

AUTHENTICATION  
IN ART

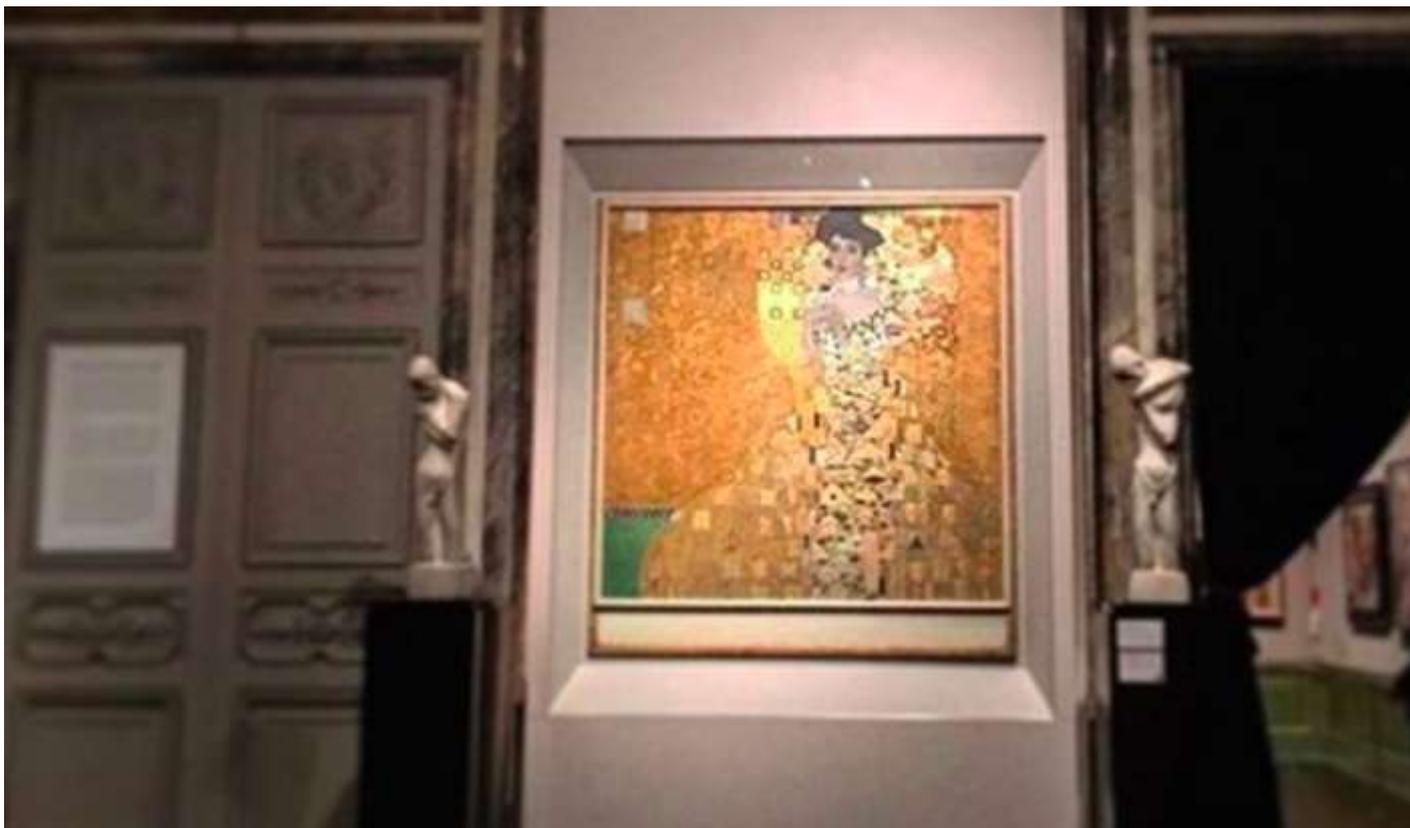
AiA Art News-service



Center for art law

## Cheers: A New Court for Resolving Art Disputes

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Gustav Klimt, "Portrait of Adele Bloch-Bauer I" (1907), at the Neue Galerie (NYC), from the famous case of the "Woman in Gold," resolved through arbitration.

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*By Marilyn Hayden, Dr. Sharon Hecker, and Center for Art Law.*



On April 1, 2019, the [Court of Arbitration for Art](#) (CAfA) will open its doors to arbitrate and mediate art law disputes. The idea for CAfA started as a response to the fact that judges seldom have expertise in art law, a fairly nuanced field, and that most art disputes entailed opposing reports by the experts chosen by the parties, resulting in a “battle of experts.” The new court is set to address questions of authenticity, chain of title disputes, contract, copyright and more, using alternative dispute resolution modes (ADR). Questions remain as to the current blueprint for this court and understanding art historical methods and procedures. After all, why would art dealers and collectors turn to arbitration instead of litigation?

## Litigation and ADR 101

Simply said, litigation is the process of resolving a dispute in front of a court of law, where the judge is an impartial government employee. By contrast, arbitration is a contract-based mode of finding a solution outside of court, and it involves one or multiple arbitrators (a panel) chosen (read “hired”) by the parties. Arbitrators are usually selected based on their expertise in the field of the dispute, and their decision (or award), generally based on the regulations and customs of the field, will be binding upon the parties once a court validates the process. Mediation, another alternative to litigation, is non-binding, and is based on discussion and compromise facilitated by a mediator. Whereas litigation is often long, costly, and public, arbitration and mediation have the benefit of being rather quick, private, and less expensive – depending on the location and number of people involved in the dispute. However,

cases heard in the judicial system are published and become part of the common law, whereas arbitral awards rarely create precedent.

## Why CAfA?

Bill Charron, partner at [Pryor Cashman](#), and the mastermind behind CAfA, first tossed out the idea of a court of arbitration for resolving art dispute at a talk he gave in 2016 at the Authentication in Art (“AiA”) Congress, a [conference](#) aimed at those in the field of determining art authentication which meets for three days every two years in the Netherlands.<sup>[i]</sup> Charron’s idea for a CAfA did not spring forth on the spur of the moment. He had some experience representing client(s) before the Court of Arbitration for Sport and saw possibilities for something similar for the art world. As a litigator who accidentally found himself deep in major art cases concerning Nazi art restitution as well as cases of art fakes and fraud, he realized that there are limits to a settlement in a court of law. While the court system will resolve art-related issues, the art market is not always willing to accept the judgment, particularly those issues debating authenticity. A number of court published decisions have gone so far as to clearly state that the market and not the courts is the best place to resolve authenticity issues.<sup>[ii]</sup> There is also an endless worry of how to solve disputes quickly and economically without sacrificing confidentiality, neutrality, expertise, and long-term relationships.



Egon Schiele, "Seated Woman With Bent Left Leg" (1917), from the case *Bakalar v. Vavra*, No. 11-4042-cv (2d Cir. 2012)

The working committee that set out to design a CAfA with authenticity issues in mind soon discovered there was interest in expanding to issues concerning the larger art market. To paraphrase F. Scott Fitzgerald: "The rich are different from you and me." And the art market is different from stocks and bonds, real estate, or automobiles. The art market is not regulated, not transparent, and not necessarily rational. An art contract can be as little as one page and fail to include important details that open it to a future dispute. Add the complications surrounding ownership and issues of authenticity and it's clear the art market has its share of unique problems and disputes that can be difficult to settle in a regular court of law in a manner that is acceptable to the open market. Other issues loom large, including privacy, conflicting ideas of who is an expert witness, long-drawn out discovery, and high expenses. One of Bill Charron's Nazi [restitution cases](#) went on for more than seven years.<sup>[iii]</sup> Talks with dealers, auction houses, art experts and legal professionals led to the idea that the time was right for a Court of Arbitration for Art.

CAfA is based on the idea that the parties in a dispute involving a piece of art usually want the matter to remain private, and to be able to call on experts with experience in the art world and its customs. "Arbitration is a creature of contract," Bill Charron says. The tribunal itself will sit in the Hague, where AiA is based, and will comply with the

Netherlands Arbitration Act,<sup>[iv]</sup> but the parties can agree on a different venue for the arbitration. “The Hague is the natural choice for the headquarters,” says Bill Charron, “the Netherlands Arbitration Association is a highly regarded alternative dispute resolution organization in Europe.”

After a year and a half, the working committee announced its plans in June 2018 and took the results on a road show seeking input. “The response was great,” recalls Bill Charron, “we heard plenty of likes and dislikes. We listened and made changes. There was some concern that it might favor the larger institutions.” An answer to the critics was the default rule 51 of the NAI Arbitration Rules, which are to be followed by CAfA, that the decisions of the case would be published and the artwork identified.<sup>[v]</sup> In keeping with privacy concerns, the party names involved may be redacted.<sup>[vi]</sup>

If the parties do choose CAfA to resolve their art-related dispute, this also imposes a set of procedural rules which must be followed, including the fact that the arbitrator(s) must be chosen from the Arbitrator Pool, which is “primarily composed of international lawyers with demonstrated experience in litigating or counseling clients in art law disputes and/or international arbitration,”<sup>[vii]</sup> and the chair of a three-arbitrator panel and sole arbitrators must have university legal training.<sup>[viii]</sup>

There are downsides to arbitration, the primary one is that the right to appeal is no longer an option. This can be hard to take when the decision leaves one participant convinced that the conclusions were illogical, unfair or lacked a true understanding of the issues.

## Resolving the Battle of Experts?

With regards to the great question of expertise, expert witnesses and expert opinions, CAfA’s plan is to create a “pool of experts” and out of which the arbitral tribunal will select specific expert to serve on each individual case. This is to avoid the conflict of experts mandated by the parties, which too often results in opposing reports.

The Expert Pool is to be “composed of specialists qualified, among other things, to address art object authenticity issues and include a pool of international materials analysts, forensic scientists, and art historians/provenance researchers.”<sup>[ix]</sup> CAfA’s

stated objective in doing so is to avoid a “battle of experts,” and shifts the burden of choosing the expert on the arbitral tribunal if the issue raised is “one of forensic science or provenance of the object.”<sup>[x]</sup> From the art historian’s perspective, this may be problematic as the practice of expertise does not separate forensic science from provenance or knowing the history of the artist.

Bill Charron makes clear that “the parties may also engage their own testifying experts on all other pertinent matters on a case-by-case basis, such as damages, custom and practice, and foreign law. There will, however, be more limited discovery than you would have in court.” To keep costs down, some proceedings may take place via telephone but the evidentiary hearings primarily will be in person.

In addition, CAfA plans to appoint a Technical Process Advisor to “assist the arbitral tribunal with respect to the evidentiary matters of a highly complex or technical nature, such as those concerning an evidence of an object’s authenticity.”<sup>[xi]</sup>

Prior to the launch of CAfA, art experts, historians, and scholars have been wondering whether the initiative takes into account the realities of art history and art historical expertise. To begin with, what will be the criteria for choosing the experts and the technical process advisors? Transparency of method and open criteria for selection seem crucial for fair handling of art-related cases.

Art historians know that the person who writes the catalogue raisonné, or has been appointed by a foundation to conduct expertise, or is the recognized ‘market expert’, may not be the best or the only expert. Sometimes such a ‘designated expert’ is neither impartial nor independent. He or she could be a family member of the artist or have an interest in market issues.



Art historians also know that expertise is not based on a single person's viewpoint. On the contrary, art history is grounded in open debate and discussions and requires a public consensus among experts to gain credibility. Just look at the [debate](#) that is raging on the subject of the *Salvator Mundi* that was auctioned by Christie's in 2017 and which has been attributed (by some) to the hand of Leonardo Da Vinci, or more recently, the controversial [sale](#) of *Judith and Holofernes*, attributed to Caravaggio. The attempts by a court to select one expert may actually result in ignoring differing viewpoints among experts and putting aside the diverse evidence they bring to bear. Take, for example, the case of Modigliani, where there are numerous experts and catalogue raisonnés, differing opinions, ongoing technical studies, so that no single expert today is accepted as the ultimate authority.

Additionally, many experts do not wish to become involved in legal or market questions for fear of repercussions and lawsuits. One may wonder how CAfA plans to protect its experts if they agree to express a viewpoint that is not that of the majority. One of the reasons that art historians are often reluctant to offer expertise is the fact that they are aware that the field is filled with grey areas. Art historians are aware of the fluidity of their field; whereas the market and the law demand a definitive, binary yes-or-no choice. In reality, information discovered at a later date might lead to a different conclusion and a changed attribution.

## Framing Authenticity

Turning now to questions of uniform assessment procedures and documentation, how will the court know or be able to show that adequate steps have been taken in regard to the assessment of an artwork? Although the AiA/NAI guidelines state that "Art authenticity is typically understood to be evaluated according to standards of connoisseurship, provenance, and forensic science,"<sup>[xiii]</sup> there is currently no outline of a systematic procedure for experts to approach the assessment of an artwork's authenticity. Further, in cases of disputed authenticity, on the basis of what criteria and competency will the court decide about the reliability and validity of an art expert's research?

The goal of the Hague court is to work for the art market to resolve legal questions. To this end, CAfA could benefit from a standardized set of steps. A useful addition to the

current blueprint could be for judges not to strive to determine authenticity (which may not even be possible in many cases), but rather to ascertain whether the full due diligence has been conducted on the art object according to a uniform standard procedure.<sup>[xiii]</sup> The role of the court, whether judges or arbitrators, should not be to say who is right among experts, but rather to make sure that a proper process of due diligence has been followed.

In order to be credible and objective, experts and expertise cannot work directly for the art market. It is important that CAfA remain independent from the art market, which suffers from a lack of transparency. The law and art history must work together to address uncertain attributions and reluctant experts.

## Promises and High Hopes



Gustav Klimt, "Portrait of Adele Bloch-Bauer I" (1907)

Opening of CAfA will be a notable event but it will not be marking the beginning of using arbitration for resolving art disputes. One of the best known arbitration cases involves the restitution of the famously looted "Woman in Gold" painting, a case brought in 2006 against the Austrian government by Holocaust survivor Maria Altmann.<sup>[xiv]</sup> It involved Gustav Klimt's painting entitled *Adele Bloch-Bauer I* (1907), which belonged to Mrs. Altmann's family before the Nazis annexed Austria and the family fled to the United States in 1938. In 1998-1999, before the Restitution

Committee recently set up by Austria, Mrs. Altmann decided to claim ownership of six paintings in the government's possession, including the portrait, questioning Austria's title to the paintings and claiming that they had to reconstitute them under the 1998 Art Restitution Act.<sup>[xvi]</sup> After rejection by the Committee, she decided to sue the Republic of Austria and the Austrian National Gallery before the Central District of California. In 2004, the U.S. Supreme Court allowed Mrs. Altmann to pursue her lawsuit against the Austrian government.<sup>[xvii]</sup> The parties subsequently agreed to resolve the dispute through arbitration,<sup>[xviii]</sup> and the arbitration court decided that five of the six paintings had to be returned to Mrs. Altmann.<sup>[xviii]</sup>

The "Woman in Gold" case is a perfect example of the length and complexity of Nazi-era looted art litigation. CAfA provides a potential venue for resolving such cases, taking into account the emotional attachment of the parties to a piece of art, the specificities of restitution laws, and the international aspect of the majority of these cases.

Additionally, CAfA is a promising solution to legal issues involving financially valuable artworks. The team of attorneys behind the CAfA initiative show high hopes that CAfA is an option that might well suit the art market. Over one hundred and forty applications worldwide have been received by potential arbitrators. The default rules are viewed as part of its future success. "One looks like it might be ready really, really soon," says Bill Charron. As CAfA has yet to hear their first case, only then will we be able to answer those concerns and see how the tribunal can address art-related disputes, in what will hopefully be a fair and efficient manner. How quickly will the art world be able to evaluate the practical benefits of the court remains to be seen.

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<sup>[i]</sup> AiA is a Hague-based non-profit group founded in 2012 to catalyze the best practices concerning the problems of authentication facing the art world. For more information: <https://authenticationinart.org/>

<sup>[ii]</sup> See e.g., *Thome v. The Alexander and Laura Calder Foundation*, 70 A.D.2d 88, 890 N.Y.S.2d 16 (1st Dep't 2009).

[iii] *Baklar v. Vavra*, No. 11-4042-cv (2d Cir. 2012). See [summary order](#) affirming the New York Southern District Court’s ruling that “Seated Woman With Bent Left Leg” (1917) by Egon Schiele should remain with its current owner, David Bakalar.

[iv] AiA/NAI Court of Arbitration for Art Adjunct Arbitration Rules, in force as of 30 April 2018, Art. 21(7). Available [here](#).

[v] Netherlands Arbitration Institute Arbitration Rules, in force as of 1 January 2015, Art. 51. Available [here](#).

[vi] AiA/NAI Adjunct Arbitration Rules, *Id.*, Point 15.

[vii] *Id.*, explanatory note no. 2.1.

[viii] *Id.*, Art. 11(7).

[ix] *Id.*, explanatory note no. 2.2.

[x] *Id.*, rule 28(7).

[xi] *Id.*, explanatory note no. 8.1.

[xii] *Id.*, explanatory note 2.2.

[xiii] A possible approach could be one taken by The Hecker Standard™, which uses a best-practices, evidence-based approach to conducting due diligence on art objects. For more information: [www.theheckerstandard.com](http://www.theheckerstandard.com)

[xiv] *Maria V. Altmann et al. v. Republic of Austria* (2006) (Nödl, Rechberger, Rummel, Arb.). Arbitral award [here](#).

[xv] Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th December 1998, Federal Law Gazette 1 No. 18111998.

[xvi] *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

[xvii] Felicia R. Lee, “Arbitration Set for Case of Looted Art”, The New York Times (May 19, 2005). Available [here](#).

[xviii] For more details: Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, “Case 6 Klimt Paintings – Maria Altmann and Austria,” Platform ArThemis, Art-Law Centre, University of Geneva. Available [here](#).

#### **Additional Sources:**

- AiA/NAI Court Of Arbitration For Art Adjunct Arbitration Rules, in force as of 30 April 2018. Available [Here](#).

Netherlands Arbitration Institute Arbitration Rules, in force as of 1 January 2015.  
Available [here](#).