



IBA Art, Cultural Institutions and Heritage Law Committee
Museum Law Session - Madrid, October 5, 2009

WIPO and Alternative Dispute Resolution in the Museum Sector

Sarah Theurich
WIPO Arbitration and Mediation Center





World Intellectual Property Organization (WIPO)

- Headquarters in Geneva, Switzerland
- 184 Member States
- Administers 24 Treaties
- WIPO Activities
 - Normative (treaties, legislative assistance, advancing intellectual property issues)
 - Development cooperation (reinforcing legal infrastructure)
 - Registration and other services (e.g. Patent Cooperation Treaty, Madrid Protocol for marks, Arbitration and Mediation Center)

WIPO Activities in the Museum Sector

- **WIPO Traditional Knowledge Division and WIPO Copyright Division**
 - Collaboration with UNESCO, ICOM, cultural institutions, indigenous communities and other stakeholders
 - WIPO Creative Heritage Project
 - WIPO Guide on Managing IP for Museums
 - WIPO Compendium for museums, archives and libraries on IP management relating especially to indigenous collections – peer review process
 - International Conference on IP and Cultural Heritage in the Digital World (Madrid, October 29, 30, 2009)
- **WIPO Arbitration and Mediation Center**
 - Close collaboration in development of tailored ADR services for the art and cultural heritage sector

Role of the WIPO Arbitration and Mediation Center

- Established in 1994 as part of WIPO
- **International and neutral forum** especially appropriate for cross-border and cross-cultural disputes
- **Objective:** to promote and facilitate, on a not-for-profit basis, the alternative resolution of intellectual property and related disputes
- **Administering Authority:** WIPO Mediation, Arbitration, Expert Determination Rules and Clauses, Domain Name Disputes
- **Resource Center:**
 - IP ADR Guidance, and “good offices” submission advisory service
 - development of tailored ADR services for specific sectors (e.g., art and cultural heritage, entertainment - AGICOA, biodiversity..4)

WIPO Mediation and Arbitration Case Load

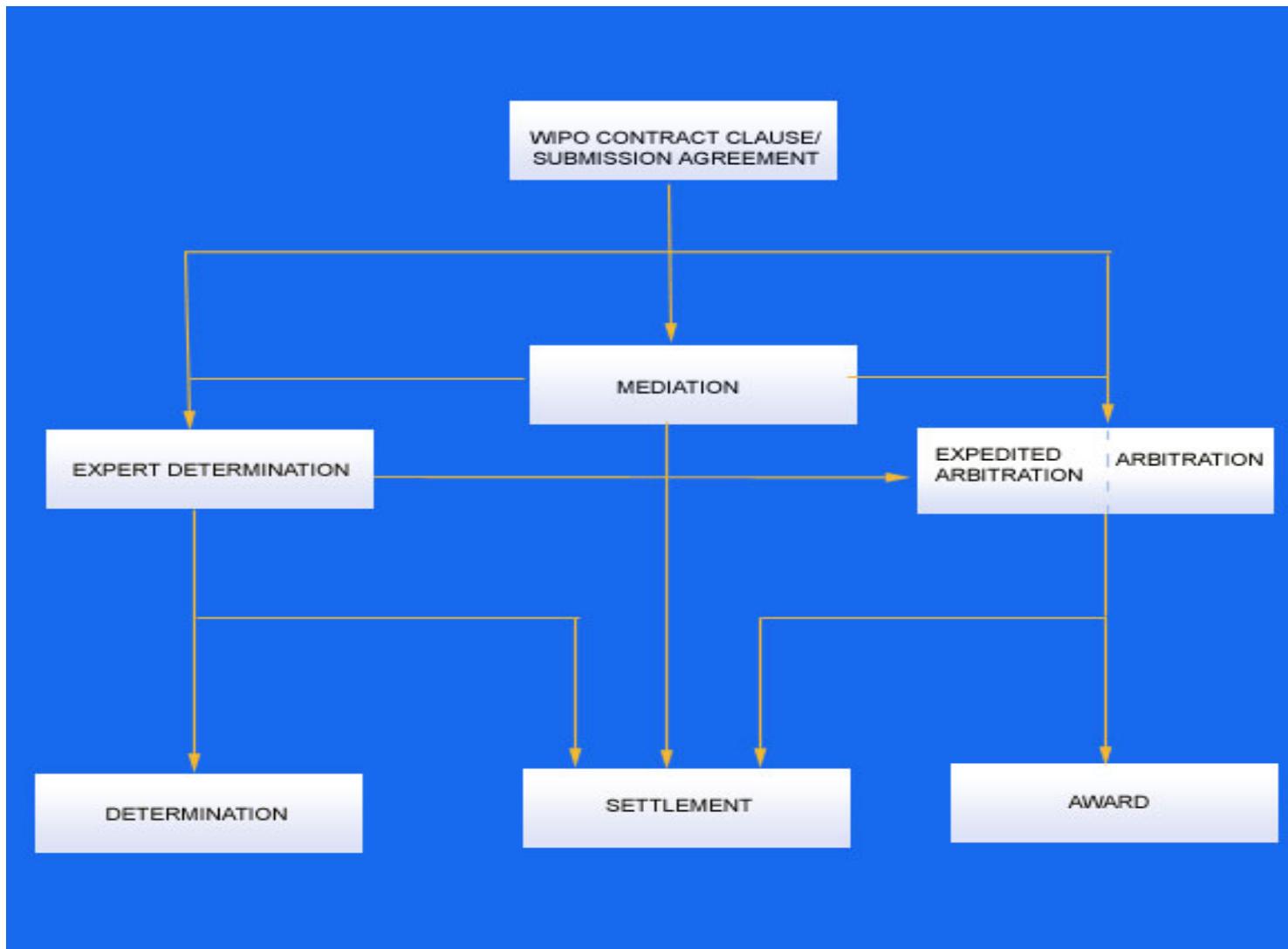
- **+200 mediations and arbitrations**
 - Contractual: copyright, artist-gallery contracts, collecting societies, publishing house transactions, settlement agreements, distribution agreements, software/IT, patent licenses, R&D, joint ventures, trademark coexistence agreements...
 - Non-contractual: infringement cases
 - Cases referred by courts
- **Remedies**: damages, infringement declarations, specific performance (e.g., provision of paintings by the artist instead of monetary damages)

Alternative Dispute Resolution (ADR)

***ADR** allows consenting parties to solve their disputes outside court in a flexible, neutral, confidential, cost and time efficient way with the help of an independent intermediary.*

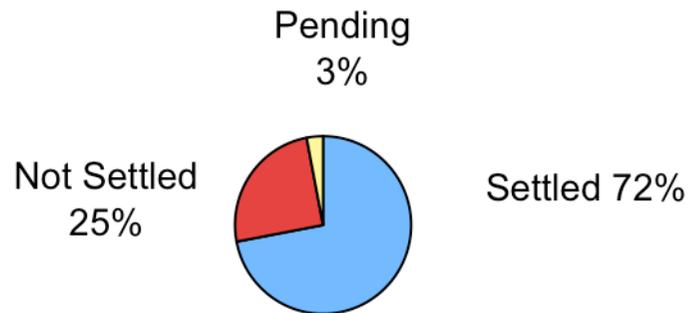
- **Mediation:** an informal procedure in which one or more neutral mediator(s) assist the parties in reaching a settlement of their dispute, by helping to identify their respective interests. The mediator(s) cannot render a decision.
- **Arbitration:** a procedure in which one or more neutral arbitrator(s) render a formal decision based on the parties' respective rights and obligations and enforceable as an award under the New York Convention.
- **Expert Determination:** a procedure in which the parties submit a specific issue to one or more neutral expert(s) who make a determination on the matter, which can be binding under contract unless the parties have agreed otherwise.

WIPO ADR Options

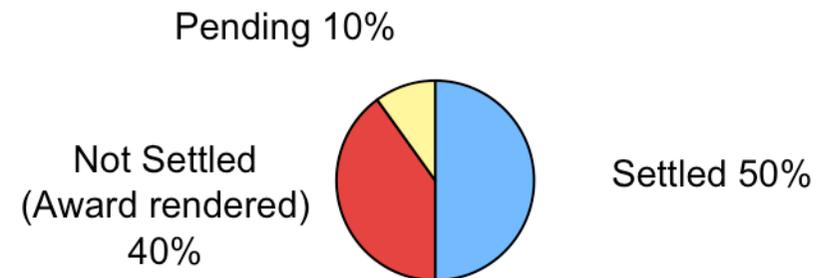


Settlement in WIPO Administered Cases

Settlement in WIPO Mediation



Settlement in WIPO Arbitration



Why ADR in the Museum Sector?

- **Particular Features of Museum Related Disputes**
 - specific subject matter
 - often international
 - possible sensitivity, including indigenous issues
 - non-legal issues
 - tangible and intangible issues can arise in one dispute
 - “small world” – close working relationships
 - public interest angle

Benefits of ADR in the Museum Sector

- **Expertise**
- **Neutrality**
- **Consideration of sensitive non-legal issues**
(commercial, moral, ethical, political, religious, spiritual...)
- **Consideration of customary laws and protocols**
- **Creative solutions** (e.g., provision of works of art in lieu of monetary damages, conclusion of long-term loans, shared ownership, formal recognition of ownership or custodianship...)
- **Preservation of long-term relationships**
- **Confidentiality where appropriate**

Issues to Consider

- Arbitrability of author's "droit moral" in certain jurisdictions?
- Effective representation of museums in ADR proceedings
- Mandatory administrative procedures (e.g., "déclassement" in France, see *Museum de Rouen case*)
- Implementation of solution (i.e., deaccessioning issue, see *Benevento Missal case*)
- Identification and representation of indigenous communities in ADR proceedings

ADR Case Examples in the Museum Sector

- Negotiation – Agreements between *Italy and US museums* (such as Metropolitan Museum of New York, Boston Museum of Fine Arts, and Getty Museum)
- Mediation - *Swiss cantons St Gall and Zurich*
- *British Natural History Museum*
- *Tasmanian Aboriginal Center*
- Arbitration - *Altmann v Republic of Austria*

National and International ADR Initiatives in the Museum Related Sector

- **UNIDROIT 1995, Art. 8**
- **National advisory commissions for Nazi-looted art related claims** (Washington Principles 1998, § 11; Terezin Declaration, June 30, 2009)
- **UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP)**
 - “Draft Rules of Procedure on Mediation and Conciliation in accordance with Article 4, paragraph 1, of the Statutes of the ICPRCP” submitted in 2007 for negotiation

WIPO ADR Initiatives in the Museum Related Sector

- **WIPO Traditional Knowledge Division**
 - reflection on the role of ADR in disputes concerning the alleged misappropriation of genetic resources, traditional knowledge and folklore (see for example draft *Compendium*)
- **“*Study on Customary Law and Intellectual Property*”** – examines also application of customary law in ADR
- **WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore**
 - Member States have raised potential of considering ADR

WIPO ADR Tools for Museum Related Disputes

- **WIPO Mediation, Expedited Arbitration, Arbitration, and Expert Determination Rules**
 - no limitation in scope (Art. 2) - applicability in museum disputes also where no link to intellectual property
- **WIPO ADR contract clauses** can be inserted in museum contracts (e.g., loan-, donation-, insurance agreements, copyright licenses and assignments...)
- **WIPO ADR submission agreements** can be used in non-contractual museum related disputes (e.g., dispute with indigenous community over reproduction of traditional cultural objects)

Future Disputes: WIPO Mediation followed in the absence of Settlement by (Expedited) Arbitration

*"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be **submitted to mediation in accordance with the WIPO Mediation Rules**. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].*

*If, and to the extent that, any such dispute, controversy or claim has **not been settled pursuant to the mediation within [60][90] days of the commencement** of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be **referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules**. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]* The **place of arbitration** shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the **law of [specify jurisdiction]**." (* The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.)*

Existing Disputes: Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration

- *"We, the undersigned parties, hereby **agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute:** [brief description of the dispute] The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].*
- *We further agree that, if, and to the extent that, the dispute has **not been settled pursuant to the mediation within [60][90] days of the commencement** of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be **referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules.** Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].]* The **place of arbitration** shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute referred to arbitration shall be decided in accordance with the **law of** [specify jurisdiction]." (* The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.)*

Specialized WIPO Neutrals

- WIPO General Database of Neutrals – over 1,500 neutrals from over 70 countries
- Special WIPO List of Mediators, Arbitrators and Experts with expertise in the art and cultural heritage sector

WIPO ADR Case Examples in the Art and Cultural Heritage Sector

- **“Good Offices” – Indigenous Community and Museum**
 - Restitution and copyright issues regarding cultural object
- **Arbitration – Artist and Galleries**
 - dispute over artist promotion exclusive cooperation agreement
 - termination of agreement in exchange for provision of a number of paintings

Further Information

- **WIPO Center:** www.wipo.int/amc
- **Traditional Knowledge:** www.wipo.int/tk/en/
- **Copyright:** www.wipo.int/copyright/en/
- **WIPO Arbitration Workshop** - October 15 and 16, 2009, and again in October 2010
- **WIPO Mediation Workshop** - May 6 and 7, 2010
- **Email:** arbiter.mail@wipo.int
sarah.theurich@wipo.int