

Kerstin Odendahl/Peter Johannes Weber (Hrsg.)

# Kulturgüterschutz – Kunstrecht – Kulturrecht

Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise  
des Doktoranden- und Habilitandenseminars „Kunst und Recht“



Nomos



DIKE

facultas.wuv





# Schriften zum Kunst- und Kulturrecht

Herausgegeben von

Prof. Dr. Barbara Grunewald, Universität Köln

Prof. Dr. Burkhard Hess, Universität Heidelberg

Prof. Dr. iur. Dr. phil. h.c. Peter Michael Lynen,

Hochschule für Musik und Tanz Köln,

Prof. Dr. Kerstin Odendahl, Universität St. Gallen

Prof. Dr. Janbernd Oebbecke, Universität Münster

Prof. Dr. Rainer J. Schweizer, Universität St. Gallen

Prof. Dr. Armin Stolz, Universität Graz

Band 8

unterstützt durch



KOMPETENZZENTRUM FÜR  
KUNST- UND KULTURRECHT

Kerstin Odendahl/Peter Johannes Weber (Hrsg.)

# Kulturgüterschutz – Kunstrecht – Kulturrecht

Festschrift für Kurt Siehr zum 75. Geburtstag aus dem  
Kreise des Doktoranden- und Habilitandenseminars  
„Kunst und Recht“



Nomos



DIKE

facultas.wuv



Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

ISBN 978-3-8329-5770-4 (Nomos Verlag, Baden-Baden)  
ISBN 978-3-03751-293-7 (Dike Verlag, Zürich/St. Gallen)  
ISBN 978-3-7089-0494-8 (facultas.wuv Verlag, Wien)

1. Auflage 2010

© Nomos Verlagsgesellschaft, Baden-Baden 2010. Printed in Germany. Alle Rechte, auch die des Nachdrucks von Auszügen, der photomechanischen Wiedergabe und der Übersetzung, vorbehalten. Gedruckt auf alterungsbeständigem Papier.



# Inhaltsverzeichnis

Tabula Gratulatoria	11
Sponsoren	13
Vorwort	
<i>Kerstin Odendahl / Peter Johannes Weber</i>	15
75 Jahre Kurt Siehr – 15 Jahre Seminar „Kunst und Recht“ <i>Peter Johannes Weber</i>	17
<b>Teil I: Kulturgüterschutz</b>	
Zum Begriff des Denkmals im österreichischen Recht Entstehung – Entwicklung – Ausblick <i>Erika C. Pieler</i>	21
Cultural Heritage Protection in Turkey – Problems and Perspectives <i>Suzan Topal-Gökceli</i>	41
Safe Haven für gefährdete Kulturgüter – Überblick über eine erste Vorlage zur Umsetzung sogenannter „sicherer Häfen“ unter besonderer Berücksichtigung von Kulturgütern unbekannter Herkunft <i>Sophie Engelhardt</i>	55
Der Bedeutungswandel der Situs-Regel im Internationalen Sachenrecht der Kulturgüter <i>Volker Wiese</i>	83
Freies Geleit von Kulturgut im internationalen Leihverkehr – rechtsvergleichende und völkerrechtliche Überlegungen <i>Kerstin Asmuss / Robert Peters</i>	101

Die Kunstleihgabe: Fragen zur Vertragsgestaltung anlässlich der Kündigung des Leihvertrags für Hans Holbeins d.J. „Madonna des Baseler Bürgermeisters Jacob Meyer zum Hasen“ im Frankfurter Städel-Museum <i>Matthias Weller</i>	119
Raubkunst – Rückblick und Ausblick <i>Melinda Müller</i>	147
Pringsheim, Provenance and Principles: a Case Study on the Restitution of Nazi Looted Art and Compensatory Payments <i>Katja Lubina / Hildegard Schneider</i>	161
Die haushaltsrechtliche Bewältigung der Restitution von Holocaust Art im Freistaat Bayern <i>Robert Kirchmaier</i>	177
Human Rights Aspects of Indigenous Cultural Property Repatriation <i>Karolina Kuprecht</i>	191
Legacy of Serenissima. State Succession to ‘Istria’s jewels’ <i>Andrzej Jakubowski</i>	227
Existe-il des crimes contre la culture ? La protection des biens culturels et l’émergence de la responsabilité pénale internationale de l’individu <i>Vittorio Mainetti</i>	251
Antonio Canova und die Kulturgüterschutzgesetzgebung in Rom zu Beginn des 19. Jahrhunderts <i>Peter Johannes Weber</i>	271

## **Teil II: Kunstrecht**

Der Begriff der Echtheit von Kunstwerken im Zivil- und Strafrecht <i>Friederike Gräfin von Brühl</i>	303
Zur Provenienz von vier chinesischen Kunstwerken aus dem Eigentum von Rosa und Jakob Oppenheimer im Museum Rietberg Zürich <i>Esther Tisa Francini</i>	313



„Kunstvertrieb“ – Absatzmittlung von Kunstwerken in Recht und Praxis <i>Michael Anton</i>	331
Zuständigkeiten bei internationaler Vermittlung im Kunsthandel <i>Boris Grell</i>	367
Going once, going twice, going three times, sold ... ! <i>Daniel-Philipp Häret</i>	385
Die Entwicklung des Gewährleistungsrechts bei Auktionen <i>Nicolai B. Kemle</i>	393
Liability for the Acquisition of Faked or Wrongly Attributed Works of Art in US Law <i>Marc Weber</i>	409
Folgerecht – Aktueller Stand und letzte Entwicklungen in Österreich und den Mitgliedstaaten der EU <i>Angelika Peukert</i>	435
Die Entstehungsgeschichte des Urheberpersönlichkeitsrechts <i>Christiane Thies</i>	457
Urheberrechtliche Auswirkungen der Mitwirkung eines Assistentenstabs an Werken zeitgenössischer Künstler <i>Yasmin Mahmoudi</i>	483
Die Apotheose des Kompromisses – Der Kunstbeirat und die Auftragskunst für den Reichstag <i>Lucas Elmenhorst</i>	501

### **Teil III: Kulturrecht**

Der Theaterbesuchsvertrag – und die Möglichkeit seiner Anfechtung wegen Leistungsstörungen am Beispiel der „Fledermaus“-Entscheidung, LG Salzburg 53 R 417/02 h <i>Ursula Schrammel</i>	523
--	-----

Questions de culture(s) ? Convention Unesco 2005 sur la protection et la promotion de la diversité des expressions culturelles	
<i>Raphaël Contel</i>	537
Towards a Case Law on the Interface of Trade and Culture	
<i>Stefano Caldoro</i>	553
Alternative Dispute Resolution in Art and Cultural Heritage – Explored in the Context of the World Intellectual Property Organization’s Work	569
<i>Sarah Theurich</i>	
Colonies françaises et politique de protection du patrimoine culturel. Prémices de réflexion sur l’expérience coloniale et sa transposition en Métropole	
<i>Antoinette Maget Dominicé</i>	595
Die Schule von Athen. Eine Darstellung von Raphaels Bildprogramm in der Stanza della Segnatura	
<i>Valentine von Fellenberg</i>	611
Fotoquellen	633

# Alternative Dispute Resolution in Art and Cultural Heritage – Explored in the Context of the World Intellectual Property Organization’s Work

*Sarah Theurich\**

I.	Introduction	570
II.	General Background of Alternative Dispute Resolution (ADR) in Art and Cultural Heritage	572
	1. Examples of Types of Art and Cultural Heritage Disputes	573
	2. Particular Features and Dispute Resolution Needs	574
	3. The Potential of ADR	575
	a) What is ADR?	576
	aa) Mediation and Conciliation	577
	bb) Arbitration	577
	cc) Expert Determination	578
	dd) Combined Procedures	578
	b) Benefits of ADR for Art and Cultural Heritage Disputes	578
	4. Elements for Further Consideration	580
III.	The Role of the World Intellectual Property Organization (WIPO)	580
IV.	Reflections on Art and Cultural Heritage ADR within WIPO’s Program on Intellectual Property (IP), Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF)	581
	1. Background	582
	2. ADR Considerations in the Forum of the WIPO Intergovernmental Committee on IP, GR and Folklore (IGC)	583

\* LL.M (London), LL.M (Köln/Paris), Legal Staff, WIPO Arbitration and Mediation Center, voluntary legal researcher and PhD candidate at the Art-Law Center of the University of Geneva.

The author would like to thank Ignacio de Castro, Deputy Director, WIPO Arbitration Center, and Brigitte Vézina, Legal Officer, WIPO Traditional Creativity, Cultural Expressions and Cultural Heritage Section, for their valuable advice in the preparation of this article.

*The views expressed in this article are the personal views of the author and do not necessarily reflect those of WIPO, its Secretariat or any of its Member States.*

a)	By Member States in Policy Discussions	583
b)	In Draft Provisions for an International Legal Instrument (or Instruments)	584
c)	In IGC Working Documents	585
3.	Further ADR Considerations within WIPO's Program on IP and GR, TK and TCEs/EoF	586
V.	The WIPO Arbitration and Mediation Center's Procedural Experience in Art and Cultural Heritage ADR	587
1.	The Role of the WIPO Arbitration and Mediation Center	587
a)	Administering institution	589
b)	Resource Center	589
aa)	Tailored ADR Services	590
bb)	Art and Cultural Heritage ADR Services	591
2.	Art and Cultural Heritage Case Examples	591
a)	WIPO "Good Offices" in a Cultural Heritage Matter between an Indigenous Community and a Museum	592
b)	WIPO Arbitration in an Artist Promotion Dispute	593
VI.	Conclusion	594

## *I. Introduction*

In Goethe's nineteenth century novel "Elective Affinities" the character Mr. Mittler is introduced, with a name that coincidentally translates into the German for "mediator". He is presented as someone who "[...] had distinguished himself by his capacity for settling and silencing all disputes, domestic and communal [...]".<sup>1</sup>

Indeed, disputes have often been illustrated in art, and mediators or arbitrators have sometimes been protagonists in literature, paintings, and film.

But how can disputes involving art and cultural heritage be resolved in a more appropriate, sustainable and efficient way?

This question has been addressed in the work of the World Intellectual Property Organization (WIPO), as well as under different angles in other international fora. For example, in the context of the United Nations Educational Scientific

1 *Johann Wolfgang von Goethe*, original German title "Die Wahlverwandschaften", 1809, here quoted from the English translation by R. J. Hollingdale, Penguin, London, 1971, p. 33.

and Cultural Organization (UNESCO)<sup>2</sup>, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) has seen mediation and conciliation added to its mandate in 2005, in order to facilitate the return and restitution of cultural property.<sup>3</sup> The ICPRCP is currently negotiating a specific set of draft rules of procedure for mediation and conciliation.<sup>4</sup> Another example is the International Council of Museums (ICOM), which is developing a mediation program for disputes involving museums.<sup>5</sup>

Many authors have emphasized the great potential of alternative dispute resolution (ADR), such as mediation or arbitration, for resolving art and cultural heritage disputes, and this both for disputes regarding “intangible” cultural heritage, as well as for those involving “tangible” cultural property.<sup>6</sup>

- 2 UNESCO is an intergovernmental organization with currently 193 Member States and a mandate to “contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information”, see <[www.unesco.org](http://www.unesco.org)>.
- 3 See 33 C/Resolution 44, General Conference, 33rd Session, October 3-21, 2005, p. 98.
- 4 For the status of the negotiations, see latest Secretariat Report for the Sixteenth Session of the ICPRCP, July 2010, CLT-2010/ CONF.203/COM.16/2 Rev, <<http://unesdoc.unesco.org/images/0018/001875/187506e.pdf>>.
- 5 ICOM is a not-for-profit non-governmental organization created in 1946, see <<http://icom.museum/>>. On mediation, see *Alissandra Cummins*, Promoting the use of Mediation in Resolution of disputes over the Ownership of objects in Museum Collections: Statement by the President of ICOM, January 2006, <[http://icom.museum/statement\\_mediation\\_eng.html](http://icom.museum/statement_mediation_eng.html)>.
- 6 See for example: *Quentin Bryne-Sutton*, Arbitration and Mediation in Art-Related Disputes, Arbitration International, Vol. 14, 1998, pp. 447 ff.; *Gabrielle Kaufmann-Kohler*, Art et Arbitrage : Quels enseignements tirer de la résolution des litiges sportifs, in: Quentin Bryne Sutton/Fabienne Geisinger-Mariéthoz (eds.), Resolution methods for art-related disputes, Studies in Art Law, 11, Schulthess, Zürich 1999, pp. 123 ff.; *Kurt Siehr*, Resolution of Disputes in International Art Trade, Third Annual Conference of the Foundation “The Venice Court of National and International Arbitration”, Venice, 29-30, September, 2000, International Law FORUM du droit international 3, 2001, pp. 64 ff.; *Christian Wicher/Wend Wendland*, Mediation as an Option for Resolving Disputes between Indigenous/Traditional Communities and Industry concerning Traditional Knowledge, in: Barbara Hoffman (ed.), Art and Cultural Heritage, Law, Policy and Practice, Cambridge University Press, Cambridge 2005, pp. 475 ff.; *Marc-André Renold*, Arbitration and Mediation as Alternative Resolution Mechanisms in Disputes Relating to the Restitution of Cultural Property, in: Jaynie Anderson (ed.), Crossing Cultures: Conflict, Migration and Convergence, The Proceedings of the 32nd International Congress in the History of Art (CIHA), The University of Melbourne, January 13-18, 2008, pp. 1104 ff.; *Norman Palmer*, Alternative Procedures – Litigation: The Best Remedy?, in: Lyndel V. Prott (ed.), Witnesses to History, A Compendium of Documents and Writings on the Return of Cultural Objects, UNESCO, Paris, 2009, pp. 358-368; *Sarah Theurich*, Art and Cultural Heritage Dispute Resolution, WIPO Magazine, July 2009, Issue 4, pp. 17 ff.; *Beat*

Although there are a variety of types of art and cultural heritage disputes relating to different legal fields and subject matters, certain similar features and dispute resolution needs may be identified. This is why exchange between different experts in this field is important and may increase awareness of available options and approaches.

In order to contribute to such discussions, and before the general background of art and cultural heritage ADR, the present article aims to provide an illustrative and non-exhaustive overview of reflections on that topic that are taking place at WIPO, as well as of the WIPO Arbitration and Mediation Center's procedural experience with the resolution of such disputes.

It does not attempt in any way whatsoever to take a position on or prejudge the outcome of substantive and normative art and cultural heritage discussions that may be ongoing at WIPO and in other fora.

The potential of ADR in the field of art and cultural heritage is significant. As a neutral and technical dispute resolution tool, ADR may be considered as a possible means to apply and implement the principles of normative art and cultural heritage instruments through party consent. It may also assist to resolve on a case-by-case basis, individual contractual and non-contractual art and cultural heritage disputes that parties choose to submit to ADR. Further, ADR may be contemplated to play a role as a potential "compliance" mechanism within certain normative cultural heritage instruments.

## II. *General Background of Alternative Dispute Resolution (ADR) in Art and Cultural Heritage*

It seems appropriate to first draw a brief general background of the topic of art and cultural heritage ADR, in order to better understand WIPO's related work. Hence, this Section<sup>7</sup> aims to indicate the particular features and dispute resolution needs in art and cultural heritage conflicts, which have also been addressed by other experts in this field.

*Schönberger*, Restitution von Kulturgut, Anspruchsgrundlagen – Restitutionshindernisse – Entwicklung, Stämpfli Verlag, Bern, 2009, pp. 274 ff.; *Kurt Siehr*, Internationale Schiedsgerichtsbarkeit über Kulturgut-Streitigkeiten, in: *Liber Amicorum Tibor Várady*, CEU Press, Budapest, New York, 2009, pp. 255 ff.; *Marie Cornu/Marc-André Renold*, New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution, *International Journal of Cultural Property*, Volume 17, Issue 01, February 2010, pp. 1 ff.

7 This Section is based on elements developed in *Sarah Theurich* (*supra* note 6).

## 1. Examples of Types of Art and Cultural Heritage Disputes

Art and cultural heritage is a wide area and related disputes may involve a variety of different private and public stakeholders and subject matters. Without attempting to define art and cultural heritage disputes, some examples of the types of such disputes may illustrate the issues involved.

Numerous contractual art and cultural heritage disputes originate from transactions concluded in the art market and the cultural sector. For example such disputes may arise between artists and galleries over artist representation agreements, copyright licenses, or sale agreements. Cultural institutions may be in dispute with donors over donation agreements. They may also be in dispute with other cultural institutions over loan agreements, with researchers over the reproduction of exhibited works, with restaurateurs over restoration agreements, or with insurance companies over art insurance contracts. Further, art buyers and sellers, such as auction houses and art collectors, may be involved in a number of contractual disputes, relating for example to a warranty of authenticity.

Non-contractual art and cultural heritage disputes are also abundant. For example, artists may be disputing with art collectors and galleries about resale rights, or with publishers, photographers or other parties over the unauthorized reproduction of their works. Indigenous and local communities may be involved in disputes with cultural institutions in relation to the access to and reproduction of traditional cultural expressions or expressions of folklore (TCEs/EoF)<sup>8</sup>. Fur-

8 A description of TCEs/EoF is provided in Revised Draft Provisions for the Protection of TCEs/EoF, which are currently negotiated in the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, see WIPO/GTRKF/IC/9/4, Annex, page 11, Article 1 - Subject Matter of Protection: “(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols; (ii) musical expressions, such as songs and instrumental music; (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and, (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are: (aa) the products of creative intellectual activity, including individual and communal creativity; (bb) characteristic of a community’s cultural and social identity and cultural heritage; and (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_9/wipo\\_grtkf\\_ic\\_9\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_4.pdf)>.

ther, conflicts over the restitution of stolen cultural property or the return of illicitly appropriated cultural property may involve numerous actors, such as States, cultural institutions, non-governmental organizations, indigenous communities, and individuals.

## 2. Particular Features and Dispute Resolution Needs

First and foremost, the nature of the objects concerned in art and cultural heritage disputes has been regarded as special in light of their “cultural and immaterial value”.<sup>9</sup>

Also, the subject matter involved may often be specific, which makes legal and technical expertise essential for resolving such disputes, for example in relation to the cultural and historical background(s) of the art work. National judges may not always have this expert knowledge.

A dispute may involve both tangible and intangible cultural heritage. For example, certain TCEs may combine both tangible and intangible elements<sup>10</sup> such as a painting (tangible) that depicts a legend (intangible).<sup>11</sup> Further, a dispute over tangible cultural heritage may also raise intangible or intellectual issues. For example, in a dispute over the restitution of a sculpture (tangible), IP issues may arise if a photo of that sculpture has been reproduced (intangible) in a publication. However, even if different issues are involved, it seems nevertheless important that the entire dispute be resolved in a single forum, instead of submitting different issues to different fora, which may lead to contradictory outcomes and lengthy processes.

Art and cultural heritage disputes are often cross-border and cross-regional, involving parties from different cultural and linguistic backgrounds. Hence,

9 See for example, *Quentin Bryne-Sutton* (*supra* note 6), at p. 447.

10 See for example, “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions”, Document prepared by the WIPO Secretariat, May 2, 2003, WIPO/GRTKF/IC/5/3, Annex, p. 18, paragraph 51: “Expressions of” traditional culture (or “expressions of” folklore) may be either intangible, tangible or, most usually, a combination of the two. [...], paragraph 52: “Traditional cultural expressions for IP purposes include both tangible and intangible components. A separation between the two is artificial, as it may be said that tangible expressions are the “body” and intangible expressions the “soul” which together form a whole. That said, tangible and intangible expressions of culture may require different measures for their legal protection.”, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_5/wipo\\_grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_3.pdf)>.

11 *Supra* note 10, at paragraph 51.



access to a neutral and competent dispute resolution platform that all involved parties can trust, seems crucial.

In addition to complex legal issues, such disputes may involve sensitive, not necessarily legal elements, of a cultural, emotional, ethical, historical, moral, political, religious, or spiritual nature.<sup>12</sup> The Australian “carpet case” *Milpururru & Others v. Indofurn Pty Ltd*,<sup>13</sup> illustrates the kind of sensitive issues that may arise in such disputes. In this case, industrial carpet manufacturers were reproducing works of Aboriginal artists without their authorization. The artists’ works incorporated images and traditional knowledge of their community. Under what could be seen as the customary law or practice of the community, the artists could actually be held responsible by their community if a third party made inappropriate use of the traditional images, resulting in particular in possible communal sanctions of the artists. Also, a “moral rights” issue arose in this case, as the carpets seemed not to have reproduced the artists’ works in their integrity.

Further, conventional remedies available through court litigation, such as monetary damages, may not always be satisfactory in art and cultural heritage disputes, where parties may sometimes seek more comprehensive and sustainable solutions reflecting also the non-legal interests involved.

### 3. The Potential of ADR

As many commentators have explained, litigation in a national court may be entirely appropriate in certain art and cultural heritage disputes, for example where a recalcitrant party is involved that may be unwilling to consent to ADR, or where a legal precedent is sought for a deterrent effect for the future.

On the other hand, court litigation is normally a public process and ends generally with a winning and a losing party. This may affect long-term professional relationships and may not necessarily take account of relevant non-legal interests and issues.

12 For more background on the intricate and multilayered issues that may arise in disputes relating to indigenous knowledge, see for example, *Jane E. Anderson*, *Law, Knowledge, Culture: the Production of Indigenous Knowledge in Intellectual Property Law*, Edward Elgar Publishing Ltd., Cheltenham, UK, Northampton, USA, 2009, pp. 1 f.

13 (1994) 30 IPR 209. For an analysis of the case, see for example *Jane E. Anderson* (*supra* note 12), pp. 131 f.; as well as *Terri Janke*, *Minding Culture, Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO Publication, Geneva, 2003, pp. 8 ff. <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>>.

Also, in international art and cultural heritage disputes, different national court actions may need to be introduced in multiple jurisdictions concerned by the dispute. For example, if a cultural object has been reproduced and published without authorization in four different jurisdictions, court litigation may need to be undertaken in all four countries. This may not only be costly and lengthy, but there may also be a perceived national bias, potential conflict of laws, as well as a risk of contradictory outcomes, as legislation in the art and cultural heritage sector is not fully harmonized. For example, in the context of folklore, there are different national approaches regarding the copyright requirement of fixation.<sup>14</sup> Also, in the cultural property context, civil- and common-law jurisdictions have different approaches as to the good faith acquisition of stolen cultural property.<sup>15</sup>

In light of the foregoing, ADR may often be an interesting neutral avenue to consider for parties in art and cultural heritage disputes.

a) What is ADR?

ADR is generally considered as referring to a variety of private, out-of-court dispute resolution mechanisms that allow parties to resolve their dispute in a more flexible, time and cost efficient way, giving parties control over the process and the possibility to select one or several independent mediators, arbitrators or experts.<sup>16</sup>

ADR mechanisms are generally consensual, in that they can only be used if all parties consent to submitting their dispute to ADR. For future disputes, such consent can be achieved through the inclusion of an ADR clause into a contract, and for existing disputes through the conclusion of an ADR submission agreement. ADR can also be mandated by a competent court or through other jurisdiction creating mechanisms.

14 See *Agnès Lucas-Schloetter*, Folklore, Part III, Section 4, in: Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property – Genetic Resources, Traditional Knowledge and Folklore*, Kluwer Law International, The Hague 2008, pp. 383 f.

15 See *Marc-André Renold*, *Stolen Art: The Ubiquitous Question of Good Faith*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes: Papers emanating from the seventh PCS International Law Seminar, May 23, 2003*, Kluwer Law International, The Hague 2003, pp. 251 ff.

16 *Dispute Resolution for the 21st Century*, WIPO Publication No. 779, August 2007, p. 1, <[www.wipo.int/freepublications/en/arbitration/779/wipo\\_pub\\_779.pdf](http://www.wipo.int/freepublications/en/arbitration/779/wipo_pub_779.pdf)>; See also *Julian D. M. Lew/Loukas A. Mistelis/Stefan M. Kröll*, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003, pp. 9 f.

## aa) Mediation and Conciliation

Mediation is an informal procedure in which the parties request one or several mediators to assist them to settle their dispute. The mediator facilitates the settlement process by furthering dialogue between the parties and helping them to identify their underlying interests and to reach mutually satisfactory solutions. Depending on the parties' agreement, the mediator can play a facilitative or evaluative role, but cannot impose a decision on the parties.<sup>17</sup>

Through its informal, confidential, non-confrontational and interest-based nature, mediation may be particularly interesting in art and cultural heritage disputes, as it allows to take account of sensitive, non-legal issues, and to preserve party relationships. If successful, mediation ends in a settlement agreement between the parties, which would have the force of a contract.<sup>18</sup>

Conciliation has been considered as a type of mediation, with the difference that a conciliator would render a non-binding recommendation for a solution of the dispute, which the parties can accept or reject.<sup>19</sup>

## bb) Arbitration

Arbitration is a more formal procedure, whereby parties submit their dispute to one or several arbitrators who render a final and binding decision (arbitral award) on the parties' dispute.<sup>20</sup> The arbitral award would be internationally enforceable under the New York Convention.<sup>21</sup>

17 See for example, Guide to WIPO Mediation, WIPO Publication no. 449, January 2009, pp. 3-5, <[www.wipo.int/freepublications/en/arbitration/449/wipo\\_pub\\_449.pdf](http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf)>.

18 For example, in WIPO mediations, so far to date, about 73% of cases have resulted in settlement, see <[www.wipo.int/amc/en/center/caseload.html](http://www.wipo.int/amc/en/center/caseload.html)>.

19 For a definition of conciliation, see for example, *Erik Schäfer*, Schiedsgerichtsbarkeit und Mediation, in: Hellwig Torggler (ed.), *Praxishandbuch Schiedsgerichtsbarkeit*, Schulthess, Zürich 2007, paragraph 34; see also in the different context of disputes between States, *John Collier/Vaughan Lowe*, *The Settlement of Disputes in International Law*, Oxford University Press, Oxford, 2000, p. 29.

20 See for example Guide to WIPO Arbitration, WIPO Publication no. 919, January 2009, p. 3, <[www.wipo.int/freepublications/en/arbitration/919/wipo\\_pub\\_919.pdf](http://www.wipo.int/freepublications/en/arbitration/919/wipo_pub_919.pdf)>.

21 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)>.

cc) Expert Determination

In expert determination, an expert makes a determination on a specific matter submitted by the parties,<sup>22</sup> which can be a particularly interesting option for matters regarding the authenticity of an artwork.

dd) Combined Procedures

ADR procedures are flexible and may be combined with each other, as long as time limits are defined for each phase. For example, it may be agreed that in a first mediation phase, parties attempt to settle the dispute and if they fail, the dispute is submitted to arbitration.

Such combined procedures can increase the settlement chances and allow to define the issues in dispute and to settle part of them, which makes the following phases better prepared and may expedite the subsequent proceedings.<sup>23</sup>

b) Benefits of ADR for Art and Cultural Heritage Disputes

As explained by many commentators, ADR offers a number of benefits for art and cultural heritage dispute resolution.

For example, it provides a neutral forum that allows parties to resolve their dispute in a single procedure, which may be particularly interesting for international art and cultural heritage disputes as it avoids multijurisdictional actions. Parties can design the process in a neutral way, as they have the choice of the applicable law, language and place of mediation or arbitration, and of the nationality of the mediators, arbitrators or experts.

Most importantly, in ADR, parties can choose mediators, arbitrators or experts that have the relevant expertise in the applicable legal field and the subject matter of art and cultural heritage, as well as knowledge of the cultural and historical background of the concerned works of art.

22 See <[www.wipo.int/amc/en/expert-determination/what-is-exp.html](http://www.wipo.int/amc/en/expert-determination/what-is-exp.html)>.

23 Even in a pending arbitration, parties have the possibility to agree to settle the dispute before the arbitrator renders the award. It may be noted that so far to date, in WIPO arbitrations 58% of cases have resulted in settlement, while the remainder concluded generally with an arbitral award, see <[www.wipo.int/amc/en/center/caseload.html](http://www.wipo.int/amc/en/center/caseload.html)>.

ADR, and in particular mediation, provides a flexible forum, in which legal as well as sensitive non-legal issues may be considered. Also, in arbitration, parties have the option to ask the arbitrator to decide the dispute *ex aequo et bono*, which means on the basis of principles of fairness, or as *amiable compositeur*, so as to restore the relationship between the parties.<sup>24</sup>

For art and cultural heritage disputes that involve indigenous communities, ADR may allow the consideration of customary laws and protocols. This possibility has been analyzed in a WIPO Study on Customary Law and the Intellectual Property System in the Protection of TCEs and Traditional Knowledge, as further explained below.<sup>25</sup>

Moreover, ADR allows parties to adopt mutually satisfactory solutions and fair and balanced remedies that can preserve their relationships and provide a basis for future collaboration. A number of creative non-monetary solutions have been envisaged for art and cultural heritage disputes, such as the provision of works of art in lieu of monetary damages, the conclusion of long-term loan agreements, shared ownership or custodianship, the formal recognition of ownership, and capacity-building programs in exchange for the lending of an object.<sup>26</sup>

Except where otherwise required by law, ADR mechanisms allow parties, to a large extent, to keep the proceedings and outcomes confidential.<sup>27</sup> Confidentiality can help to preserve reputation, which may be important in the international art market. It may also be paramount where sacred traditional material is involved. Depending on the circumstances, parties can agree to balance confidentiality provisions with public interest requirements.

The advantage of arbitration is that arbitral awards can be internationally enforced through national courts without a review of the substance of the case, in accordance with the New York Convention, which currently has 144 Member States. This can be interesting in art and cultural heritage disputes where a party seeks to implement a decision in another country.

24 See for example, Article 59 (a) WIPO Arbitration Rules, Article 53 (a) WIPO Expedited Arbitration Rules that provide for such possibility. For a definition of these concepts, see for example *Julian D. M. Lew/Loukas A. Mistelis/Stefan M. Kröll* (*supra* note 16), pp. 470 ff.

25 See Section IV.2.c).

26 For examples of possible solutions in the context of restitution disputes, see for example *Marie Cornu/Marc-André Renold* (*supra* note 6).

27 For instance, the WIPO Mediation (Articles 14-17), Arbitration (Articles 73-76), Expedited Arbitration (Articles 66-69) and Expert Determination (Article 15) Rules provide for the confidentiality of the proceedings, unless the parties agree otherwise and except where otherwise required by law.

#### 4. Elements for Further Consideration

Certain elements in art and cultural heritage ADR may warrant further reflection on different levels. Some of these elements are set out below, without further development however, which would exceed the scope of this article.

For example, establishing jurisdiction is a crucial element in art and cultural heritage ADR. As disputes may often arise without a contractual basis, due consideration needs to be given to effective means of creating jurisdiction. In that context, the development of tailored ADR clauses and submission agreements, ADR mechanisms in art and cultural heritage normative instruments, voluntary ADR pledges by cultural institutions, administrative mechanisms, or references in national laws may be considered.

While not unique to ADR, in certain instances, consideration may need to be given to how public cultural institutions are represented in ADR proceedings, as well as to their capacity to dispose of the cultural object at stake.

Also, where indigenous communities are involved, due consideration may need to be given to their identification and representation.

Further, art and cultural heritage disputes may involve parties with a different degree of economic power. Hence, issues of cost, funding and legal assistance may need to be examined.

### *III. The Role of the World Intellectual Property Organization (WIPO)*

Some of the elements set out above, are also of relevance in WIPO's work in this area. WIPO is an intergovernmental organization and a specialized agency of the United Nations with its headquarters in Geneva, Switzerland.<sup>28</sup> Its work is "dedicated to develop a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest".<sup>29</sup> WIPO has currently 184 Member States and administers 24 international Treaties.<sup>30</sup>

28 See WIPO's website, at <[www.wipo.int](http://www.wipo.int)>. WIPO also has external offices, currently in Brazil, Japan, New York and Singapore.

29 See <[www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html)>.

30 For the full list of treaties, see <[www.wipo.int/treaties/en/](http://www.wipo.int/treaties/en/)>.

WIPO was founded in 1967 by the WIPO Convention,<sup>31</sup> conferring to it the mandate “to promote the protection of IP throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization”<sup>32</sup>. The organization’s history dates back to 1883 with the adoption of the Paris Convention for the Protection of Industrial Property<sup>33</sup>, and to 1886 when the Berne Convention for the Protection of Literary and Artistic Works was adopted.<sup>34</sup>

WIPO’s core tasks include normative work on the evolution of international IP law, as well as assisting governments and organizations in exploring IP for economic development, servicing global registration and filing systems for certain IP rights, as well as the provision of dispute resolution services.<sup>35</sup>

Among other subject areas, WIPO’s activities include copyright, cultural heritage, traditional knowledge and TCEs/EoF. It thereby works with cultural institutions, such as museums, archives and libraries, as well as with indigenous communities and other stakeholders. For clarification purposes, it may be noted that this area of WIPO’s work focuses on the protection against various forms of misappropriation and unauthorized use of art and cultural heritage, whereas UNESCO concentrates on the preservation, safeguarding and promotion of cultural property.

#### *IV. Reflections on Art and Cultural Heritage ADR within WIPO’s Program on Intellectual Property (IP), Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF)*

The potential of ADR for resolving art and cultural heritage related disputes has been addressed in different instances in the work of WIPO’s program on IP and GR, TK, TCEs/EoF.

31 Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967 and amended on September 28, 1979. Available at <[www.wipo.int/treaties/en/convention](http://www.wipo.int/treaties/en/convention)>.

32 See Article 3 of the WIPO Convention.

33 For the full text of the Paris Convention, see <[www.wipo.int/treaties/en/ip/paris/](http://www.wipo.int/treaties/en/ip/paris/)>.

34 For the full text of the Berne Convention, see <[www.wipo.int/treaties/en/ip/berne/](http://www.wipo.int/treaties/en/ip/berne/)>.

35 See WIPO – An Overview, WIPO Publication No. 1007E, 2009, at <[www.wipo.int/about-wipo/en/report.html](http://www.wipo.int/about-wipo/en/report.html)>.

## 1. Background

WIPO reflections on folklore, in particular in collaboration with UNESCO, date back to the late 1970s.<sup>36</sup> In 1982, the two organizations issued Model Provisions for national laws related to folklore,<sup>37</sup> and in 1997 the UNESCO/WIPO World Forum on the Protection of Folklore adopted a plan of action and recommended further work in this area.<sup>38</sup>

In 1998 and 1999, WIPO conducted fact-finding missions in nine regions around the world to identify the needs and expectations of holders of TK and TCEs.<sup>39</sup> It may be noted that the report on these missions mentions in particular arbitration and mediation as possible means of enforcement for IP holders.<sup>40</sup> Also, the fact-finding mission to North America revealed amongst other issues that customary laws and protocols include a variety of mechanisms for dispute resolution.<sup>41</sup>

WIPO's program on IP and GR, TK, and TCEs started operating in 1998 to address the role that IP can play in protecting TK and TCEs from misappropriation, and in generating and equitably sharing benefits from their commercialization, as well as the role of IP in access to and benefit-sharing in GR.<sup>42</sup>

Following in particular round-tables and extensive regional consultations in 1999, it was proposed to create a specific intergovernmental body within WIPO to facilitate discussions on IP and GR, TK and TCEs.<sup>43</sup>

Accordingly, the WIPO General Assembly established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at its 26<sup>th</sup> Session in 2000.<sup>44</sup>

36 For a more detailed history of WIPO's work in this area, see *Peter-Tobias Scholl/Anja von Hahn*, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, Part II, Section 6.I., in: Silke von Lewinski (*supra* note 14), pp. 36 f.

37 WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, see a completed version of 1985 <[www.wipo.int/export/sites/www/tk/en/laws/pdf/unesco\\_wipo.pdf](http://www.wipo.int/export/sites/www/tk/en/laws/pdf/unesco_wipo.pdf)>.

38 For more details and references, see *Agnès Lucas-Schloetter* (*supra* note 14), pp. 460 f.

39 Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva April 2001, <[www.wipo.int/tk/en/tk/ffm/report/index.html](http://www.wipo.int/tk/en/tk/ffm/report/index.html)>.

40 Part I of the Report "Framing the IP needs and Expectations of TK Holders", p. 48.

41 Part II of the Report "Identifying the IP Needs and Expectations of TK Holders: Results of the Nine Fact-Finding Missions", p. 126.

42 See <[www.wipo.int/tk/en/](http://www.wipo.int/tk/en/)>.

43 See document WIPO/GA/26/6, p. 3, with references on the background of the creation of this body, <[www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=1460](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1460)>.



2. ADR Considerations in the Forum of the WIPO Intergovernmental Committee on IP, GR and Folklore (IGC)

The IGC has been holding regular sessions since 2001.<sup>45</sup> In 2009, its mandate was renewed for another two years, under which it is currently undertaking “text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GR, TK and TCEs”.<sup>46</sup>

In addition to the 184 WIPO Member States, a number of intergovernmental organizations, as well as nongovernmental organizations (including representatives of indigenous peoples and communities), which are permanent observers to WIPO or specifically accredited to the IGC, also participate in the IGC sessions.<sup>47</sup>

The potential role of ADR has been addressed in the context of the IGC in a number of policy discussions, draft provisions, and working documents.

a) By Member States in Policy Discussions

Some WIPO Member States participating in the IGC have raised the potential of considering ADR and the need to further reflect on ADR options in particular in relation to IP and TCEs.

For example, the Asian Group and China “[r]ecogniz[ed] that the WIPO Arbitration and Mediation Center offers arbitration and mediation services for the resolution of international commercial disputes between private parties”, and proposed that “WIPO should study possibilities of offering alternative dispute resolution services, including but not limited to arbitration and mediation, which are particularly appropriate for the problems involving intellectual property issues related to traditional knowledge and folklore.”<sup>48</sup>

44 Report adopted by the General Assembly WIPO/GA/26/10, Agenda Item 15, page 23, <[www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/govbody/en/wo\\_ga\\_26/wo\\_ga\\_26\\_10.html](http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/govbody/en/wo_ga_26/wo_ga_26_10.html)>.

45 See <[www.wipo.int/tk/en/igc/](http://www.wipo.int/tk/en/igc/)>.

46 Report of the WIPO General Assembly, 38th Session, 2009, WIPO/GA/38/20, Agenda Item 28, paragraph 217a, <[www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130286](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130286)>.

47 See <[www.wipo.int/tk/en/ngoparticipation/](http://www.wipo.int/tk/en/ngoparticipation/)>.

48 Position Paper of the Asian Group and China, December 3, 2001, WIPO/GRTKF/IC/2/10, Annex, p. 2, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_2/wipo\\_grtkf\\_ic\\_2\\_10.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_10.doc)>.

Under a different angle, the African Group indicated that it “[...] favors the establishment of a comprehensive international binding instrument on the protection of expressions of folklore, with some form of dispute settlement mechanism either similar to that which is obtainable under the TRIPS Agreement or a mediation process as is provided by the WIPO Arbitration and Mediation Center.”<sup>49</sup>

The role of ADR for disputes involving IP and TCEs has also been addressed by different delegations in the course of discussions at the IGC sessions.<sup>50</sup>

b) In Draft Provisions for an International Legal Instrument (or Instruments)

In 2004, the IGC decided that the WIPO Secretariat should prepare drafts of “an overview of policy objectives and core principles for protection of TCEs; and an outline of the policy options and legal mechanisms for the protection of TCE subject matter [...]”.<sup>51</sup>

Accordingly, the WIPO Secretariat submitted drafts of “Revised provisions for the protection of TCEs”, that have been the basis of discussions and comments at different IGC sessions.<sup>52</sup>

As did previous drafts, the current and latest draft in discussion also proposes a role for ADR in the TCEs context.<sup>53</sup> Draft Article 7(2)(d) on “Formalities” and the related commentary suggest that the proposed organization or office for the registration and notification of TCEs would also be responsible for the resolution of disputes between indigenous communities about their entitlement to benefit from the protection of TCE/EoF. For this purpose, it is proposed in particular, that such organization or office should use customary laws and processes, as well as ADR, as far as possible. Draft Article 8(1) on “Sanctions, Remedies and Exercise of Rights” and the related commentary mention dispute-resolution mechanisms as some of the measures that should be available in cases of breach of the protection for the TCEs/EoF, referring also to the desirability of ADR.

49 Position paper of the African Group, June 14, 2002, WIPO/GRTKF/IC/3/15, Annex, p. 7, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_3/wipo\\_grtkf\\_ic\\_3\\_15.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_15.doc)>.

50 See the different IGC session reports available at: <[www.wipo.int/meetings/en/topic.jsp?group\\_id=110](http://www.wipo.int/meetings/en/topic.jsp?group_id=110)>.

51 See Report of the Sixth Session of the IGC, WIPO/GRTKF/IC/6/14, paragraph 66, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_6/wipo\\_grtkf\\_ic\\_6\\_14.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_14.doc)>.

52 See for example the first such draft WIPO/GRTKF/7/3, dated August 20, 2004, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_3.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.doc)>.

53 WIPO/GRTKF/17/4 PROV., dated June 7, 2010, Annex, pp. 44, 45, 48, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_4\\_prov.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_4_prov.pdf)>.

c) In IGC Working Documents

Responding to a questionnaire by the WIPO Secretariat on national experiences with the legal protection of EoF, certain States proposed that the IGC examine mechanisms, such as ADR, for the resolution of issues relating to the extra-territorial protection of folklore (i.e., claims on folklore involving more than one country in a region).<sup>54</sup> It also addressed the issue of the resolution of domain name disputes that may involve indigenous names.

Moreover, the intricacies of settling international disputes relating to GR, TK and TCEs between States, as well as between private parties, were part of a specific analysis within a WIPO study on the international dimension of TK, TCEs and GR.<sup>55</sup> In relation to such disputes between private parties, the study found that indigenous and local communities and other TK holders may “[...] encounter practical hurdles in monitoring and enforcing their rights, whether they are conventional or *sui generis* IP rights, or based on contracts and licenses.” It also pointed out that they may need “[...] an effective and culturally appropriate mechanism for enforcing rights, seeking remedies for breaches, and settling disputes with commercial partners, with effect in multiple jurisdictions”. The study further noted that “[t]here are salient aspects of international disputes over genetic resources, traditional knowledge and TCEs which may at once lend themselves to alternative dispute resolution and yet call for specially adapted rules for mediation or arbitration.” These would include in particular the international nature of such disputes involving often parties from different countries; possible conflicts of laws; considerations of customary law; a “possible asymmetry of interests” including a “cultural and linguistic gap”; the “need for unconventional remedies”; the fact that such disputes may involve “religious, moral, cultural or ethical factors, rather than strictly legal issues”; the difficulty for holders of TK and TCEs to “gain effective access to formal judicial systems, particularly in multiple jurisdictions”.

54 See Final Report on National Experiences with the Legal Protection of EoF, WIPO/GRTKF/IC/3/10, March 25, 2002, in particular p. 59 and Annex I, p. 40, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_3/wipo\\_grtkf\\_ic\\_3\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_10.pdf)>. The Consolidated Analysis of the Legal Protection of TCEs also echoes this proposal, WIPO/GRTKF/IC/5/3, May 2, 2003, Annex, p. 82, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_5/wipo\\_grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_3.pdf)>.

55 Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The International Dimension, WIPO/GRTKF/IC/6/6, November 30, 2003, prepared by the WIPO Secretariat following a request from the WIPO General Assembly that the IGC consider in particular the “international dimension” of its work, in particular pp. 23-24, <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_6/wipo\\_grtkf\\_ic\\_6\\_6.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_6.pdf)>.

Another WIPO study examined in particular the role that ADR can play in the recognition of customary law and protocols in IP disputes involving TCEs and TK.<sup>56</sup> According to this study, customary laws and protocols could be “incorporated into ADR proceedings

- (i) to provide direct guidance concerning the substantial issues in a dispute (such as custodianship over TK or TCEs, the sharing of TK and TCEs across national boundaries, determining what sharing of benefits should be considered equitable, and the practical interpretation of the principle of prior informed consent);
- (ii) to establish appropriate dispute resolution procedures, such as forms of community consultation, consent and decision-making, that reflect customary procedures;
- (iii) to guide the development and agreement upon appropriate remedies, which may include financial or non-financial forms of compensation and other acts of restitution, acknowledgement of cultural and spiritual concerns, expiation of cultural or spiritual offence, and undertakings to abide by certain practices in the future.”

3. Further ADR Considerations within WIPO’s Program on IP and GR, TK and TCEs/EoF

In addition to work in the forum of the IGC, WIPO’s Program on IP and GR, TK and TCEs/EoF has a capacity building role, assisting government officials, indigenous and local communities, nongovernmental organizations, as well as research and cultural institutions.<sup>57</sup> This WIPO Program thereby undertakes awareness-raising activities, training programs, legislative and policy development. It also operates the “Creative Heritage Project”, which provides best practices, guidelines and resources for cultural institutions, museums and indigenous communities.<sup>58</sup>

It also collaborates with different actors, such as UNESCO, ICOM, the Food and Agriculture Organization (FAO), and the Convention on Biological Diversi-

56 WIPO revised issues paper, “Customary Law and the IP System in the Protection of TCEs and TK”, version 3.0, December 2006, p. 33, <[www.wipo.int/tk/en/consultations/customary\\_law/index.html](http://www.wipo.int/tk/en/consultations/customary_law/index.html)>.

57 See *Jessyca Van Weelde/Wend Wendland*, Capacity Building – Intellectual Property and Traditional Knowledge, WIPO Magazine, September 2009, Issue 5, pp. 10 f.

58 See <[www.wipo.int/tk/en/culturalheritage](http://www.wipo.int/tk/en/culturalheritage)>.

ty (CBD), as well as the WIPO Program on Copyright and the WIPO Arbitration and Mediation Center.

WIPO's program on IP and GR, TK and TCEs also issues publications, a number of which address also the potential role of ADR for resolving disputes involving IP and cultural heritage. For example, the WIPO Guide on Managing Intellectual Property for Museums<sup>59</sup> emphasizes in particular that ADR can be a time and cost-efficient tool for museums to resolve IP contractual disputes in which they may be involved. It also explains how museums can use ADR contract clauses in their IP agreements in order to provide for the eventuality of future disputes.<sup>60</sup>

#### V. *The WIPO Arbitration and Mediation Center's Procedural Experience in Art and Cultural Heritage ADR*

The role of the ADR services of the WIPO Arbitration and Mediation Center (WIPO Center) has been discussed in the art and cultural heritage context,<sup>61</sup> and parties have applied WIPO ADR procedures to resolve disputes in this area. In collaboration with concerned stakeholders, the WIPO Center also furthers the development of tailored art and cultural heritage ADR services.

##### 1. The Role of the WIPO Arbitration and Mediation Center

The WIPO Center was established in 1994 to respond to the need for the creation of a specific dispute resolution service in the IP area.<sup>62</sup> It is based in Geneva, Switzerland, and also has a regional office in Singapore since January 2010.

59 This WIPO-commissioned guide was prepared by Rina Elster Pantalony, and published in August 2007, <[www.wipo.int/copyright/en/museums\\_ip](http://www.wipo.int/copyright/en/museums_ip)>.

60 See Part I, section 2.7.

61 See for example, *Marie Cornu/Marc-André Renold* (*supra* note 6); *Christian Wicher/Wend Wendland* (*supra* note 6); *Gabrielle Kaufmann-Kohler* (*supra* note 6), in particular at p. 149; see also *Martin Skrydstrup*, Should ICOM Adjudicate Cultural Property Disputes? A review Essay from the Triennial in Seoul, at <<http://kunst.no/alias/HJEMMESIDE/icme/icme2004/repatriation.html>>, referring to the WIPO Center as “an interesting model to study” for the resolution of cultural property disputes.

62 See for example, *Francis Gurry*, The WIPO Arbitration and Mediation Center and its Services, *The American Review of International Arbitration*, Vol. 5, No. 2, 1994, pp. 197 ff.: “[t]he underlying reason for the establishment of the Center was a belief in the speci-

As part of an international organization, the WIPO Center is recognized as an international and neutral dispute resolution provider particularly appropriate for the resolution of cross-border and cross-cultural disputes.

Leading international dispute resolution specialists and IP experts developed the WIPO Mediation, Arbitration and Expedited Arbitration Rules in 1994, and the Expert Determination Rules in 2007 (WIPO ADR Rules).<sup>63</sup>

WIPO ADR procedures are provided on a not-for-profit basis for the cost and time efficient resolution of IP related disputes, as well as for domain name disputes. The WIPO ADR Rules contain specific provisions particularly adapted for IP related issues (e.g., confidentiality, interim measures, and technical evidence). However, the scope of the WIPO ADR Rules is not limited to IP matters.<sup>64</sup> Hence, the WIPO Center has also administered disputes in other areas than IP, as well as disputes that combined IP and non-IP issues.<sup>65</sup>

Most of the cases administered by the WIPO Center involve private parties. However, public entities, such as universities, research centers, and collecting societies, have also been parties in WIPO cases. A State entity may be a party in a WIPO ADR procedure, provided that it has expressed its consent, as well as the other involved party(ies), to submit the dispute to such a procedure.<sup>66</sup>

ficity of intellectual property as a subject matter, and, thus, of disputes concerning intellectual property, coupled with the conviction that arbitration and other dispute-resolution alternatives offered particularly suitable means of accommodating the specific characteristics of intellectual property disputes”. On the history of the WIPO Center, see also: Development of WIPO’s Dispute Resolution Services, World Intellectual Property Organization, 1992-2007, Part III, pp. 93 ff., <[www.wipo.int/amc/en/history/](http://www.wipo.int/amc/en/history/)>.

- 63 WIPO Arbitration, Mediation, and Expert Determination Rules and Clauses, WIPO Publication No. 446, January 2009, <[www.wipo.int/freepublications/en/arbitration/446/wipo\\_pub\\_446.pdf](http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf)>. For a commentary on the WIPO Arbitration Rules, see *Hans Smit* (ed.), *WIPO Arbitration Rules: Commentary and Analysis*, Juris Publishing, Juris Net, New York 2000.
- 64 See Article 2 “Scope of Application of Rules” of the WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules. The only requirement is party agreement to submit the dispute(s) to a WIPO ADR procedure.
- 65 It seems crucial that the entire dispute and all issues involved can be addressed in a single forum. Referring parts of the same dispute to different fora may lead to contradictory results and hinder case efficiency.
- 66 See *The Services of the WIPO Arbitration Center*, WIPO Publication No. 445, 1995, p. 18, <[www.wipo.int/freepublications/en/arbitration/445/wipo\\_pub\\_445.pdf](http://www.wipo.int/freepublications/en/arbitration/445/wipo_pub_445.pdf)>.

a) Administering institution

As an administering institution, the WIPO Center manages cases filed under WIPO ADR Rules. It thereby uses an active case management system, which includes assistance in the appointment of mediators and arbitrators, management of fees and deposits, facilitation of case communication<sup>67</sup>, as well as logistical and technical assistance.

To date, the WIPO Center has administered over 220 mediation and arbitration cases, most of which have been filed in the last five years.<sup>68</sup> The majority of cases concerned contractual disputes arising mainly out of IP license agreements, a number of which involved art and/or cultural heritage (as further explained below). Non-contractual disputes concerning IP infringement have also been submitted to WIPO mediation.

b) Resource Center

The WIPO Center also functions as a resource center, raising awareness about the role that ADR can play in different sectors.

For this purpose, it makes available ADR resources in different languages, such as the WIPO ADR Rules, model contract ADR clauses, publications, and it provides training. An important tool is its growing database of over 1,500 mediators and arbitrators from over 70 countries, including art and cultural heritage specialists.

It also provides procedural guidance upon request to interested parties and entities. More specifically, it offers its “good offices” through its “Submission Advisory Service”.<sup>69</sup> The aim of the Submission Advisory Service is for the WIPO Center, as a neutral intermediary, to promote the consideration by both parties of the possibility of submitting their difference to a WIPO procedure.

Capacity building and technical assistance are also part of its activities, whereby it assists entities in the development of dispute resolution systems and related training.

67 For example through an electronic online case communication system: WIPO Electronic Case Facility (WIPO ECAF), see <[www.wipo.int/amc/en/ecaf](http://www.wipo.int/amc/en/ecaf)>.

68 See WIPO Center caseload page at : <[www.wipo.int/amc/en/center/caseload.html](http://www.wipo.int/amc/en/center/caseload.html)>.

69 See The Services of the WIPO Arbitration Center (*supra* note 66), p. 20 f.

aa) Tailored ADR Services

The WIPO Center also develops tailored dispute resolution schemes that are adapted to the particular needs of specific sectors in collaboration with associations and other entities that face recurrent disputes.<sup>70</sup> For example, it has developed specific tailored ADR Rules for domain name disputes,<sup>71</sup> for disputes involving members of certain collecting societies,<sup>72</sup> and for disputes in the film and media sector.<sup>73</sup>

The WIPO Center also works with stakeholders in emerging IP-related areas, such as biodiversity, GR, TK, TCes/EoF and access to health care, in order to explore appropriate dispute resolution systems. For example, it has been providing technical advice to the Secretariat of the International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA) on a dispute resolution mechanism in the context of the ITPGRFA and the related Standard Material Transfer Agreement.<sup>74</sup> The WIPO Center has also been involved in informal explorations of ADR's potential in the context of the Convention on Biological Diversity of June 5, 1992.

70 For more details, see *Sarah Theurich*, *Designing Tailored Alternative Dispute Resolution in Intellectual Property: the Experience of WIPO*, in: Jacques de Werra (ed.), *Resolution of Intellectual Property Disputes*, Actes de la Journée de propriété intellectuelle, édition ip-pi, Schulthess, expected publication fall 2010.

71 The WIPO-initiated Uniform Domain Name Dispute Resolution Policy (UDRP) was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999, and as of 2010, the WIPO Center has administered some 18,000 such UDRP cases. On domain name dispute resolution, see <[www.wipo.int/amc/en/domains](http://www.wipo.int/amc/en/domains)>.

72 WIPO Expedited Arbitration for AGICOA, <[www.wipo.int/amc/en/arbitration/agicoa](http://www.wipo.int/amc/en/arbitration/agicoa)>.

73 In December 2009, the WIPO Center launched the "WIPO Mediation and Expedited Arbitration Rules for Film and Media", developed in consultation with international industry experts, see <[www.wipo.int/amc/en/film](http://www.wipo.int/amc/en/film)>. These Rules are particularly appropriate for international film and media related disputes, relating for example to co-production agreements, copyright issues, distribution agreements, new media agreements, broadcasting agreements and TV format related disputes.

74 See Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, Tunis, Tunisia, 1-5 June 2009, IT/GB-3/09/Report, Appendix A.5, Resolution 5/2009, p. 25, <<ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf>>.



## bb) Art and Cultural Heritage ADR Services

In close collaboration with concerned entities, such as WIPO's programs dealing with TCEs/EoF and copyright, the WIPO Center furthers the development of specifically tailored ADR services for the art and cultural heritage sector.

For this purpose, it has been identifying a special list of art and cultural heritage mediators, arbitrators and experts that can and have been appointed in disputes in this area.

It has also been advising art and cultural heritage stakeholders on appropriate dispute resolution options, as well as efficient drafting of dispute resolution clauses and submission agreements. For example, it contributed to the development of a model agreement for a licence on digitisation of out of print works for the i2010 Digital Libraries Initiative, which includes a specifically adapted WIPO Expert Determination clause.<sup>75</sup>

Further, the WIPO Center participates as an observer in the sessions of the UNESCO ICPRCP on the development of a conciliation and mediation procedure for the resolution of disputes relating to the return or restitution of cultural property, at which it shares its procedural experience.<sup>76</sup>

## 2. Art and Cultural Heritage Case Examples

Disputes have been submitted to the WIPO Center that related to art and/or cultural heritage, involving different parties, such as an artist, collecting societies, galleries, an indigenous community, a museum, a producer, a publishing house. Two of such matters are summarized below in anonymized form (in light of the sensitivities involved, as well confidentiality requirements), to illustrate the issues that can arise in such disputes and how they can be addressed by ADR.

75 See Article 10 of the model license agreement, available at: [www.ifrro.org/upload/documents/i2010%20Copyright%20Subgroup\\_Final%20report\\_Annex%203.pdf](http://www.ifrro.org/upload/documents/i2010%20Copyright%20Subgroup_Final%20report_Annex%203.pdf).

76 UNESCO ICPRCP (*supra* notes 3 and 4).

a) WIPO “Good Offices” in a Cultural Heritage Matter between an Indigenous Community and a Museum

The WIPO Center has recently carried out its “good offices”<sup>77</sup> in a cultural heritage related matter between an indigenous community and a museum that were based in different countries.<sup>78</sup>

The indigenous community had approached the WIPO Center requesting mediation and arbitration assistance in a matter concerning an ancient cultural object that it regarded as sacred and considered to belong to the indigenous community. Amongst other issues, it indicated that the cultural object had made its way to the other country years ago where it was eventually purchased by the museum and included in the museum’s exhibition where it is also displayed today. It further alleged that the image of the cultural object had been reproduced without its authorization. The indigenous community hence sought to explore through mediation and arbitration, in particular its official recognition as the original owner of the creation of the object including associated moral, economic and other rights; an agreement to share financial or commercial benefits associated with the object; compensation for the reproduction of the object; and any other relevant arrangement, including the repatriation of the object.

Following the indigenous community’s request for assistance in this matter, the WIPO Center exercised its “good offices” in order to explore the potential interest of the museum to agree to submit the matter to mediation and/or arbitration.

The museum in turn, sent a response to the WIPO Center, setting out the facts from its perspective and seeking to address concerns raised by the indigenous community. In particular, it explained its differing understanding of the nature of the cultural object and attempted to clarify the history of the purchase of the object. In that regard it stated that it had consulted the competent authority in the country of the indigenous community prior to the purchase. The museum also explained that it did not use the object for commercial gain but for protection and education purposes. In particular, it alleged that the reproduction was made independently and that it did not receive benefits from it. Finally, it considered having clarified the facts and addressed the concerns of the indigenous community

77 For a definition of the “good offices” service, see *supra* Section V.1.b).

78 This summary is based on exchanges made by the indigenous community and the museum with the WIPO Center in this matter. The alleged issues and arguments have been summarized in order to prevent any identification of the matter.

in its response, and therefore did not see how the matter could be further resolved through mediation or arbitration.

While this matter has not been formally submitted to mediation or arbitration, it still permits to draw interesting lessons on ADR in cultural heritage disputes. Indeed, the “good offices” involvement by a neutral institution seems to have contributed to further the dialogue between the indigenous community and the museum, by providing a platform which allowed them to set out the facts and their positions. Also, this matter illustrates the types of issues that may arise in cultural heritage disputes and in particular the possible combination of intangible and tangible elements in a single matter. It further shows that there seems to be increasing awareness amongst indigenous communities and museums about the availability of ADR options and that ADR is seriously considered by concerned stakeholders for the resolution of cultural heritage related disputes.

#### b) WIPO Arbitration in an Artist Promotion Dispute

The following is a summary of a different kind of art-related case that was administered by the WIPO Center. It shows in particular the flexibility of ADR and the types of creative solutions that may be found through this avenue.

In this case,<sup>79</sup> a European art gallery had concluded an exclusive cooperation agreement with a European artist in order to promote the artist in the international market. The agreement contained a WIPO arbitration clause providing for a three-member arbitral tribunal. Three years after the signing of the agreement, the parties’ relationship began to deteriorate and the artist sent a notice terminating the agreement. At that point, the art gallery initiated WIPO arbitration proceedings.

Following consultations between the parties and the WIPO Center, the WIPO Center appointed three arbitrators experienced in art law issues.

After studying the parties’ pleadings, the tribunal considered that there may be potential for settlement. With the agreement of the parties, the tribunal issued a preliminary case assessment encouraging the parties to resume settlement negotiations which the parties had attempted at an earlier stage. The parties did indeed reach a settlement and asked the tribunal to render a consent award<sup>80</sup>, in-

79 This and other anonymized case summaries are available on the WIPO Center’s website at : <[www.wipo.int/amc/en/arbitration/case-example](http://www.wipo.int/amc/en/arbitration/case-example)>.

80 In WIPO arbitration and expedited arbitration, parties can jointly request the arbitrator(s) to issue a consent award, which is an arbitration award that records the settlement

corporating the parties' settlement agreement. The terms of the settlement included the termination of the cooperation agreement and the provision of a number of art works by the artist to the gallery in final settlement.

## *VI. Conclusion*

As illustrated, ADR may provide interesting avenues for addressing the particular features and needs in art and cultural heritage disputes.

It is hoped that some of the elements developed in reflections on art and cultural heritage ADR in the work of WIPO, may also be relevant in related discussions in other fora.

Finally, the procedural and technical experience of the WIPO Center with art and cultural heritage cases may assist to shed light on some of the practical issues that may arise in such disputes.

reached by the parties (Article 65(b) of the WIPO Arbitration Rules, Article 58 WIPO Expedited Arbitration Rules).