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**The Court of Arbitration for Art (CAfA).
A Conversation with Bert Demarsin ***

**La Corte arbitrale per l'arte (CAfA).
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The Court of Arbitration for Art (CAfA)

A Conversation with Bert Demarsin

In September 2023, Federica Violi and Antonio Cappuccio, assisted by Hannah Driesens, met with Bert Demarsin, Professor at KU Leuven and the driving force behind the Art, Law & Management Research Programme, dedicated to the promotion of interdisciplinarity in the art industry. He also sits on the governing board of the Court of Arbitration for Art (CAfA). Spurred by the interest in this noteworthy example of the interplay between law and art, LawArt took the opportunity to explore with him the peculiarities of dispute resolution in the art industry.

LawArt: Dear Prof. Demarsin, thank you very much for taking the time to engage with us for this interview. Let us start by providing the general context of our conversation to our readers. How did the idea of instituting CAfA take shape? What was/were its main prompts or triggers for it to materialize?

BD: The idea of creating a specialized mediation & arbitration institution for art-related disputes was the result of a conference organised by *Authentication in Art* (henceforth AiA), a foundation constituted under Dutch law. The AiA foundation brings together people that work in the art industry: art experts, material scientists, and conservation studies experts. In other terms, people who have deep knowledge of the art world. Within this environment, there was some frustration regarding civil court cases involving art-related disputes. Traditional court proceedings do not consistently ensure a comprehensive understanding of art expertise. In this regard, there is a common sentiment among these experts that a public judge may not always be the best positioned to adjudicate these disputes. Particularly in the US, certain decisions have been vehemently criticized¹, fuelling the opinion within the art industry that the

¹ See e.g. *Greenberg Gallery v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993).

outcome of these cases might have been different if they were taken by arbitrators with closer contact with the art world. This shared feeling triggered the idea that there should be a dedicated court or arbitration institute specialized in art matters, similarly to what has already occurred in other fields, such as sports. CAfA was thus an initiative borne out of the art world itself.

Since AiA is a Dutch foundation, it made sense to reach out to the Netherlands Arbitration Institute (henceforth NAI), a well-established arbitration institute, founded right after World War II. NAI has a very solid reputation in the market. It is also an arbitration institution that was somewhat interested and keen on taking this new path and exploring the potential for a dedicated arbitration institution for the art business. The AiA and NAI decided to team up, and in 2018 the creation of CAfA was announced at the annual Conference of AiA in The Hague. There CAfA was founded, so to speak. Not technically, but the idea became concrete and gained significant support in the relevant market. The decision was made to incorporate CAfA in The Hague, with the idea of relying on its baseline as the city of peace and justice, with historical ties to arbitration institutions.

After its formal establishment in 2018, the founders of CAfA reached out to me with an invitation to become the seventh board member and serve as a sort of neutral intermediary between the three members of NAI and the three members of AiA, mostly from the US. The invitation was extended to me due to my experience in art and cultural heritage law, both in the US and in the Dutch-speaking world.

Ever since, CAfA exists. However, creating a mediation & arbitration institution that has the ambition to work globally is not easy. It is of great importance to convince the market that you are a solid arbitration institution to work with and you need to find arbitrators and experts that are willing to work for the board. In 2019 CAfA started looking for neutrals and then Covid-19 hit. In a way, Covid-19 facilitated the establishment of CAfA since it was suddenly more feasible to connect with people online without travelling around the world.

LawArt: *Would you briefly explain how CAfA works? What is a typical case that you envision could be litigated or mediated at CAfA? What peculiarities of the art ‘world’ (very broadly speaking) can be accommodated through CAfA that would otherwise not be properly addressed in a general commercial arbitration proceeding or in a public court?*

BD: Authenticity disputes are definitely among the ones CAfA would be best positioned to handle. Authenticity in the market is still a key problem. Everybody who buys a piece of art is constantly wondering whether it is real: ‘do I get value for money at the end?’. This would be a typical art case for CAfA. Another one could be provenance. Here, the problem is not whether the piece of art is real, but rather ‘can I legitimately own it?’. People can ask themselves ‘Do I acquire it from a person who has good title?’. In fact, provenance issues primarily arise in two scenarios: art theft and smuggling. Smuggling art entails taking it out of its intended jurisdiction, which may not necessarily imply an ownership problem.

For both authenticity and provenance, cases may come before CAfA based either on arbitration clauses in contracts or general terms appointing CAfA as the competent dispute settlement body, or based on a decision of the parties to submit the case to CAfA *ad hoc*.

CAfA shares the back office of administration with NAI, which administers all formal procedural steps, including appointing neutrals. CAfA has now more than 200 neutrals acting globally and can work in 60 languages. In this sense, we act worldwide with people from all continents registered as potential neutrals. Regarding the arbitration rules, CAfA’s ones reflect those of the NAI but are tweaked in a certain way to accommodate the necessities of the art industry.

These adjustments are particularly relevant when it comes to the appointment of arbitrators, who are selected based on several rigorous criteria. On the one hand, CAfA relies on a set of neutrals with extensive experience as lawyers in the art industry. On the other hand, there are international commercial arbitration specialists, not necessarily specialized on art-related matters. It is imperative that the arbitration panel in-

cludes neutrals with affinity with the art world. A careful selection of neutrals is crucial in order to gain the confidence of the art world. The outcome should somewhat align with the expectations of the market. Differently from a civil court judge, we anticipate our neutrals to have a strong grasp of the technical possibilities, practices, and limitations within the realm of art expertise, especially when it comes to assessing evidence. In essence, having highly skilled, specialized neutrals is key!

Secondly, you need to be somehow more appealing than state courts. CAfA can offer quicker proceedings and can be more discrete. As to the latter aspect, we do however have a standard rule that awards can be published, unless the parties request not to. Publication of awards is important to build jurisprudence, solidity, and reputation for the institution. CAfA can also operate flexibly in a global world: our home base is The Hague, but we can also act in any convention centre worldwide. This gains time and saves certain costs, which leads me to the next aspect.

Arbitration is indeed more expensive. However, this needs to be considered in perspective. Litigating in public courts, with decisions subject to appeal, often leads to staggering costs. The upfront costs of arbitration will be higher, yet the ultimate costs should not surpass those of a traditional courtroom proceeding.

Finally, I would like to mention that CAfA has designated expert pools, attached to the institution: material scientists, who are lab testing pieces of art, and provenance experts. CAfA maintains a pool of experts mainly because, as such, the objective outcome of these tests is not disputable, if the test is well-performed. While interpretation of the results might be debated, the outcome of the test itself remains fixed. Parties of course still retain the right to challenge these findings in court hearings and introduce their own experts. We aim at limiting costs and work with well-esteemed organisations that are equipped to run these kinds of tests. When it comes to provenance research, the focus is on finding and examining documents that can certify the presence (or absence) of a specific piece in a given place. Provenance research is essentially historical investigation. Instead of inviting all parties to bring their witnesses for court

testimony for example, we have a dedicated expert pool to conduct this kind of inquiries. This approach limits costs, increases quality and enhances confidence in CAfA on the part of the art world.

This expertise entails burdensome costs. For this reason, CAfA chooses to work with a technical process advisor. This advisor assists the neutrals presiding over the case, guides factfinding and provides information to the panel as to what they can expect to find through these tests. Technical process advisors possess a very well overview of current possibilities qua testing and examinations. I keep on emphasizing that, ultimately, it all boils down to the individuals involved; what is special about the CAfA is the people: neutrals, experts, technical process advisors with extensive experience and knowledge of the art world. The advantage of this approach is that it effectively mitigates costs without compromising investigation and outcome.

This does not mean of course that you will not find specialized professionals elsewhere. Take JAMS for example. There is an overlap with our experts; the outcomes in terms of dispute resolution might be very similar as the ones reached by CAfA. This further underscores the value of commercial arbitration and mediation in art-related disputes. When there are compelling reasons to opt for a private resolution, commercial arbitration and mediation can offer an advantageous alternative compared with the public court system. In order to establish a solid presence on the market vis-à-vis other arbitration institutions like JAMS, CAfA has to rely on the strong calibre of its pool of experts and strive to become the most cost-effective option.

LawArt: Is there any type of art disputes that you believe CAfA would/should not be called upon to administer? If so, which type of disputes and where would you see these being litigated?

BD: As an arbitration institution, we are different from a public court. I can imagine that out of principle, certain parties in specific cases may rather prefer an official decision from a state court. In fact, CAfA does not necessarily provide the ideal solution for every art-related case. It is fair

to say that for certain matters it might be more appropriate to seize the public courts. For instance, in case there are compelling reasons to make the case public, or if there is no interest in preserving longstanding (business) relationships, possibly due to significant frustration. Arbitration is designed to be quicker, less adversarial, and discrete. The rationale is to move past a dispute swiftly in the art business, something that is not *per se* prioritized in public courts.

Furthermore, CAfA does not have the same powers of investigation that public judges have. If a case on restitution before the public courts is linked to a criminal investigation, it is obvious that a state court is the one positioned to find evidence.

Commercial arbitration is less powerful in this sense. The standard for CAfA is civil and commercial cases, and less cases where the state authority is heavily involved. It is true that public authorities (increasingly) agree on arbitration clauses, e.g. in procurement contracts. Yet, while CAfA is open to administer cases between an individual and the state, it is logical to expect the public administration to opt for the public court system, for reasons of transparency and (fiscal) accountability. Ultimately, CAfA fits more disputes among private parties.

However, it is worth indicating that for certain matters public authorities have already created institutions akin to arbitration for cases involving Nazi-era looting. In the Netherlands, for instance, there is the *Restitutie commissie*, which functions as some sort of arbitration or alternative dispute resolution institution, presiding over disputes related to Nazi-era looting. Public authorities have established these kinds of restitution commissions to make sure that decisions concerning these matters remain under state purview. In that sense, it is unlikely that the Netherlands would ever refer a case about Nazi-era looting to CAfA. Yet, I can imagine that in states where such commissions are missing, authorities might consider submitting these kinds of disputes to CAfA. It depends on the situation and the legal framework of each jurisdiction.

That said, I think there are many cases involving public authorities where CAfA does not play a significant role. It is important to bear in

mind that the primary purpose of commercial arbitration is to facilitate dispute resolution between private parties, and this is very much true for CAfA as well.

LawArt: CAfA officially engages in arbitration as ‘the administration of justice by arbitrators’. What notion of justice does this reference embody? Do you see CAfA expanding towards disputes involving questions of non-transactional justice?

BD: The kind of justice model we have in mind is very much contractual, based on an agreement between the parties. In the end a decision is delivered to make sure that commercial parties can move on, and business can proceed further.

Do I see CAfA’s role expanding towards non-transactional justice, for instance in cases of colonial restitution?

Most of the objects were removed by government authorities under official state policies during the colonial period. Most of these collections are still in the hands of public institutions. Unlike with Nazi-era looting, where private individuals can often still prove ownership, most of these objects taken from indigenous communities during the colonial era cannot be linked to a specific individual.

The damage of Nazi-era looting can be easily individualised. This does not hold true for colonial heritage. With colonial heritage, states are heavily involved, and we do not have institutions akin to a *Restitutie commissie*. What we mostly have are ministerial policies dealing with the restitution of colonial artefacts. Ultimately, however, the decision rests with ministries and it remains very much a political decision. This can be broadly observed. I do not know of any jurisdiction where a country could seize a public court to claim restitution of artefacts taken during the colonial era. The atrocities that occurred were enormous. The problem is that from a strict (European) civil or property law perspective, most of these objects belong to museum collections. Besides the formal legal aspect, bringing a case before a court might also not be effective, due to the politics and diplomacy deeply intertwined with these matters.

Colonial objects are also used as diplomatic tools in international relations. Considering the complexity and multitude of interests of states and communities, I do not believe that such sensitive topics will ever be adjudicated at CAfA. Private institutions most likely are not going to be entrusted with the resolution of this type of conflicts. Should CAfA become the ultimate authority in art-related matters and develop a flawless reputation and credibility, these cases might one day come before CAfA. However, I remain sceptical about this prospect.

Ultimately, CAfA has a role to play as a commercial arbitration initiative, with the idea in mind to deliver contractual or transactional justice. Whether CAfA will expand its scope or find itself well positioned to handle cases with a distinct remedial or distributive justice dimension is really for the future to say. Yet, states will probably come up with their own initiatives. Should states decide at a certain point to establish a specialized court, or make courts competent to hear this kind of cases, or create a restitution body for colonial-related conflicts, that would imply relinquishing a very important instrument of diplomacy. Thus, I do not foresee countries transferring this role to CAfA. They would instead install mechanisms that remain under state control.

I hope that CAfA will be successful in achieving its initial ambitions, meaning that CAfA will become over time the institution that springs to mind when it comes to the resolution of civil and commercial art-related disputes; the same way as other arbitration institutions are immediately associated with certain types of cases. The fact that those arbitration institutions exist shows that it is attainable! However, it is important to acknowledge that CAfA is a start-up at this stage. We are now directing our efforts into ensuring that our clauses are inscribed into relevant contracts, as this is the guarantee that sooner or later the cases will be appointed to CAfA. We strive to become a well-established and reputable arbitration institution for art-related matters. Time will tell whether this endeavour will be successful or not. Ultimately, arbitration will always hinge upon the willingness of the parties involved.