

The Resolution of Art Disputes by Adjudication

A New Way Forward

Anthony Connerty



Disputes in the field of art are on the increase. This article looks at two areas of dispute and asks whether adjudication can assist in resolving such disputes. The disputes considered are claims for the return of national treasures and one specific claim relating to the thirty – nine French Impressionist paintings of the Hugh Lane Bequest.

Claims for the Return of National Treasures

There has been a recent rise in claims for the return of national treasures: some relating to stolen art and some relating to claims made against museums.

Claims for the return of stolen art

Such claims may not be straightforward. A work of art may have been stolen but evidence may show that a later purchaser has rights of ownership. An example is the case of Matisse's "Portrait of Greta Moll".

The National Gallery in London acquired the Matisse painting on behalf of the British public in 1979. The Gallery purchased the work from a commercial gallery in London in good faith and says that it is its rightful owner. Since then the painting has been on display free of charge for millions of visitors to enjoy each year in the Gallery in Trafalgar Square. The National Gallery faced an appeal in the United States Supreme Court for the return of the "stolen" Matisse portrait in proceedings brought by family members of the painting's subject.

Three grandchildren of Greta Moll demanded that the museum pay \$30 million compensation or return "Portrait of Greta Moll", painted by Matisse in 1908. The family alleged that the painting was stolen from them in 1947 during the upheaval following the Soviet occupation of Berlin at the end of World War II. The Claimants alleged that the family lost the painting due to the dishonest act of a family friend in 1947- years before it was purchased in good faith by the National Gallery.

The Gallery said that it understood that both Greta Moll and her husband were living in Germany during the Second World War. Some years after the war ended - when the family say the painting was still in their possession- Greta Moll moved to Wales: *"This case therefore does not concern Nazi looted art."*

A decision of the New York court of 21 September 2017 upheld the Gallery's arguments that there was no justification for bringing litigation in United States. The court also confirmed that it was too late for the heirs to bring a case at that stage: the family had been aware of the location of the painting for many decades.

The National Gallery welcomed the decision of 10 September 2018 by the United States Court of Appeals for the Second Circuit, which upheld the decision of the District Court of

the Second Circuit to dismiss all claims made by heirs to Greta Moll in respect of the Gallery's Portrait of Greta Moll.

The National Gallery has made its position clear: *"This is not a case involving Nazi looted art; the claimants allege that the family lost the painting due to the dishonest act of a family friend in 1947, many years before it was purchased in good faith by the National Gallery"*.^[2]

Claims against museums

The long-standing claim by Greece for the return by the British Museum of the Elgin Marbles has been joined by news that Egypt is to demand proof that a pyramid stone said to have been taken from the Great Pyramid of Giza and due to be exhibited in the Museum of Scotland is held legally. Egyptian officials have suggested that the stone may have been smuggled into Britain. ^[3]

A claim by the Isle of Man for the return by the British Library of the Chronicles of the Kings of Man and the Isles joins another long-standing claim by Nigeria for the return of Benin bronzes by the British Museum. ^[4]

Perhaps one of the most striking examples of claims against national museums is shown by the approach taken by President Macron of France. He adopted a report by two academics: French historian Bénédicte Savoy and Senegalese economist and writer Felwine Sarr.

President Macron commissioned the report which recommends the full restitution by French museums of works in their collections which were taken "without consent" from former African colonies.

The academics argue that the complete transfer of property back to Africa - and not the long-term loan of objects to African museums - should be the general rule for works taken in the colonial period unless it can be shown that these objects were acquired "legitimately". Savoy denies that the policy proposed by the report might lead to the emptying of institutions such as the Musée du Quai Branly in Paris. The Musée houses 70,000 African objects. The report also seeks to put pressure on museums in Europe to review their policies. ^[5]

The head of the Musée du Quai Branly, Stéphane Martin, criticizes the report's authors for tainting every collection with the "impurity of colonial crime". He says that the main problem with Savoy and Sarr's report is that "it sidelines museums in favor of specialists in historical reparations."

Martin states that restitution cannot be the only way of dealing with the problem, otherwise *"we will empty European museums."* He maintains that there have long been examples of transfers of state-to-state ownership. *"The Getty has returned objects to Italy, the British Museum to Australia..."* He argues that the "current legal apparatus" is sufficient to organise the deaccessioning of such works. ^[6]

Neil MacGregor, a former Director of the British Museum, is also critical of the approach taken by President Macron. He describes the proposal to return African objects in France's institutions as "quite extraordinary". He says that the Savoy-Sarr report advocating that everything acquired in the colonial period was acquired unequally and must be returned unless you can prove otherwise is "very extreme".

The Hugh Lane Bequest: the dispute between the National Gallery in London and the Dublin City Gallery

The dispute relating to the thirty-nine paintings left to the National Gallery in London by Sir Hugh Lane in his 1913 will has raged for many years and continues: where should ownership lie? Sir Hugh's 1913 will stipulated that he bequeathed the thirty-nine pictures to the London National Gallery. His 1915 codicil directed that paintings "now at the London National Gallery" should instead be bequeathed to the City of Dublin. The codicil was not witnessed. At the time of Hugh Lane's death, Ireland was part of the United Kingdom. English law applied. The requirement was that a codicil to a will required to be witnessed. The same requirement as to witnesses applies today under the laws of the Republic of Ireland. In law, the codicil had no effect on the earlier will bequeathing the paintings to the London Gallery. Lane died in 1915, a passenger on the *Lusitania* returning to England from New York: the ship was torpedoed by a German submarine. The will therefore remained unchanged, and the bequest to London remained unaltered. In the early 1900s the [French Impressionist paintings](#) in the bequest were considered to be of limited interest in both Dublin and London. They are now thought to have a value in the region of one billion GBP.

There is no difference of view between London and Dublin: both agree that the dispute is about ownership. More precisely, the dispute is whether, notwithstanding the fact that the London Gallery has legal ownership (as a consequence of Hugh Lane's 1913 will), yet nevertheless that ownership should be transferred by London to Dublin.

Although born in Ireland, Hugh Lane was brought up in England. He began his career as an art dealer in London at the age of 18, and made his fortune in London. Later, he was knighted and bought a house in one of the most expensive areas of London. London was his home. He evidently never bought a house in Dublin, and on his visits there he stayed in a St Stephen's Green gentlemen's club. He spoke with an English accent.

The Lane controversy does not involve the return of cultural property to its country of origin, nor its restitution in the case of illicit appropriation. It is not a case of Irish works of art illegally taken from Ireland. This is not a case of looted art. This is not a Benin Bronzes case.

The dispute is a significant one: the British and Irish governments have long been involved. When John A. Costello became Taoiseach (Irish Prime Minister) in 1948, he initiated negotiations with Harold Macmillan, the British Prime Minister. This eventually led to a compromise in 1959 under Taoiseach Sean Lemass: half of the Lane Bequest would be lent and shown in Dublin every five years.

Harold Macmillan in a statement to the House of Commons said that an agreement had been concluded between the Commissioners of Public Works of the Irish Republic and the Trustees of the National Gallery in London, and that the British government welcomed the arrangements which offered a solution to a question which had been the subject of controversy for a long time.

More recently, government involvement in the Hugh Lane Bequest was shown at the opening of an Exhibition at the Hugh Lane Gallery in Dublin. In January 2020 Michael D. Higgins, the President of Ireland, said the occasion was celebrating:

“... not only a collection of beautiful and enriching works of art, but also acknowledging an important and a fruitful partnership between the National Gallery in London and the Hugh Lane Gallery in Dublin.

“It is an occasion which marks an important moment in the cultural life of our nation, a moment when we mark both the selfless patronage and creative vision of Hugh Lane and the generous spirit of affiliation that has grown between two important cultural institutions.”

Later he said that:

“ This is an important moment in the shared cultural life of two nations, who have now come together in a shared appreciation of the inclusive capacity of culture and its power to enrich the lives of all those who are enabled to access it.”

Can Adjudication Assist in the Resolution of Art Disputes?

Apart from litigation in the national courts, the various types of ADR are available for the resolution of art and cultural heritage disputes: arbitration, mediation and expert determination.

At first sight, alternative dispute resolution by adjudication might seem an unlikely procedure to be used in the field of art: adjudication is seen as a process for resolving disputes relating to construction contracts. But the provisions of section 108 of the Housing Grants, Construction and Regeneration Act 1996 – the Construction Act- provide a process that might assist. The section states that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure *“complying with this section.”* The contract is to include a provision in writing which enables the adjudicator *“to take the initiative in ascertaining the facts and the law.”*

The section goes on to state that the contract is to provide that *“ the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.”*

A process which provides for the ascertainment by an adjudicator of the facts and law relating to an art dispute may have much to offer. The parties may accept the decision of the adjudicator, failing which the matter proceeds to arbitration. It would be open to the parties to choose *ad hoc* arbitration or to opt for arbitration under the Rules of one of the arbitral institutions such as the LCIA, ICC, AAA/IDRC and CIETAC.

There is also one organisation which deals specifically with art law. The Court of Arbitration for Art (CAfA) is a comparatively new international arbitration institution for resolving art law disputes. CafA is based in The Hague, and is a joint initiative of the Netherlands Arbitration Institute and Authentication in Art, a non-profit organization. [7]

Adjudication: Claims for the Return of National Treasures and the Hugh Lane Dispute

Use of an adjudication process aimed at *“ascertaining the facts and the law”* would seem appropriate for resolving disputes involving works of art alleged to have been stolen: an example is the Greta Moll case.

Adjudication could also be used for claims for the restitution of national treasures alleged to have been taken illegally. The Great Pyramid of Giza case is an example: the Egyptian government is calling for access to the certification documents for all Egyptian antiquities displayed at the National Museum of Scotland.

In both cases the *“first stage”* adjudication process of ascertaining the facts and law might well resolve the claims. Facts ascertained by a neutral party may bring parties to an agreement when they see the strengths and weaknesses of their positions.

But if the issues are still unresolved the adjudication can proceed to the second stage: arbitration.

The Hugh Lane Bequest may be more difficult. The dispute is long -standing and involves the British and Irish governments. But a first stage process of setting out the facts and law by an independent adjudicator might assist. [8]

A Role for Adjudication?

Disputes concerning works of art and cultural objects will inevitably increase. Issues involving stolen works, the repatriation of national treasures, provenance, authenticity and ownership are currently dealt with by litigation in the national courts and by ADR processes such as arbitration and mediation.

Adjudication could well be an additional means of resolving disputes in the fascinating world of Art Law.

[2] <https://www.nationalgallery.org.uk/about-us/press-and-media/press-releases/national-gallery-and-the-british-public-are-rightful-owners-of-portrait-of-greta-moll>

[3] *The Times* 10 January 2019.

[4] *The Times* 7 January 2019.

[5] *The Art Newspaper* 20 November 2018: <https://www.theartnewspaper.com/news/give-africa-its-art-back->

[6] *Art World* 28 November 2018: <https://news.artnet.com/art-world/quai-branly-president-macron-africa-restitution-report-1404364>

[7] <https://www.cafa.world/>

[8] The author has suggested that a Commission on the lines of the Alabama Claims Commission and the UK /Norway Framework Agreement might be a way of dealing with the dispute between Dublin and London over the Hugh Lane French Impressionist paintings: "Ownership, Ethics and Non- Adversarial Settlement Methods: The Hugh Lane Bequest": Volume 26 of the Studies in Art Law, "Cultural Heritage Law and Ethics: Mapping Recent Developments".

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