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Manet Or Monet? Let The New Arb Court Decide, Attys Say

By [Christopher Crosby](#)

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Law360 (May 7, 2018, 9:52 PM EDT) -- A new arbitration court dedicated to resolving legal disputes over art will launch next month as an alternative to traditional litigation where marketplace doubt on ownership and authenticity sometimes lingers even after a verdict, lawyers said Monday.

The Court of Arbitration for Art will hear contract, chain of title, copyright and other disputes emanating from the art world, areas in which its organizers say normal courts have struggled to grapple. The court, which will be seated in The Hague and implemented under the auspices of the Netherlands Arbitration Institute, will conduct proceedings globally.

The CAA will be geared toward resolving issues of forensic science, ownership history and an artist's distinct style — areas of difficulty that often confront traditional courts and juries, [Pryor Cashman LLP](#) partner and art law co-chair William Charron said in an interview with Law360 on Monday.

Markets aren't required to and often don't abide by court decisions on whether a work is real or fake, since those determinations are made by lay individuals on the basis of art experts hired by either party in the dispute, Charron said. The CAA was conceived to solve that problem and "flatten the learning curve" by having tribunals consisting of experienced art lawyers decide cases, he said.

"There are two overarching principles we're aiming at: market legitimacy and accuracy," Charron said. "I think the apparatus we've set up here meets those two goals. I think the market will be receptive to this."

Underlying the decision to create the CAA was a recognition that the word of the court is rarely the last word on art. Disputes between dealers, buyers, sellers, collectors, institutions, foundations and the like may wind up in court, but the final say over whether a painting is real — at least in terms of its value — is determined by the market, according to Thomas C. Danziger of [Danziger, Danziger & Muro LLP](#).

"Even if a court says a work was made by the artist, Christie's or [Sotheby's](#) might not be persuaded by, or, more importantly, bound by, that decision," Danziger said.

That's because the art marketplace bases its determination on a work's value not by the court but by the recognized expert on that artist, be it their heir, child, widow or a scholar who has written extensively on the artist, Danziger, an established art attorney who did not work on the court,

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said.

More than one court has concluded that litigation doesn't always best serve art-world disputes, with a New York state appeals court opining in 2009 in *Joel Thome v. The Calder Foundation*, a dispute over the works of the late sculptor Alexander Calder's artworks, that authenticity of art is subjective, "and particularly ill-suited to resolution by declaratory judgment."

"The law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive," the court order on the works states.

To address that issue, Charron said the CAA will be set up to be as neutral, but definitive, as possible. Disputes valued over \$500,000 will be decided by a tribunal; below that value, a single arbitrator. Each party will pick an experienced art lawyer as an arbitrator, and those two appointees will select a third. As opposed to court litigation, the CAA arbitration won't always see each party's expert competing against the other.

While parties may retain their own experts testifying on issues, tribunals will appoint forensic and provenance experts in authenticity disputes from an internationally recognized pool, and technical advisers may walk parties through the discovery process. Decisions will be enforced under the New York Convention.

"The idea is to give the most comfort possible to the market that authenticity decisions are based on truly neutral expert analysis," Luke Nikas of [Quinn Emanuel Urquhart & Sullivan LLP](#), who also worked on the idea, said in a press release.

Judith Prowda of Stropheus Art Law and the Sotheby's Institute of Art said in a press release Monday that, "Everything we analyzed came back to the questions of whether this is something the market will likely accept, and whether this is something that best positions the tribunal to render the right results."

Part of impetus for the court is the way art is bought. Not every piece goes through extensive testing by experts or scientists prior to purchase, Charron said, creating the foundation for future disputes over authenticity. With skyrocketing prices and art becoming as much an investment strategy as anything else, the pressure to buy — "the sense that you've got to have it" — encourages quick decisions often made with little more than an invoice, let alone a contract with an arbitration clause, Charron said.

Megan Noh of the art law boutique [Cahill Cossu Noh & Robinson LLP](#), who worked alongside Charron, Prowda and Nikas, said that even as transactions for the purchase and sale of high-value artwork become increasingly sophisticated, "it's not clear to me that individual sellers and purchasers are more conscious of the potential advantages and disadvantages of litigation and arbitration, respectively, beyond a general perception that the latter may afford greater confidentiality."

Proceedings will be private and confidential, as in standard dispute resolution. However final arbitration decisions will be published and will identify the art at issue while maintaining the parties' anonymity. Since many court cases settle before a judge can apply the law to the facts, Noh said that they were interested in generating "a more robust body of public decisions from which lessons can be learned by future marketplace actors, while still protecting the privacy of the individual parties to the disputes."

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While the industry standard contract has come to include [JAMS](#) arbitration provisions, if the CAA is successful, more and more attorneys may start to include it in contracts for their clients, although the switch-over could take years to play out, Danziger said.

"Although the new tribunal has some excellent attorneys behind it, the jury is out as to whether the art market itself will recognize its findings — a fact which the lawyers who set up the tribunal clearly recognize," he said.

--Editing by John Campbell.

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