

**NETHERLANDS
ARBITRATION INSTITUTE**

&

AUTHENTICATION

in

ART

**NETHERLANDS
ARBITRATION
INSTITUTE** **NAI**



**AiA/NAI COURT OF ARBITRATION FOR ART
ADJUNCT ARBITRATION RULES**

In force as of 30 April 2018

AiA/NAI COURT OF ARBITRATION FOR ART ADJUNCT ARBITRATION RULES

Point 1 – Definitions (supplement to end of Art. 1 NAI Arbitration Rules)

In these Rules, the following terms and expressions shall have the following meanings:

- (l) “the Arbitrator Pool”: the published list of arbitrators compiled by the AiA Board and NAI for possible appointments under these Adjunct Arbitration Rules.
- (m) “the AiA Board”: the governing body of the Netherlands foundation Authentication in Art registered in The Hague.
- (n) “the Expert Pool”: the published list of experts compiled by the AiA Board for possible appointments under these Adjunct Arbitration Rules.
- (o) “the Pools”: the Arbitrator Pool and Expert Pool.

Point 2 – Scope of Application (in lieu of Art. 2 NAI Arbitration Rules)

- 2(1) These Adjunct Arbitration Rules shall apply if the parties have referred to arbitration in accordance with these Adjunct Arbitration Rules. Such reference shall constitute a reference to the most recent version of the NAI Arbitration Rules as well, which are incorporated by reference in these Adjunct Arbitration Rules.
- 2(2) The provisions of the NAI Arbitration Rules shall apply except where they are modified by these Adjunct Arbitration Rules.
- 2(3) These Adjunct Arbitration Rules shall apply in the form they have at the time at which the arbitration is commenced.

AiA/NAI COURT OF ARBITRATION FOR ART ADJUNCT ARBITRATION RULES

Point 3 – Language (supplement to the end of Art. 5(1) NAI Arbitration Rules)

The proceedings shall be conducted in the English language, unless the parties agree otherwise.

Point 4 – The Arbitrator (supplement to end of Art. 11 NAI Arbitration Rules)

11(6) Arbitrators shall in principle be chosen from among those persons listed in the Pools. Only in the event of compelling reasons with the consent of the AiA Board and the administrator may an arbitrator be appointed from outside the Pools. The administrator may also deviate from the requirement of the first sentence when employing the list procedure under Art. 14 of the NAI Arbitration Rules.

11(7) The chairs of a three-arbitrator panel and sole arbitrators must have university legal training. No deviation shall be allowed from this requirement.

Point 5 – Number of arbitrators (in lieu of Art. 12(2) NAI Arbitration Rules)

12(2) The number of arbitrators shall be three, unless the monetary value of relief sought is less than € 500,000 (five hundred thousand Euros) or the parties have agreed to one arbitrator.

Point 6 – Appointment of the arbitral tribunal (in lieu of Art. 13(4) NAI Arbitration Rules)

13(4) In case either a party acting under Art. 13(2) or co-arbitrators acting under Art. 13(3) desire(s) a waiver from the requirement of the first sentence of Art. 11(6), they shall submit such request to the administrator no later than by the deadline for the appointment notification set out in Art. 13 above. Such request shall state the reasons for proposed deviation from the Pools and the name, the address,

AiA/NAI COURT OF ARBITRATION FOR ART ADJUNCT ARBITRATION RULES

the place of residence, the telephone number and the e-mail address of the arbitrator that the party seeks to appoint from outside of the Pools. After hearing all parties, the administrator shall confer with the AiA Board and then decide whether to authorize a deviation from the Pools. If such authorization is granted, the appointment of the arbitrator proposed will be confirmed. If such authorization is denied, the party required to make an appointment shall notify the administrator of the appointment of an arbitrator listed in the Pools within fourteen days from the notification of the denial to deviate from the Pools. If such a notice is not received within this period, the arbitrator shall be appointed in accordance with the provisions of Art. 14.

Point 7 – Secretary (in lieu of Art. 20 NAI Arbitration Rules)

At the request of the arbitral tribunal or on its own motion, the administrator may appoint a lawyer as the arbitral tribunal's secretary. The provisions of Articles 11(1) through (5), 16 and 19 shall apply mutatis mutandis.

Point 8 – Place of Arbitration (in lieu of Art. 21(7) NAI Arbitration Rules)

21(7) The place of arbitration shall be The Hague, The Netherlands.

Point 9 – Evidence in general (supplement to Art. 26 NAI Arbitration Rules)

26(3) The arbitral tribunal may seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration on all matters addressed therein.

Point 10 – Experts (supplement to the end of Art. 28 NAI Arbitration Rules)

28(7) On issues of forensic science or the provenance

AiA/NAI COURT OF ARBITRATION FOR ART ADJUNCT ARBITRATION RULES

of an object, the only admissible expert evidence shall be from an expert or experts appointed by the arbitral tribunal. The arbitral tribunal may appoint such experts from within the Expert Pool. On all other issues, evidence from party-appointed experts shall be admissible. Expert evidence of a party-appointed expert on such other issues may not compete with or supplement the expert evidence from the arbitral tribunal-appointed expert on issues of forensic science or the provenance of an object.

Point 11 – Assistance to the Tribunal (in lieu of Art. 29(1) of the NAI Arbitration Rules)

29(1) The arbitral tribunal may appoint one or more experts to give written advice. Where appropriate an expert may be chosen from the Expert Pool. The Arbitral Tribunal shall consult the parties regarding the terms of reference to be issued to the experts. The Arbitral Tribunal shall send the parties a copy of the appointment and the terms of reference as soon as possible.

Point 12 – Assistance to the Tribunal (supplement to the end of Art. 29 of the NAI Arbitration Rules)

29(7) In any case where complex and/or highly technical issues have arisen or are expected to arise, such as concerning an object's authenticity, the arbitral tribunal may appoint a technical process advisor, for example, from the Expert Pool to advise the arbitral tribunal with respect to pre-hearing evidence gathering and evidence exchange processes. Such a technical process advisor shall only be appointed with the parties' consent following an arbitral tribunal engagement proposal spelling out the contemplated role, scope of authority, advisory mandate, and other matters concerning the appointment, which shall ultimately also be confirmed in a procedural order making the appointment.

AiA/NAI COURT OF ARBITRATION FOR ART ADJUNCT ARBITRATION RULES

- 29(8) All communications with and from the technical process advisor shall be simultaneously shared with the arbitral tribunal and the parties alike.
- 29(9) The arbitral tribunal retains ultimate decision-making responsibility on all matters the technical process advisor recommends or advises on. The technical process advisor does not attend the hearing on the merits or participate in the arbitral tribunal's deliberations.

Point 13 –Substantive law (supplement to the end of Art. 42(2) NAI Arbitration Rules)

An appropriate choice of law for the arbitral tribunal may be the law of the principal location of the seller, if known at the time of the transaction, or, if no sale is involved, of the owner of the object in question at the time of the commencement of the arbitration.

Point 14 –Substantive law (supplement to the end of Art. 42 NAI Arbitration Rules)

- 42(5) Unless the parties have agreed otherwise, the arbitral tribunal shall, subject to the provisions in Art. 42 (1-4) NAI Arbitration Rules, respect applicable periods of limitation, prescription, and repose as well as similar time-bar principles when claims or defenses have not been acted on within a reasonable time.

Point 15 – Publication of the award (supplement to the end of Art. 51 NAI Arbitration Rules)

The AiA shall be authorized to have the award published in the same manner. The name or identity of the object in question may be revealed.

EXPLANATORY NOTES

Recommended arbitration clause

All disputes arising in connection with the present agreement, or further agreements resulting therefrom, shall be settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute supplemented and modified by the AiA/NAI Adjunct Arbitration Rules.

EXPLANATORY NOTES

1. The AiA and NAI

- 1.1 The Foundation Authentication in Art (Stichting Authentication in Art; “AiA”) is an independent nonprofit organization founded in December 2012, is based in The Hague, International City of Peace and Justice (the Netherlands) and complies to international non-profit regulations. The AiA Executive Board consists of a group of prominent international art world professionals who have come together to create a forum that can act as a catalyst and promote best practices in the field of art, and art authentication in particular. AiA has been created to provide leadership and shape dialogue, develop sound practice and liaise with the wider art community including international collectors, art historians, art market professionals, financial institutions, legal advisers, trust & estate practitioners and other stakeholders in the international art market.
- 1.2 The Netherlands Arbitration Institute (Stichting Nederlands Arbitrage Instituut; “NAI”) was founded in 1949. The NAI Executive Board consists of people from the business community, legal profession and science who have extensive experience in the fields of arbitration, binding advice and mediation. The NAI’s mission is to promote dispute resolution in

EXPLANATORY NOTES

these fields and other legal means for the prevention, limitation and resolution of disputes.

- 1.3 The NAI has been conducting arbitrations for over six decades and has developed its Arbitration Rules (most recently revised and updated effective 1 January 2015) to suit the broadest range of commercial disputes.
- 1.4 To promote its mission, the AiA conceived plans to establish a pool of highly qualified international arbitration professionals coupled with a pool of leading experts in the field of art and art authentication qualified to resolve disputes in the wider art community, including matters involving international collectors, art historians, art market professionals, financial institutions, and other stakeholders in the international art market. To that end, the AiA has collaborated with the NAI to establish the AiA/NAI “Court of Arbitration for Art” and to develop with the NAI Adjunct Arbitration Rules to supplement and tailor the primary NAI Arbitration Rules specifically for disputes within the wider art community. The result is this set of AiA/NAI Adjunct Arbitration Rules.
- 1.5 The AiA/NAI Adjunct Arbitration Rules are to be employed together with the NAI Arbitration Rules. To better understand the NAI Arbitration Rules it is advisable to consult their Explanation notes set forth in the published Rules. These Explanatory Notes address primarily aspects relating to the provisions of the AiA/NAI Adjunct Arbitration Rules only.

2. The Arbitrator Pool and Expert Pool

- 2.1 The Arbitrator Pool is primarily composed of international lawyers with demonstrated experience in litigating or counseling clients in art law disputes and/or international arbitration. Issues in such disputes include (although are not limited to) unique, market-specific considerations; technical issues of scientific and scholarly analysis; and

EXPLANATORY NOTES

applications of various jurisdictional laws and regulations concerning such matters as the making of warranties, the duties of investigation and diligence, and the barring of stale claims where the evidence is inadequate to permit a fair and fully-reasoned decision.

- 2.2 The Expert Pool is composed of specialists qualified, among other things, to address art object authenticity issues and includes a pool of international materials analysts/forensic scientists, and art historians/provenance researchers. Art authenticity is typically understood to be evaluated according to standards of connoisseurship, provenance, and forensic science. While relevant connoisseurs or scholars of a particular artist must be approached on a case-by-case basis, experts in the fields of provenance and forensic science can analyze objects of art more generally. As an alternative to having disputing parties retain their own respective experts in these particular fields, with such experts then advocating for their side, the AiA/NAI Rules shall offer the Expert Pool to provide the exclusive analysis and testimony on these subjects. The parties may retain their own consulting experts to assist in their work with, and examinations or cross-examinations of, such tribunal-appointed experts from the Expert Pool. The latter shall have the right - and obligation - to correct errors or to conduct further analysis as may be identified during the course of a given case (prior to the hearing).

3. Scope of Application

- 3.1 As noted above, the Adjunct Arbitration Rules are designed to apply together with the NAI Arbitration Rules and incorporate the most recent version of the NAI Arbitration Rules. To the extent the Adjunct Arbitration Rules provide for deviations from the NAI Arbitration Rules, the Adjunct Arbitration Rules prevail.

EXPLANATORY NOTES

- 3.2 In order for the Adjunct Arbitration Rules to apply the parties must refer to them in, for example, a contractual arbitration clause, submission agreement, or other agreement to arbitrate. The following arbitration clause is recommended:

“All disputes arising in connection with the present agreement, or further agreements resulting therefrom, shall be settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute supplemented and modified by the AiA/NAI Adjunct Arbitration Rules.”

4. Language

- 4.1 In the absence of any agreement otherwise, the proceedings (including but not limited to the hearing) shall be conducted in English, which is the general operating language of AiA. The parties and the arbitral tribunal may jointly agree and decide to conduct their proceedings in any language acceptable to the arbitral tribunal.
- 4.2 The arbitral tribunal may direct the parties individually to bear or to equally share in the costs of any translation and interpretation instructed under Art. 5 of the NAI Arbitration Rules, pending a final decision on the costs under Art. 57 of the NAI Arbitration Rules.

5. The Arbitrators

- 5.1 In addition to the provisions of Art. 11 of the NAI Arbitration Rules, arbitrators must in principle be appointed from among the Arbitrator Pool compiled jointly by the AiA Board and the NAI based upon their backgrounds and experience in handling art (law) disputes. Exceptions may be allowed by the NAI administrator (in consultation with the AiA Board), but only in the event of compelling reasons, such as the desirability of an arbitrator with a very specific background and the absence of such an arbitrator in

EXPLANATORY NOTES

the Arbitrator Pool (see Adjunct Arbitration Rules Points 4 and 6). Adjunct Arbitration Rules Point 6 describes the procedure to obtain such authorization to deviate from this requirement.

- 5.2 Except in relatively small value matters of less than € 500,000 or in cases where the parties have agreed to an arbitral tribunal consisting of one arbitrator, the arbitral tribunal shall be composed of three members. Thus for objects of art valued at or above € 500,000, the proceedings shall be conducted before three-arbitrator panels. For objects of art valued below € 500,000, the parties shall conduct their arbitration proceedings before a sole arbitrator.
- 5.3 In the case of appointment of a sole arbitrator, the parties shall use their best efforts to jointly agree upon that appointment from the Arbitrator Pool under Art. 13(1) of the NAI Rules. If the parties are unable to so agree, then the NAI shall appoint the arbitrator pursuant to the list procedure in Art. 14 of the NAI Rules.
- 5.4 In the case of appointment of a three-member arbitral tribunal, each party shall select one arbitrator from the Arbitrator Pool under Art. 13(2) of the NAI Rules, and those two selected arbitrators shall jointly agree upon the selection of a third arbitrator from the Arbitrator Pool under Art. 13(3) of the NAI Rules.
- 5.5 In all cases, the chairperson of every arbitral tribunal must have a university legal background.

6. Place of Arbitration / Hearings / Evidentiary Matters

- 6.1 Every arbitral tribunal is seated in The Hague, Netherlands. This means that the Netherlands Arbitration Act applies to the arbitration generally. The courts of The Hague have supervisory jurisdiction.
- 6.2 Notwithstanding the seat of arbitration in The Hague, the arbitral tribunal may decide under Art. 21(8) and 25(2) of the NAI Rules to conduct the

EXPLANATORY NOTES

hearing of factual and/or expert testimony and/or oral argument at any other location in the world. By the same token, the parties and the Arbitral Tribunal may jointly agree to conduct the hearing at another location. The arbitral tribunal has authority under Art. 21(1) of the NAI Rules to direct the parties individually to bear or to equally share in the costs of any necessary travel.

- 6.3 The Adjunct Arbitration Rules provide that an arbitral tribunal may seek guidance from the International Bar Association Rules on the Taking of Evidence in International Arbitration (“IBA Evidence Rules”), which provide mechanisms and procedures for the disclosure and presentation of documents, witnesses of fact, party-appointed experts, tribunal-appointed experts, inspections, evidentiary hearings, and the admissibility and assessment of evidence. Those IBA Evidence Rules shall, however, not be binding on the arbitral tribunal unless the parties have so provided in their arbitration agreement or the arbitral tribunal has adopted them as such.

7. Experts

- 7.1 Point 10 of the Adjunct Arbitration Rules provides that with respect to issues of forensic science or the provenance of an art object, such as relating to authenticity, the only admissible expert evidence must be from an expert or experts appointed by the arbitral tribunal under Art. 29 of the NAI Arbitration Rules and that such expert may be chosen from the AiA’s Expert Pool. This limitation overrides Art. 28 of the NAI Arbitration Rules with respect to presentation of evidence from party-appointed experts on these issues.
- 7.2 For all other matters of expert witness evidence (than issues of forensic science or the provenance of an art object), evidence from party-appointed experts is admissible as provided in Art. 28 of the NAI Arbitration Rules. The evidence offered in

EXPLANATORY NOTES

these areas may not compete with or supplement the expert evidence given by the Panel's appointed Experts.

- 7.3 Point 11 of the Adjunct Arbitration Rules provides that an arbitral tribunal may appoint Experts from within the AiA Expert Pool after consultation with the parties. In that respect, if the Arbitral Tribunal prefers not to use the guidelines and procedures set forth in Article 6 (Tribunal-Appointed Experts) of the IBA Evidence Rules, the arbitral tribunal may consider the following mechanisms:

- A *Mandate and Confidentiality*. For each Expert, the arbitral tribunal shall establish terms of reference, after considering any observations of the parties. The arbitral tribunal shall communicate this mandate to each Expert, and communicate a copy of the same to the parties. Each Expert shall be required to sign an appropriate confidentiality agreement.
- B *Areas of Expertise*. Following consultation with the parties, the arbitral tribunal may select Experts in the areas of forensics and provenance from a list of AiA's Expert Pool. The arbitral tribunal may additionally contact appropriate connoisseurs for the artist at issue.
- C *Party Objections*. A party may object to the appointment of an Expert on the grounds of a lack of impartiality or independence, and shall submit a written statement of the grounds for such objection(s) within five days of the appointment of such Expert, following which objection the arbitral tribunal and hearing the other parties and the Expert, and make a determination as to the necessity of replacement of such Expert.
- D *Evidence to be Made Available to Experts*. As directed by the arbitral tribunal, the parties shall provide each appointed Expert with any relevant

EXPLANATORY NOTES

information, and produce for inspection any relevant documents or property that the Expert may require, including, but not limited to, the artwork at issue.

- E. *Evidence Disputes*. Any dispute regarding the relevance of the requested evidence shall be referred to the arbitral tribunal for decision.
- F. *Hearing Testimony*. Each Expert may be examined and cross-examined at the Hearing by the Arbitral Tribunal and any party, at the request of that party.

8. Technical Process Advisor

- 8.1 Point 11-12 of the Adjunct Arbitration Rules allows a tribunal to appoint a technical process advisor. The role of the technical process advisor is a fairly unique aspect of the Rules. Such an advisor is intended to assist an 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. The advisor can help facilitate identifying and the gathering of relevant evidence in an efficient and cost-effective manner. The advisor acts under the authority and direction of the arbitral tribunal, but may, if requested, draft proposed procedural orders for adoption by the arbitral tribunal. The precise role in any given case will depend upon the needs and desires of the tribunal and nature of the issues involved.
- 8.2 All communications with the advisor whether to or from the tribunal or a party must be conducted in an open and transparent manner respecting at all times the principles of due process such that the parties are simultaneously informed and provided an adequate opportunity to comment on the matters recommended or advised by the advisor.
- 8.3 The technical process advisor is an advisor to the tribunal whose primary function is to assist in

EXPLANATORY NOTES

the pre-hearing evidence gathering and evidence exchange processes. The advisor is not an extension of the arbitral tribunal, does not attend the hearing on the merits, or participate in the arbitral tribunal's deliberations. The arbitral tribunal may, however, wish to have the advisor present at hearings on procedural matters of an evidentiary nature in order to facilitate obtaining the advisor's advice on such issues.

9. Substantive Law

- 9.1 If the parties have not agreed to a governing substantive law, under Art. 42(2) of the NAI Arbitration Rules the arbitral tribunal is to determine the appropriate applicable law. In that respect, the Adjunct Arbitration Rules provide that an appropriate choice of law for arbitral the tribunal may be the law of the principal location of the seller, if known at the time of the transaction, in the case of a sale transaction. In matters other than a sale, an appropriate choice is the law of the principal location of the owner of the art object in question at the time of commencement of the arbitration.
- 9.2 Under Art. 42 of the NAI Arbitration Rules, the arbitral tribunal is to base its decisions on the rules of law, while respecting any applicable (art) industry trade usages. Should the parties prefer instead that arbitral tribunal not be bound by such law, so as to decide equitably as amiable compositeur, the parties must so authorize the arbitral tribunal in accordance with Art. 42(3) of the NAI Arbitration Rules.
- 9.3 It is not uncommon in the area of art disputes for a party to attempt to bring claims many years or even decades after they have arisen, particularly in the context of restitution claims. Point 14 of the Adjunct Arbitration Rules confirms that prescriptive periods and similar time-bar principles are intended to be respected where the party raising a claim or defense has no justification for its failure to timely advance

EXPLANATORY NOTES

its case. The purpose is to protect the other party from “stale” claims or defenses which were not pursued with reasonable diligence and other situations of undue prejudice, such as where evidence has been lost due to the long passage of time.

10. Appealability and Enforcement of Awards

- 10.1 Under Art. 47 of the NAI Arbitration Rules, a party may ask the arbitral tribunal to rectify a manifest error in an award with two months of the date of the award. However, there shall be no right to appeal the decisions of the arbitral tribunal to any other body or tribunal.
- 10.2 Since the place of arbitration is in the Netherlands and the Netherlands is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), an award can be enforced in the many countries and other territories that are signatories to the convention or similar treaties with the Netherlands. A party seeking to enforce a final award, may follow the statutes, rules or regulations of the signatory country in which enforcement is sought.