The Getty Information Institute’s guidelines for describing art and antiquities under the Object ID project are useful standards that will help determine the cultural property that the arbitration clause covers.<sup>109</sup>

## B. Procedural Law

### 1. Arbitral Institution

The arbitration agreement should specify how to conduct the arbitration or include the name of an arbitral institution that will have preexisting procedures to conduct arbitration.<sup>110</sup> A perfunctory clause that merely expresses an agreement to arbitrate will still require the court’s assistance to determine how the arbitration is to properly proceed.<sup>111</sup>

The agreement should state whether the parties want to use an arbitral institution or ad hoc arbitration.<sup>112</sup> Institutional arbitration

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<sup>107</sup> Fed. Republic of Germany v. Elicofon, 536 F. Supp. 813, 821 (1978) (trying to determine ownership of the Grand Ducal Art Collection and which paintings were included in that collection fifty-one years after the Settlement Agreement).

<sup>108</sup> Thomas Wessel, *Who Wins the War Against Art Booty and Art Theft?*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR 181 (2004). The following should be included: photographs, the type of object, materials and technique, measurements, inscription and markings, distinguishing features, title, subject, date or period, maker, value and short description. *Id.* at Appendix.

<sup>109</sup> See INTRODUCTION TO OBJECT ID: GUIDELINES FOR MAKING RECORDS THAT DESCRIBE ART AND ANTIQUITIES (Getty Research Institute 1999), available at <http://www.object-id.com/guide>.

<sup>110</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5:04.

<sup>111</sup> Townsend, *supra* note 48, at 1-6 (citing Federal Arbitration Act, 9 U.S.C. § 5 (1925)).

<sup>112</sup> *Id.*

is easier than ad hoc arbitration because arbitral institutions offer administrative assistance. Moreover, there is less chance of judicial intervention if the parties use institutional arbitration because institutional rules and processes have already passed judicial scrutiny. Arbitral institutions also have default rules that allow the proceedings to survive in the event that one of the parties balks at participating in arbitration.<sup>113</sup>

If the parties choose to use an arbitral institution, drafters should look at the different arbitral institutions to determine which institution is best for the cultural entities' needs by considering the following factors:

- (1) The adequacy of the service provider's rules templates vis-à-vis the type and complexity of controversies that are likely to arise in the course of the client's business;
- (2) the depth, breadth, and quality of the provider's pool of available arbitrators (they are not equal);
- (3) the experience, expertise, and general quality of the provider's case managers; and
- (4) the provider's hearing facilities, technological resources, and related support services.<sup>114</sup>

If parties decide to use an arbitral institution, the arbitration agreement should specify the arbitral institution that the parties want to use. For example, the parties can include a clause that the arbitration will be "administered by the American Arbitration Association under its" rules.<sup>115</sup>

If the parties specify an arbitral institution in the clause they should confirm that the institution exists.<sup>116</sup> The parties should include a default option in their clause if they choose a regional arbitral institution in case the regional arbitral institution later closes.

## 2. Rules to Govern Arbitration

Arbitration agreements should include the rules to govern arbitration. Incorporating the rules of a nationally known arbitration organization like the AAA or JAMS will facilitate the arbitration process because arbitral institutions already have a set of arbitral clauses and rules that have survived judicial scrutiny. Most institu-

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<sup>113</sup> The AAA and JAMS are two prominent arbitral institutions in the U.S.

<sup>114</sup> Hayford, *supra* note 58, at 443.

<sup>115</sup> Townsend, *supra* note 48, at 1-6.

<sup>116</sup> Ernest Legier, AAA Vice President, ADR Benefits Advocacy Effective Drafting of Arbitration Clauses, Address Before Tulane Advanced American Arbitration Law Seminar (Spring 2010).



tional rules are default rules such that parties can jointly modify the institutional rules.

One cultural entities' contract incorporated arbitration rules by stating that disputes will be arbitrated "according to the rules then obtaining of the American Arbitration Association . . . ."<sup>117</sup> An arbitration clause for AAMS states that disputes shall be arbitrated "in accordance with the rules of Arts Arbitration and Mediation Services, a program of California Lawyers for the Arts"<sup>118</sup> and for arbitration "in accordance with the rules of Judicial Arbitration and Mediation Services (JAMS) . . ." for arbitrations outside of California.<sup>119</sup>

The clause should specify the date of the rules the parties wish to use, either the date the arbitration agreement was drafted or the date of the dispute, as institutional rules change.<sup>120</sup> One benefit of using the rules in effect on the date of the agreement is certainty of the content of the rules. One arbitration clause in an art sale contract provided that the arbitration would be settled "pursuant to the Commercial Rules of the American Arbitration Association *then in effect*."<sup>121</sup> Alternatively, a benefit of using rules in effect on the date of dispute is that the arbitration rules will be current and will accommodate court rulings and changes in legislation. A contract for a traveling art exhibition required the "Commercial Arbitration Rules of the American Arbitration Association applicable *at the time of initiation of the arbitration*."<sup>122</sup>

Finally, if the parties are using a regional or specialized arbitration institute's rules, the drafters should include a default provision for another organization's rules in case that regional

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<sup>117</sup> National Building Museum, Standard Agreement Letter Format Exhibition Consultants (1998) (on file with author). The AAA model clause states that "[d]isputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association." AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 27.

<sup>118</sup> E-mail from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (citing creator of clauses as Co-board President, Art Arbitration and Mediation Services of California Lawyers for the Arts).

<sup>119</sup> *Id.* The Met's arbitration clause required "arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce by three arbitrators appointed in accordance with said Rules." *The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34.

<sup>120</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5.04.

<sup>121</sup> LACMA Contract (on file with author) (emphasis added).

<sup>122</sup> Traveling Exhibition Contract (on file with author) (between an organizing museum and a foreign lender/venue) (emphasis added).

arbitration institution closes. For example, one arbitration clause with a default provision that was used in a contract for co-ownership of a painting stated that “[t]he arbitrator shall be selected in accordance with the rules of Arts Arbitration and Mediation Services, a program of Bay Area Lawyers for the Arts. If such service is not available, the dispute shall be submitted to arbitration with the laws of California.”<sup>123</sup>

### 3. Location of Arbitration

The arbitration agreement should include the arbitration location, which is the seat of arbitration, determines procedural law over the cultural property dispute and impacts the convenience of the arbitration.<sup>124</sup> The jurisdictional rules of the arbitration location govern the procedural law of the arbitration,<sup>125</sup> which determines arbitrability and court procedures.<sup>126</sup> Convenience of the arbitration location is also a factor in determining location of arbitration and translates to cost for travel, hotels and availability of witnesses.<sup>127</sup>

The clause specifying the arbitration location can be simple or complex. Many clauses that specify the location of arbitration are simple. For example, an agreement for exhibition services states that “[a]ny dispute or controversy arising hereunder shall be submitted to arbitration in Washington, D.C. . . .”<sup>128</sup> Arbitration clauses that specify the location of arbitration can also be complex if the situation warrants. One auction house’s arbitration clause specifies that:

(ii) the arbitration shall be conducted in the designated location, as follows: (A) in any case in which the subject auction by Bonhams took place or was scheduled to take place in the State

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<sup>123</sup> 6 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 16:37 (3d ed. 2010).

<sup>124</sup> Townsend, *supra* note 48, at 1-6.

<sup>125</sup> Daniel Rainer, *The Impact of West Tankers on Parties’ Choice of a Seat of Arbitration*, 95 CORNELL L. REV. 431, 433 (2010).

<sup>126</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 26.

<sup>127</sup> *Id.*

<sup>128</sup> National Building Museum, Standard Agreement Letter Format Exhibition Consultants (1998) (on file with author). The model AAA clause states that “[t]he place of arbitration shall be [city], [state], or [country].” AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 26. A clause in a contract for the sale of an art collection specified that “[t]he hearing shall take place in Los Angeles, California . . . .” LACMA Contract (on file with author). A contract for a traveling exhibition provided that “[t]he arbitration will be conducted in New York, New York . . . .” Traveling Exhibition Contract (on file with author).

of New York or the Commonwealth of Massachusetts, the arbitration shall take place in New York City, New York; (B) in all other cases, the arbitration shall take place in the city of San Francisco, California.<sup>129</sup>

Finally, the arbitration agreement should specify the language that the parties will use in arbitration.<sup>130</sup> For example, the clause can state that “arbitration will be conducted in the English language.”<sup>131</sup>

### C. *Substantive Law*

The arbitration agreement should explicitly state the substantive law that the parties intend to use in the dispute.<sup>132</sup> The substantive law is not necessarily the same as the procedural law.<sup>133</sup> For example, even if the arbitration takes place in Texas, the substantive law can contractually be the law of New York. Each party should carefully consider which jurisdiction’s laws favor that party and the facts of the cultural property dispute before agreeing to the substantive law.

Clauses specifying the substantive law can be very basic. One auction house’s arbitration clause specifies that “[t]hese Conditions of Sale and the purchaser’s and our respective rights and obligations hereunder are governed by the laws of the State of California.”<sup>134</sup>

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<sup>129</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010).

<sup>130</sup> Townsend, *supra* note 48, at 1-6.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 27.

<sup>134</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). The National Building Museum provides for arbitration that “will be governed according to the laws of the District of Columbia.” National Building Museum, *Standard Agreement Letter Format Exhibition Consultants* (1998) (on file with author). A contract for the purchase of a collection of artworks provided that “[t]his Agreement and any claims, controversies or disputes arising hereunder or related hereto shall be governed by the laws of the State of California, without reference to principles of conflicts of laws.” LACMA Contract (on file with author). One of AAMS’s arbitration clauses specifies that the arbitration shall be “subject to the laws of the State of California.” E-mail from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (citing creator of clauses as Co-board

### III. TAILORING ARBITRATION CLAUSES FOR MAXIMUM BENEFIT IN CULTURAL PROPERTY DISPUTES

#### A. *Arbitration Process*

##### 1. Waiver of Sovereign Immunity

There are many ways to tailor an arbitration agreement for maximum benefit in a cultural property dispute.<sup>135</sup> The drafter can tailor the arbitration agreement by addressing some of the following considerations: waiver of sovereign immunity, confidentiality, expediting arbitration, discovery and severability clauses.<sup>136</sup>

If any of the parties are a State or State agency the arbitration agreement should include appropriate waivers of sovereign immunity. Many museums are a State agency. Moreover, many States pursue their State's cultural property claims, especially if the claim involves stolen or illegally exported works.<sup>137</sup> Scholar Isabelle Gazzini noted, "It is not uncommon indeed, that a State be directly involved in restitution of cultural property proceedings, most frequently when restitution follows the investigation of violations of export regulations, illegal excavation or theft. As a rule States invoke *ex lege, ipso iure* ownership title; they might simply solicit the restitution of the disputed item without raising further claim to title."<sup>138</sup>

When negotiating with State museums or other State entities, the arbitration agreement should include: (1) a waiver of sovereign immunity to bring the State or State agency to arbitration<sup>139</sup> and (2) a waiver of sovereign immunity for enforcement of the award.<sup>140</sup> These two waivers both should be explicitly included. The parties might not be able to bring the State to arbitration or enforce the award without both waivers.

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President, Art Arbitration and Mediation Services of California Lawyers for the Arts). The AAA's model clause suggests that "[t]his agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]" or that "[t]his contract shall be governed by the laws of the State of [specify]." AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 27.

<sup>135</sup> The drafter should tailor the agreement to fit the parties' needs with the advice of counsel and the appropriate museum specialist. Stipanowich, *supra* note 20, at 391.

<sup>136</sup> *Id.* at 400; Townsend, *supra* note 48, at 1-6. Do not make the arbitration clause so specific or unrealistic, however, that it is virtually impossible to follow. *Id.* at 1-6.

<sup>137</sup> Kaye, *supra* note 25, at 36-37.

<sup>138</sup> GAZZINI, *supra* note 22, at 81-83.

<sup>139</sup> Townsend, *supra* note 48, at 1-6.

<sup>140</sup> Federal Sovereign Immunity Act, 28 U.S.C. §§ 1604, 1609 (1976).

## 2. Confidentiality

Parties could include a provision in the arbitration agreement to make the arbitration proceedings confidential.<sup>141</sup> While arbitrators and arbitral institutions are bound by silence, the parties to the dispute are not so bound.<sup>142</sup> Confidentiality can protect parties and cultural property from being burned and reduce the risk of other claims.

Confidentiality in arbitration can prevent the parties and cultural property involved from being burned. Parties' reputation and cultural property's perceived value can be irreparably harmed by allegations in cultural property disputes. Confidentiality can preserve the parties' reputation, which is important in the cultural property world where there are many value decisions and few players who frequently determine the value and authenticity of the cultural property. "In the world we are dealing with, in which all the major players are known to each other—and in which judgments are necessarily subjective and transient—a continuing reputation is a most precious asset."<sup>143</sup> If allegations were believed by the cultural property world, even if not proven, other cultural entities would be reluctant to deal with the accused party. For example, scholar Alan Rau noted, "Public controversy over the extent of, and responsibility for, damage to a work while on loan is likely . . . to harm the bailee—by endangering the prospect of future loans."<sup>144</sup>

In addition to protecting parties' reputation, confidentiality can protect the value of the cultural property as disputes "are likely irreparably to affect the marketability of the work itself, to the detriment of whoever will be left holding it."<sup>145</sup> Confidentiality in arbitration can also protect cultural property from publicity that exposes that cultural property to other claims. Many older cultural properties have convoluted and clouded histories, which makes the title easily disputable.<sup>146</sup> Cultural property disputes risk incurring other claims from third parties involving the cultural property

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<sup>141</sup> Townsend, *supra* note 48, at 1-6. However, some parties use publicity as a weapon and will not want confidentiality. Rau, *supra* note 19, at 174.

<sup>142</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 36.

<sup>143</sup> *Id.*

<sup>144</sup> Rau, *supra* note 19, at 173.

<sup>145</sup> *Id.*

<sup>146</sup> Shapiro, *supra* note 12, at 31 (*citing* *The Republic of Croatia v. The Trustee of the Marquess of Northampton*, 610 N.Y. 2d 263 (1st Dep't 1994) where Lebanon, Yugoslavia, and Hungary all laid claim to silver dishes from the Roman empire that were being sold at Sotheby's).

when the dispute, and consequently the cultural property, is publicized.

Confidentiality clauses in arbitration agreements can be very basic or can be very detailed and list what subjects are confidential or who must maintain their silence. One auction house's arbitration clause simply specifies that "[a]ll arbitration proceedings shall be confidential."<sup>147</sup> The AAA's clause is more detailed, however, and provides that "[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties."<sup>148</sup>

### 3. Expediting Arbitration

Arbitration agreements can require expedited arbitration. Expedited arbitration proceedings are beneficial for basic contract issues, especially if there is already an established relationship between the parties involved or if there are time constraints, such as an upcoming loan, sale or exportation of the cultural property in the near future. Expediting the arbitral process, however, might not be appropriate for more complex matters such as title disputes.

Parties can expedite arbitration by: setting a time frame for the entire arbitral process, setting time limits for each party, limiting the number of depositions and limiting discovery.<sup>149</sup> The limitations should be reasonable so not to negatively affect the proceedings or results. An auction house's arbitration clause provides for expedited arbitration specifying that:

(D) Each party shall have no longer than eight (8) hours to present its position. The entire hearing before the arbitrator shall not take longer than three (3) consecutive days; (E) The award shall be made in writing no more than 30 days following the end of the proceeding.<sup>150</sup>

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<sup>147</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010).

<sup>148</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 36.

<sup>149</sup> Stipanowich, *supra* note 20, at 405-24.

<sup>150</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). One AAA clause provides that:

The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

## 4. Discovery

Arbitration agreements can have broad or limited discovery clauses. The arbitration agreement should specify the scope of discovery.<sup>151</sup> While some attorneys prefer the broad discovery that they are familiar with in litigation, broad discovery clauses sacrifice many of the benefits of arbitration including economy and efficiency.<sup>152</sup>

The parties can limit discovery by restricting documentary discovery, depositions or the duration of arbitration proceedings.<sup>153</sup> For example, one auction house's arbitration clause provides that:

(C) Discovery, if any, shall be limited as follows: (I) Requests for no more than 10 categories of documents, to be provided to the requesting party within 14 days of written request therefor; (II) No more than two (2) depositions per party, provided however, the deposition(s) are to be completed within one (1) day; (III) Compliance with the above shall be enforced by the arbitrator in accordance with California law.<sup>154</sup>

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AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 32.

The AAA provides special rules to expedite arbitral proceedings that the parties can incorporate into their arbitration clause. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION §§ E1-10 (2009).

<sup>151</sup> Townsend, *supra* note 48, at 1-6.

<sup>152</sup> *Id.*

<sup>153</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 30-32.

<sup>154</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). For example, the AAA's model clause states:

Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim][on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s)

AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 30-31. Another AAA clause specifies:

At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

These restrictions and their repercussions should be carefully considered, however, before limiting discovery for complex matters such as title disputes.

### 5. Severability Clause

The arbitration agreement should also include a severability clause that allows the arbitration to continue without any portion that a court might find impermissible.<sup>155</sup> The AAA's model clause provides that:

Should any provision, section or part of this Agreement be deemed illegal, invalid or unenforceable by a court of Competent jurisdiction, that provision of the agreement may be severed and shall not affect the validity or enforceability of the remaining portions of This agreement in that jurisdiction . . . .<sup>156</sup>

## B. *Actors*

### 1. Parties

The arbitration agreement could specify the parties to the arbitration. Determining the desired parties to the arbitration can be complicated as many parties are involved in cultural property disputes. In addition to the primary parties, the agreement could include organizations and foundations associated with the cultural property transaction, agents and insurance companies, which are almost always involved in cultural property transactions.<sup>157</sup> If a party is not included in the arbitration agreement then they are not required to arbitrate, which can lead to multiple proceedings in arbitration and in court.

The agreement could list the specific parties if many parties are involved, if one of the desired parties might try and avoid arbitration or if the drafter wants to exclude other parties from arbitra-

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AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 30-31.

<sup>155</sup> Ernest Legier, AAA Vice President, ADR Benefits Advocacy Effective Drafting of Arbitration Clauses, Address Before Tulane Advanced American Arbitration Law Seminar (Spring 2010).

<sup>156</sup> *Id.*

<sup>157</sup> *The Point of View of Professionals Involved in the Art Trade*, in RESOLUTION METHODS FOR ART-RELATED DISPUTES 106 (1999). For example, during a forced mediation by the court, one litigator found himself settling because his "real client – an insurance company – preferred the safety of an agreed upon amount of liquidated damages to a win or lose proposition with a jury deciding the amount of damages." *Id.*



tion. The arbitration clause in the Met's settlement agreement lists multiple parties to include in the arbitration providing "[t]he Parties shall make their best efforts to resolve and settle amicably any dispute between the *Ministry for Cultural Assets and Activities of the Italian Republic* and the *Commission for Cultural Assets of the Region of Sicily* and the *Museum . . .*"<sup>158</sup>

Other arbitration agreements list parties or claims to exclude from arbitration. For example, Bonhams, an auction house, had an arbitration agreement that specified the arbitration clause was between Bonhams and the purchaser stating that the arbitration clause covers claims "brought by or against Bonhams (but not including claims brought against the consignor by the purchaser of lots consigned hereunder)."<sup>159</sup> The arbitration agreement specifically excluded claims from the purchaser against the consignor so that Bonhams would not be brought into the dispute between the two other parties when a claim was not against Bonhams.<sup>160</sup>

## 2. Arbitrators: Number, Method and Neutrality

The arbitration agreement should list the number of arbitrators, provide a method of selecting arbitrators and specify the arbitrators' neutrality.<sup>161</sup>

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<sup>158</sup> *The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34 (emphasis added).

<sup>159</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010).

<sup>160</sup> Sotheby's and Christie's U.S. catalogues specify litigation rather than arbitration. See CHRISTIE'S, 500 YEARS DECORATIVE ARTS EUROPE 208 (2010); Sotheby's, Conditions of Sale New York, <http://www.sothebys.com/liveauctions/cos/pdf/N08627-COS.pdf>. (last visited Apr. 2010).

<sup>161</sup> Townsend, *supra* note 48, at 1-6. Under the FAA,

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Federal Arbitration Act, 9 U.S.C. § 5 (1925).

## i. Number of Arbitrators

The arbitration agreement should include the number of arbitrators the parties wish to use.<sup>162</sup> Typically, parties use one or three arbitrators to avoid a tie when rendering judgment.

Considerations that inform the number of arbitrators parties use in arbitration include: the additional cost of each arbitrator, the complexity of the dispute and the value of the matter in dispute. In determining the number of arbitrators, the cost of the two additional arbitrators that are paid hourly is a factor.<sup>163</sup>

If the arbitration agreement does not specify the number of arbitrators, the court will appoint one arbitrator.<sup>164</sup> One arbitrator is also the default under the AAA unless the parties specify otherwise or the AAA determines that the dispute warrants three arbitrators.<sup>165</sup> Usually, simple or low-value disputes only need one arbitrator.<sup>166</sup> One auction house's arbitration clause explicitly requires that "the parties shall submit the dispute for binding arbitration before a single neutral arbitrator."<sup>167</sup> One museum's arbitration clause provides for arbitration "with respect to a single party arbitrator . . . ."<sup>168</sup>

Complex or expensive disputes might require three arbitrators.<sup>169</sup> Disputes in cultural property transactions can become complex because of the different skill sets and knowledge required to resolve the dispute. In the context of a cultural property dispute it might be difficult to find one person who is an expert in cultural property and law. Three arbitrators are preferable if it is not possible to find one person who is competent in these two fields and the dispute justifies the cost. One arbitration clause in a contract for co-ownership of a painting required that "any disagreement of the parties concerning the Painting shall be submitted for arbitration to

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<sup>162</sup> Stipanowich, *supra* note 20, at 432.

<sup>163</sup> Anthony DiLeo, Professor at Tulane University Law School, Advanced American Arbitration Law Seminar (Spring 2010).

<sup>164</sup> Federal Arbitration Act, 9 U.S.C. § 5 (1925).

<sup>165</sup> AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION, *supra* note 150, at §15.

<sup>166</sup> Townsend, *supra* note 48, at 1-6.

<sup>167</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010).

<sup>168</sup> National Building Museum, Standard Agreement Letter Format Exhibition Consultants (1998) (on file with author).

<sup>169</sup> Townsend, *supra* note 48, at 1-6.

a panel of three arbitrators . . . .”<sup>170</sup> Moreover, a multi-arbitrator panel allows two sides an opportunity to appoint an arbitrator “who, while independent, is knowledgeable in matters important to the parties.”<sup>171</sup> A lawyer should usually serve as Chair, however, to explain the legal issues to arbitrators without a legal background.<sup>172</sup>

Furthermore, if the value of the cultural property in dispute is great the cost of the three arbitrators may be justified.<sup>173</sup> For example, one AAA clause states that “[i]n the event that any party’s claims exceeds \$1 million, exclusive of interest and attorneys’ fees, the dispute shall be heard and determined by three arbitrators.”<sup>174</sup>

## ii. Method of Selecting Arbitrators

The arbitration agreement can specify the method of selecting arbitrators. Parties can choose from a variety of methods to select an arbitrator including: an arbitral institution’s method, the parties providing a method or the parties specifying an individual in the agreement. If the arbitration agreement does not specify an institution or method of choosing an arbitrator, or if the method is not feasible, then the court will appoint the arbitrators.<sup>175</sup>

The arbitration agreement can simply list the arbitration institution or the institution’s rules in the arbitration clause, which shall proscribe the default method of selecting arbitrators.<sup>176</sup> If the parties use a regional arbitration institute that prescribes the method of choosing arbitration, the arbitration agreement should have a

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<sup>170</sup> 6 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 16:37 (3d ed. 2010). The arbitration clause in the Met’s settlement agreement provided for “three arbitrators appointed in accordance with said Rules.” *The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34. The wording of the clause providing for three arbitrators is similar to those providing for one arbitrator.

<sup>171</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5.04.

<sup>172</sup> Quentin Byrne-Sutton, *Introduction: Alternative Paths to Explore*, in RESOLUTION METHODS FOR ART-RELATED DISPUTES 9 (1999).

<sup>173</sup> Anthony DiLeo, Professor at Tulane University Law School, Advanced American Arbitration Law Seminar (Spring 2010).

<sup>174</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 25.

<sup>175</sup> COMMERCIAL CONTRACTS, *supra* note 56, at § 5.04.

<sup>176</sup> *Id.*; see AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION, *supra* note 150, at § 11. For example, an arbitration clause in a settlement agreement with the Metropolitan Museum of Art provided that “the disputed issues shall be settled in private by arbitration on the basis of the Rules of Arbitration and Conciliation of the International Chamber of Commerce by three arbitrators appointed in accordance with said Rules.” *The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34.

default provision in case the arbitration institute closes. AAMS's arbitration agreement provides:

The arbitrator shall be selected in accordance with the rules of Arts Arbitration and Mediation Services, a program of California Lawyers for the Arts. If such services are not available, the dispute shall be submitted to arbitration in accordance with the laws of the State of California.<sup>177</sup>

However, parties are free to create their own method of choosing an arbitrator.<sup>178</sup> The clause can provide for the parties jointly choosing one arbitrator if a dispute arises. Choosing a single arbitrator, however, can be complicated as the parties might not agree on one individual. The parties should include a default provision in the event that the parties cannot agree on one arbitrator. For example, a contract for a traveling art exhibition states:

Within 10 calendar days after receipt of written notice from a party that it is submitting the matter to arbitration, the parties will designate in writing an arbitrator to resolve the dispute. If the parties are unable to agree on such an arbitrator within such time period, then, within five days, each party will select an arbitrator and the two arbitrators so selected will select a third arbitrator, which third arbitrator will resolve the dispute.<sup>179</sup>

Typically, if there are three arbitrators, two parties will each choose an arbitrator and the two arbitrators will choose a third arbitrator who will be the Chair.<sup>180</sup> For example, one arbitration clause in a contract for co-ownership of a painting required that "any disagreement of the parties concerning the Painting shall be submitted for arbitration to a panel of three arbitrators: one chosen by MUSEUM X, one chosen by GALLERY Y, and a third chosen by those two."<sup>181</sup>

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<sup>177</sup> E-mail from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (citing creator of clauses as Co-board President, Art Arbitration and Mediation Services of California Lawyers for the Arts) (attaching Arts Arbitration and Mediation Services, Brochure).

<sup>178</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 23; AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL ARBITRATION RULES AND MEDIATION*, *supra* note 150, at § 12.

<sup>179</sup> Traveling Exhibition Contract (between an organizing museum and a foreign lender/venue) (on file with author).

<sup>180</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 23.

<sup>181</sup> 6 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 16:37 (3d ed. 2010). The AAA provides the following model clause for parties to select arbitrators outside of the standard institutional procedure:

The parties can also include the name of a specific arbitrator in the agreement. An AAA clause states that “[i]n the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.”<sup>182</sup> Parties should provide a default option, however, as the arbitrator might not be available when the dispute arises.<sup>183</sup> If the parties do not use an arbitral institution’s methods to choose an arbitrator, the arbitration agreement should specify that if the parties’ means of arbitrator selection fails that the default will be a specific arbitral institution’s procedures.<sup>184</sup>

### iii. Neutrality

The arbitration agreement could also specify the arbitrators are to be neutral.<sup>185</sup> Arbitral institutions, such as the AAA, will presume that the arbitrators are neutral unless the parties specify otherwise.<sup>186</sup> While parties might be tempted to use non-neutral arbitrators if the dispute involves three arbitrators and two sides

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The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within ten days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 24. Another option promulgated by the AAA states:

Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within ten days of their appointment. [The party selected arbitrators will serve in a non-neutral capacity.] If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

*Id.*

<sup>182</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 24.

<sup>183</sup> *Id.* at 23.

<sup>184</sup> *Id.* at 24. For example, one auction house’s arbitration clause specifies:

The arbitrator shall be drawn from a panel of a national arbitration service agreed to by the parties, and shall be selected as follows: (i) If the national arbitration service has specific rules or procedures, those rules or procedures shall be followed; (ii) If the national arbitration service does not have rules or procedures for the selection of an arbitrator, the arbitrator shall be an individual jointly agreed to by the parties. If the parties cannot agree on a national arbitration service, the arbitration shall be conducted by the American Arbitration Association, and the arbitrator shall be selected in accordance with the Rules of the American Arbitration Association.

Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010).

<sup>185</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 23. This only applies if there is more than one arbitrator.

<sup>186</sup> *Id.*

each pick an arbitrator, the other side has the same advantage, such that the non-neutral arbitrators become additional advocates of their respective parties.<sup>187</sup> Under this scenario, even though the parties pay for three arbitrators, practically only the Chair of the arbitral tribunal determines the outcome. Thus, all of the arbitrators should be neutral to give full effect to the three-panel arbitral tribunal.

### 3. Arbitrators Expertise

The arbitration agreement can include the arbitrators' desired expertise. The parties can also provide characteristics they desire the arbitrators to possess to the arbitral institution, which can incorporate those criteria in their arbitrator selection process.<sup>188</sup>

Drafters can match the qualifications of the arbitrators to the dispute. Parties can choose arbitrators for their professional experience or expertise in the relevant cultural property issues that would be appropriate for the dispute.<sup>189</sup>

Qualifications to consider for cultural property disputes include: cultural property professionals' backgrounds as lawyers, curators, art dealers, scholars or directors; time period of experience in a field; and a working knowledge of certain topics. If the contract is for a cultural property appraisal or the dispute is over authenticity, the arbitration agreement could specify an appraiser or cultural property specialist. If the contract is for the sale of cultural property or the dispute is over title, the arbitration agreement could specify a lawyer and an art dealer. If the contract involves conservation, one of the arbitrators could be a conservationist, and so on.<sup>190</sup> For example, one auction house's arbitration clause specifies, "such arbitrator shall be a retired judge or an attorney familiar

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<sup>187</sup> Anthony DiLeo, Professor at Tulane University Law School, Advanced American Arbitration Law Seminar (Spring 2010).

<sup>188</sup> *Id.* at 23. For example, an AAA model clause states that "the arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney." *Id.* at 25.

<sup>189</sup> Shapiro, *supra* note 12, at 30.

<sup>190</sup> A contract for a traveling exhibition provides for:

Any arbitrator designated pursuant to this Agreement will be a person experienced in commercial and business affairs who is not a representative of either party and who has not received, during the two-year period preceding the date of this Agreement or after the date of this Agreement, any compensation, directly or indirectly, from any party or any affiliate, associate, officer or director of any party.

Traveling Exhibition Contract (between an organizing museum and a foreign lender/venue) (on file with author).

with commercial law and trained in or qualified by experience in handling arbitrations.”<sup>191</sup>

While specifying arbitrator qualifications is easier post-dispute since the parties know the exact issue, it is still feasible in a pre-dispute arbitration clause.

### C. Relief

#### 1. Interim Relief

The arbitration agreement can include a provision for interim relief,<sup>192</sup> which will be particularly important to a party if the cultural property is not in that party’s possession and if the cultural property is going to be removed from the jurisdiction, sold, altered or destroyed.<sup>193</sup> One clause that the AAA provides for interim relief states:

Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal’s determination of the merits of the controversy).<sup>194</sup>

#### 2. Form of Award

The arbitration agreement can also specify the form of the written award that the parties will receive at the end of the arbitration.<sup>195</sup> The arbitrators can give the parties a reasoned award or

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<sup>191</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, [http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=US\]A&screen=WebTermsCal](http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=US]A&screen=WebTermsCal) (last visited Apr. 7, 2010). For example, the AAA’s model clauses state that “the panel of three arbitrators shall consist [of] one contractor, one architect, and one construction attorney”; “the arbitrator shall be a practicing attorney [or a retired judge] [of the [specify] Court]”; or “the arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least ten years.” AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 25.

<sup>192</sup> Townsend, *supra* note 48, at 1-6.

<sup>193</sup> AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION, *supra* note 150, at § 34.

<sup>194</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 28.

<sup>195</sup> Townsend, *supra* note 48, at 1-6.

merely write out which party won on each issue and the damages allotted. The parties should balance the desire for an explanation of the arbitrators' decision and the potential for reversal or bad publicity to determine which form of award they want.<sup>196</sup>

The agreement could require a reasoned award. A reasoned award is similar to a judicial opinion with written reasons for the arbitrators' decisions.<sup>197</sup> Sometimes parties want reasons for the arbitrators' decisions—and justification for the expenditure of the arbitration and lawyer fees. Furthermore, some entities might want a reasoned award to give that entity a chance to overturn the award or wage a public relations campaign. One auction house's arbitration clause requires a reasoned award and specifies that “[t]he arbitrator’s award shall be in writing and shall set forth findings of fact and legal conclusions.”<sup>198</sup>

Conversely, the agreement could require the arbitrator to merely list which party won on each issue and the damages allotted. Listing which party won on each issue and the damages awarded is preferable if the parties are concerned that the award might be reversed, if the parties do not want the public to know the reasons for the award or if the parties are concerned about future suits.

An award that only lists which party won on each issue and the damages granted further reduces the slim chance of reversal. Overturning an arbitral award is more difficult if there is limited reasoning for a court to analyze. Parties might also want the arbitrators to list which party won on each issue and damages assessed to retain their privacy. Parties can obtain public vindication from winning on an issue, which will be listed in the award, without airing the details of the dispute. Moreover, an award that merely lists who won on each issue and damages allotted is less useful in future disputes such that a party anticipating future claims on similar issues might prefer not to have a reasoned award so that the award

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<sup>196</sup> Hayford, *supra* note 58, at 450.

<sup>197</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 36.

<sup>198</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). If the parties desire a reasoned award the AAA recommends the following clauses that state: “[t]he award of the arbitrators shall be accompanied by a reasoned opinion”; “[t]he award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim”; “[t]he award shall include finding of fact [and conclusions of law]”; or “[t]he award shall include a breakdown as to specific claims.” AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 36.



will not be used against that party in the future. A reasoned award could be published and, consequently, could incentivize similarly situated claimants.

Under the AAA, the award does not have to be reasoned unless the parties request it to be prior to appointment of the arbitrator.<sup>199</sup> The arbitrators only have to list which party won on each issue in writing, and it must be signed by the majority of the arbitrators.

### 3. Remedies, Fees and Entry of Judgment

The arbitration agreement can also include remedies and remedy limitations.<sup>200</sup> Typical remedies for cultural property disputes include specific performance, damages and an injunction.<sup>201</sup>

Parties can cap the available damages, exclude punitive damages and relinquish certain claims in arbitration clauses.<sup>202</sup> These remedy restrictions are useful bargaining tools for desired concessions and can help bring a recalcitrant party to arbitration. For example, one AAA model clause restricts remedies by stating that “[t]he arbitrators will have no authority to award punitive or other damages not measured by the prevailing party’s actual damages, except as may be required by statute”<sup>203</sup> or “[i]n no event shall an award in an arbitration initiated under this clause exceed \$ \_\_\_\_.”<sup>204</sup>

The agreement can specify how to divide attorneys’ and administrative fees.<sup>205</sup> In regard to attorneys’ fees, the parties can dictate how the arbitrators should impose attorneys’ fees. Parties can bear their own attorneys’ fees or the loser can bear all of the attorneys’ fees.<sup>206</sup> For example, one AAA model clause suggests that “[t]he prevailing party shall be entitled to an award of reasonable attorney fees.”<sup>207</sup>

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<sup>199</sup> AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION, *supra* note 150, at §42.

<sup>200</sup> Townsend, *supra* note 48, at 1-6.

<sup>201</sup> Palmer, *Litigation: The Best Remedy?*, *supra* note 8, at 265-67. See *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989); 917 F.2d 278, 286 n.9 (7th Cir. 1990).

<sup>202</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 32.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 35.

<sup>206</sup> Townsend, *supra* note 48, at 1-6.

<sup>207</sup> AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 35.

Administrative fees are generally divided equally between the parties, but the parties can modify this in an arbitration agreement.<sup>208</sup>

Arbitration agreements that address both attorney and arbitration fees are preferable. Arbitrators have the discretion to award attorney and arbitration fees as they deem fit if the distribution of these fees is not addressed. If the parties do not specify the division of fees in the arbitration agreement the arbitrator could sanction one party by making them pay the other party's fees.<sup>209</sup>

Many arbitration clauses specify that the parties should bear their own attorneys' fees and half of the arbitration fees. For example, one auction house's arbitration clause specifies:

To the fullest extent permitted by law, and except as required by applicable arbitration rules, each party shall bear its own attorneys' fees and costs in connection with the proceedings and shall share equally the fees and expenses of the arbitrator.<sup>210</sup>

This is a fair distribution that does not unduly deter claims.

Other arbitration agreements grant the arbitrator discretion to award arbitration fees. One AAA model clause specifies that "[t]he arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees."<sup>211</sup>

Some arbitration clauses have the losing party pay all of the fees including those of the prevailing party. For example, an arbitration clause in a contract for the purchase of an art collection specifies that "fees [will be] awarded to the prevailing party."<sup>212</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> Wendy Rovira, *Is it Time to Revise Your Arbitration Agreements or Rethink Your Alternative Dispute Strategy?*, 57 *LA. B.J.* 168, 168-70 (2009) (citing *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81 (2nd Cir. 2009)); see AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL ARBITRATION RULES AND MEDIATION*, *supra* note 150, at § 43.

<sup>210</sup> Condition of Sale in California, New York, BONHAMS & BUTTERFIELDS, <http://www.bonhams.com/cgi-bin/public.sh/pubweb/publicSite.r?sContinent=USA&screen=WebTermsCal> (last visited Apr. 7, 2010). An arbitration clause in a contract for a traveling exhibition specifies that "[t]he fees and expenses of the arbitrator will be divided equally between Organizer and Participant. Each party will pay its own costs and expenses of the arbitration." Traveling Exhibition Contract (between an organizing museum and a foreign lender/venue) (on file with author). One of the AAA's model clauses specifies that "[e]ach party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration." See AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL ARBITRATION RULES AND MEDIATION*, *supra* note 150, at § 43.

<sup>211</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 35.

<sup>212</sup> LACMA Contract (on file with author).

An AAMS arbitration provision goes further explicitly providing attorney and arbitration costs to the prevailing party stating that “[t]he prevailing party in any arbitration shall be entitled to reasonable attorney’s fees and costs, including those of the arbitrator, incurred in the enforcement of this Agreement and a resulting arbitration Award.”<sup>213</sup> This provision should be approached with caution as attorney and arbitration fees can be very expensive and could be a deterrent to disputing issues.

Finally, the arbitration agreement should state that entry of judgment is permitted so that the award will be enforceable in court.<sup>214</sup> For example, the arbitration clause could include a statement that “judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction.”<sup>215</sup>

Thus, there are a host of options to tailor an arbitration agreement to cultural property disputes.

#### IV. POST-DISPUTE ARBITRATION AGREEMENTS

##### A. *Statute of Limitations*

Post-dispute arbitration agreements have additional considerations. The threshold consideration in a post-dispute arbitration agreement is which statute of limitations, or time-bar, applies and if that statute of limitations has been exceeded.<sup>216</sup> Dr. Michael Carl noted,

Time-bars are basically an attempt by the state to foster civil peace by legalizing transactions involving abandoned property or property the possession of which has been lost against the owner’s will. They are in any event a curtailment of the basic

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<sup>213</sup> E-mail from Jill Roisen, Program Director, Art Arbitration and Mediation Services of California Lawyers for the Arts to Elizabeth Varner (Feb. 23, 2010) (on file with author) (citing creator of clauses as Co-board President, Art Arbitration and Mediation Services of California Lawyers for the Arts). For example, the AAA model clause provides:

The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. “Costs and fees” mean all reasonable pre-award expenses of the arbitration, including the arbitrator’s fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys’ fees.

AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, *supra* note 65, at 35.

<sup>214</sup> Townsend, *supra* note 48, at 1-6.

<sup>215</sup> *Id.*

<sup>216</sup> Kaye, *supra* note 25, at 36-39.

right of ownership in favor of another, even if the latter is *male fides*, and should be treated with great suspicion and caution.<sup>217</sup>

Different United States jurisdictions have different calculations for statute of limitations.<sup>218</sup>

In regard to title disputes, the statute of limitations in some jurisdictions favors the original owner. New York has a demand and refusal rule that is tempered by the doctrine of laches. New York's demand and refusal rule starts the three-year statute of limitations when the original owner demands the return of the work and the good faith purchaser refuses to return the work.<sup>219</sup> The good faith purchaser, however, might have relief under the doctrine of laches wherein the good faith purchaser must establish unreasonable delay by the original owner and resulting prejudice.<sup>220</sup>

Other jurisdictions are favorable to good-faith purchasers. Some states have a discovery rule, where the clock starts when the original owner discovered the work was missing or should have discovered that the work was missing.<sup>221</sup> For example, the U.S. District Court for the Northern District of Ohio found that the four-year statute of limitations, modified by the discovery rule, had been exceeded without determining exactly when it had started as the painting at issue had been openly displayed internationally and in the Toledo Museum of Art with the claimant's name in the provenance since 1939.<sup>222</sup> Other states do not even have a discovery rule and start the statute of limitations when the cultural property leaves the possession of the original owner. A federal court in Michigan found that the Detroit Institute of Arts had clear title to the artwork as the three-year statute of limitations began to run after the transfer of artwork in 1938 as "the discovery rule did not apply because Michigan policy favors market certainty in cases alleging commercial conversion."<sup>223</sup>

If the statute of limitations has lapsed the possessor can file a declaratory action in court that will quiet title. For example, the Detroit Institute of Arts and the Toledo Museum of Art refused to

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<sup>217</sup> Michael H. Carl, *Legal Issues Associated with Restitution – Conflict of Law Rules Concerning Ownership and Statutes of Limitation*, RESOLUTION OF CULTURAL PROPERTY DISPUTES: PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR 188 (2004).

<sup>218</sup> Kaye, *supra* note 25, at 36-39.

<sup>219</sup> Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 318 (1991). Kaye, *supra* note 25, at 36-39 (citing N.Y. Civ. Prac. L. & R. 214(3) (1996)).

<sup>220</sup> Kaye, *supra* note 25, at 36-39. See O'Keeffe v. Snyder, 83 N.J. 478 (N.J. 1980).

<sup>221</sup> *Id.*

<sup>222</sup> Kreder, *supra* note 76, at 64.

<sup>223</sup> *Id.* at 65.

arbitrate after they believed that the statute of limitations had lapsed when their counterpart in a title dispute offered to submit the cultural property dispute to arbitration. Instead, the Detroit Institute of Art and Toledo Museum of Art filed a declaratory action to quiet title to Vincent van Gogh's *The Diggers* and Paul Gauguin's *Street Scene in Tahiti* respectively.<sup>224</sup>

If the statute of limitations has not passed, then the party in possession of the cultural property should strongly consider arbitrating the cultural property dispute.

### B. *Bringing Parties to the Table: Waiving Legal Action and Holding Disputed Cultural Property in Escrow*

Several benefits of post-dispute arbitration can entice rational parties to arbitrate after the dispute has arisen.<sup>225</sup> Important post-dispute arbitration provisions include: forgoing criminal charges and civil claims, holding the disputed cultural property in escrow and developing creative remedies.

#### 1. Forgoing Criminal Charges and Civil Claims

Arbitration agreements can include a clause that the parties will forgo criminal charges and other civil claims against parties possessing the artwork, which could bring the parties possessing the artwork to arbitration. This provision can be used in many situations to alleviate parties' and private individuals' fear of being sued.

For example, the Met Agreement<sup>226</sup> included a clause that Italy agreed to forgo any civil and criminal claims against the museum and executives in regard to the cultural property at issue as part of the settlement.<sup>227</sup> The settlement agreement stated that Italy "as a result of this Agreement, waive[d] their right to pursue or

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<sup>224</sup> Mark Stryker, *The Art of the Matter, The DIA and Toledo Museum of Art Could Lose a Gauguin Worth Millions in a Dispute with the Heirs of a Woman Who Sold the Works in the Nazi Era. But Was She Pressured to Settle for Less?* DETROIT FREE PRESS, March 19, 2006, at E1. This case was ultimately resolved in favor of the two museums because the statute of limitations had expired. Mark Stryker, *DIA Wins "Diggers" Dispute*, DETROIT FREE PRESS, May 11, 2007.

<sup>225</sup> Benefits will not sway an emotional party that wants their day in court.

<sup>226</sup> See Bruce Zagaris, *Recovery and Return of Stolen Cultural Property: Met Agrees to Return Missing Art to Italy*, 22 INT'L ENFORCEMENT L. REP. 152 (2006). While the Met Agreement was an international agreement, parties to domestic cultural property disputes can use similar tactics.

<sup>227</sup> Chimento, *supra* note 18, at 228. This was in a settlement agreement, but could be used in a post-dispute arbitration agreement.

support any legal action against the Museum or its structures and executives, whether in Italy, the United States or elsewhere, on any grounds whatsoever, whether civil, administrative or criminal, in relation to the Requested Items.”<sup>228</sup>

## 2. Escrow

Arbitration agreements can mandate that the cultural property be held in escrow during the dispute, until the arbitration is completed and title determined. This clause would be influential in bringing the party not holding the cultural property to arbitration. The AAA’s model clause states that:

Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution, or AAA] as the escrow agent, [. . . goods . . .]. The escrow agent shall be entitled to release the [. . . goods. . .] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.<sup>229</sup>

## V. EXPANDING RESOLUTION OPTIONS IN CULTURAL PROPERTY DISPUTES

Parties can also include creative remedies in the arbitration agreement, which will incentivize parties to arbitrate as well as maximize the benefits of arbitration. Arbitration lends itself to

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<sup>228</sup> *The Metropolitan Museum of Art-Republic of Italy Agreement*, *supra* note 67, at 427-34.

8.2. This Agreement, and any negotiations and correspondence between the Ministry for Cultural Assets and Activities of the Italian Republic and the Commission for Cultural Assets of the Region of Sicily and the Museum regarding the subject matter herein (except all the proofing material transmitted by the Ministry to the Museum in the course of these negotiations) and the transfer of title to the Requested Items to the Italian Republic shall not be construed as an admission of any civil, administrative or criminal liability. The above mentioned documents shall not be received or voluntarily produced as an explicit or implicit admission, concession or presumption of any type, in any civil, criminal, administrative, arbitral or other proceedings, whether under the laws of Italy, the United States or elsewhere, and shall not be used for any purpose other than the performance of the Agreement itself. The Agreement, the negotiations and the correspondence between the Parties shall in no case be used as evidence of negligence or other misconduct.

8.3. The Ministry for Cultural Assets and Activities of the Italian Republic and the Commission for Cultural Assets of the Region of Sicily, as a result of this Agreement, waive their right to pursue or support any legal action against the Museum or its structures and executives, whether in Italy, the United States or elsewhere, on any grounds whatsoever, whether civil, administrative or criminal, in relation to the Requested Items.

<sup>229</sup> AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES*, *supra* note 65, at 29.

creative remedies because it is a creature of contract. Litigation presents primarily binary options where one party wins and the other loses.<sup>230</sup> In arbitration, however, parties can mitigate this loss and build relationships by drafting creative remedies.

Creative remedies are especially appropriate for cultural property title disputes in arbitration. Disputes over title to cultural property often do not have a morally “wrong” person as the thief is long gone.

Creative remedies are also particularly successful in title dispute between cultural entities and private parties because the parties to the dispute often have different motivations and goals. While cultural property title disputes are hotly contested there are really two main points at issue—title and use or possession of the cultural property. However, parties do not necessarily have to have both title and possession at all times. As there are at least two negotiation points, parties have some flexibility to craft options in arbitration.

For example, a museum wants known cultural property to display. Museums would prefer title, but weighed against the cost of litigation, bad publicity and the risk of losing the cultural property, the museum might be willing to negotiate for possession and display rights in lieu of defending the title. Private individuals want title because investment value stems from title. Private individuals also want the prestige associated with ownership and vindication if the cultural property was stolen. Thus, many parties’ goals can be met in arbitration.

#### A. *Resolution Options Prior to Arbitration*

There are multiple options for resolving cultural property disputes. Parties can attempt to resolve the cultural property dispute and craft remedies in mediation or negotiation prior to arbitration. Parties can craft several remedies for cultural property disputes including: cash settlement for the cultural property; split title and possession;<sup>231</sup> trade title to disputed work for title or loans to different works in the ultimate title-holder’s collection;<sup>232</sup> and, if the

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<sup>230</sup> Rau, *supra* note 19, at 160.

<sup>231</sup> Foster, *supra* note 13, at 161.

<sup>232</sup> Rau, *supra* note 19, at 162.

disputed works are a collection, the parties can divide the cultural property in the collection.<sup>233</sup>

Cash settlement for the disputed property is a frequent option to settle cultural property disputes. Sometimes the possessor “buys” the work from the original possessor.

Splitting title and possession by arranging a long-term loan wherein the museum can conserve and research the work also has been a popular option.<sup>234</sup> There are added benefits to this remedy beyond settling the dispute. If a private party permits the cultural entity to retain possession of the cultural property after the private party is awarded title to the cultural property, the cultural property will increase in value by virtue of it being in a cultural property entity.

Examples of this collaborative approach are seen in many previous cultural property transactions.<sup>235</sup> In a mediation in 1972 where Norton Simon possessed an Indian bronze sculpture of *Shiva as “Lord of Dance”* that the Government of India wanted returned to India, “Simon agreed to give up to India all right and title to the sculpture, and India in return would agree to loan the sculpture to the Simon Foundation for ten years, after which it would be returned to India.”<sup>236</sup> In 2000, Gerta Silberberg’s claim against The Israel Museum over Camille Pissarro’s painting, *Boulevard Montmartre, Spring*, was resolved by returning title to Silberberg while the museum retained possession of the work through a long term loan.<sup>237</sup>

Alternatively, a good faith possessor can also potentially retain title while loaning the work to the claimant for an extended period as was seen in the case between the French Government and Cleveland Museum over Nicolas Poussin’s *Holy Family on the Steps*, where “‘ownership’ remained in the good faith purchaser (the museum) with temporary, if extended, use being entrusted to the claimant state.”<sup>238</sup> A party can also obtain a long-term loan of the disputed cultural property in exchange for exhibiting less known cultural property from the other party’s collection, which

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<sup>233</sup> Shapiro, *supra* note 12, at 25-26.

<sup>234</sup> Foster, *supra* note 13, at 161.

<sup>235</sup> While many of these previous cultural property agreements were international, these resolutions can inform domestic cultural property settlements.

<sup>236</sup> Rau, *supra* note 19, at 161.

<sup>237</sup> Elaine L. Johnston and Stephen W. Clark, *Holocaust Era Assets Update*, ALI-ABA Symposium: Legal Problems of Museum Administration, Mar. 22-24, 2001 Washington, D.C., at 291, 298.

<sup>238</sup> Rau, *supra* note 19, at 161.



would make the cultural property known in the art community, thereby bolstering its value.<sup>239</sup>

Another option, especially if multiple pieces are involved, is to split the collection of cultural property, share costs of conserving the works and mutually exhibit them as seen in the dispute between the M.H. de Young Memorial Museum in San Francisco and the Mexican government over the *Teotihuacan Murals*.<sup>240</sup> Another alternate form of this remedy is for one of the parties to retain a portion of the collection and the other auction their portion. In the heirs of Cino Vitta's claim against the New Zealand Public Gallery of Art for five paintings from the Macchiaioli school in 1999, a compromise was reached where the museum retained three works and two works were auctioned for the benefit of the claimants.<sup>241</sup>

If two cultural entities or States are involved in the dispute, one trend has been to return the work to the original owner in exchange for the original owner agreeing to loan different works to the good faith possessor for exhibition. Italy resolved its claims against the Wadsworth Atheneum over Jacopo Zucchi's *Bath of Bathsheba* by agreeing to a loaned exhibition that was funded by Italy in return for the painting.<sup>242</sup> Italy also settled its dispute against the Met by granting a long term loan of other works in its collection in exchange for the Met returning the disputed property and absolution of liability for theft and illegal exportation of cultural property as seen in the Met Agreement.<sup>243</sup>

Within these creative remedies, museums can also place a commemorative plaque beside works recognizing the suffering and losses associated with the misappropriation of the cultural property. For example, in one dispute over a painting by Jan Griffier the Elder, *View of Hampton Court Palace*, the Tate Gallery posted a commemorative sign beside the painting recognizing the suffering of Holocaust victims and gave an ex gratia payment to the claimant's family.<sup>244</sup>

The parties can additionally specify the location and duration of the display of the disputed cultural property in the cultural en-

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<sup>239</sup> *Id.* at 165.

<sup>240</sup> Shapiro, *supra* note 12, at 25-26.

<sup>241</sup> Frances Kennedy, *The Stolen Art That Found Its Way Home*, INDEPENDENT (London), Nov. 13, 1999, at 19.

<sup>242</sup> Stevenson Swanson, *Amicable Resolutions in Disputes of Ownership are Rare in Art World*, CHICAGO TRIBUNE, Jun. 28, 1998, at 4.

<sup>243</sup> Aaron K. Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623 (2006-2007).

<sup>244</sup> Palmer, *Litigation: The Best Remedy?*, *supra* note 8, at 273.

tity. For example, an arbitration clause could provide that if the arbitrator finds that one party has title to the cultural property, the other party can have the work on loan, but that the cultural entity must prominently display the cultural property at all times. In this way,

the loan of a work of art can serve as a temporary substitute for an immediate duty of restitution—and when it is accompanied by an obligation on the part of the bailee to exhibit the work, a “carefully orchestrated” loan can also enhance the “sale profit” of the work, to the ultimate benefit of the owner.<sup>245</sup>

### B. *Resolution Options in Arbitration*

If the parties cannot resolve the conflict in negotiation or mediation, the parties could craft a remedy provision for arbitration so that the arbitrator would award one of the creative remedies. For example, the clause might state, “upon award of title to one party, the other party shall obtain a long term loan of x work for twenty (20) years.” Under this proposal, even though one of the parties is awarded title of the cultural property neither party suffers a devastating loss thereby making arbitration the best dispute resolution process for cultural property disputes.

Arbitration provides a superior dispute resolution process in cultural property disputes that protects parties’ reputation and cultural property values while allowing creative remedies to benefit all parties. Cultural entities should include arbitration provisions in their contracts before disputes manifest and should work to bring parties to arbitration after disputes arise. Despite some protests, arbitration is feasible before and after a cultural property dispute arises, especially in light of the many incentives for parties to arbitrate. Arbitration has been accepted internationally in cultural property disputes. It is time for the U.S. to embrace arbitration in domestic cultural property disputes.

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<sup>245</sup> Rau, *supra* note 19, at 163.