UDC 719.025:347.9
Biblid 0543-3657, 69 (2018)
Vol. LXIX, No. 1171, pp. 42–53
Original paper

ALTERNATIVE DISPUTE RESOLUTION IN CULTURAL HERITAGE DISPUTES – TOWARDS A SPECIALISED TRIBUNAL?

Vanja PAVIĆEVIĆ[1]

Abstract: This paper deals with problems arising from a deficiency of an effective mechanism dedicated to alternative resolution of disputes regarding cultural heritage. Firstly, it analyses relevant international cultural heritage conventions and dispute resolution procedures contained therein. Secondly, it examines the alternative dispute resolution methods often used in this area, and finally, it presents contemporary proposals in this regard and suggests the establishment of a new, specialised arbitral tribunal.

Key words: Cultural heritage disputes, UNESCO Conventions, good offices, negotiation, conciliation, mediation, arbitration, specialised tribunal, culture-sensitive approach.

INTRODUCTION

With the beginning of the 20th century, a growing awareness has emerged regarding the need for a specific legal regime devoted solely to the protection of cultural heritage, which led to the recognition of its special legal status within a national level. However, having in mind the cross-border character inherent to cultural heritage and cultural objects[2], on the one side, with the frequent

[1] Vanja Pavićević, Research Assistant. Institute of International Politics and Economics, Belgrade.

[2] In this paper, notions of 'cultural heritage', 'cultural objects' and 'cultural property' will be used interchangeably, although they may carry different meaning which exceeds the scope of this subject matter.

incompetence of domestic courts when dealing with specific questions, on the other, the establishment of international rules of procedure became a strong necessity. The result of this gradual process is that the international law concerning cultural heritage has emerged as a distinct field of international law (Chechi, 2014, p. 65).

Consequently, in the last thirty years, alternative dispute resolution (ADR) has gained increased attention, especially because the international cultural heritage law suffers from a deficiency of an effective mechanism dedicated to the resolution of disputes. The following sections will be devoted, firstly, to the analysis of the relevant international cultural heritage conventions and dispute resolution procedures contained therein. The second section will be devoted to the alternative dispute resolution methods which are often used in this area, and finally, the third section will deal with the proposal to establish a new arbitral tribunal specialised for cultural heritage disputes. The relevant international conventions which will be analysed in this regard have been adopted within the auspices of UNESCO and address different questions of cultural heritage protection, hence, providing a complex-web of conventional structures (Forrest, 2010, p. 388): those are the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (henceforth: the Hague Convention), the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (henceforth: the 1970 UNESCO Convention), the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (henceforth: the 1972 UNESCO Convention), the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (henceforth: the 1995 UNIDROIT Convention), the 2001 Convention on the Protection of the Underwater Cultural Heritage (henceforth: the 2001 UNESCO Convention) and the 2003 UNESCO Convention.

RELEVANT INTERNATIONAL CULTURAL HERITAGE CONVENTIONS

The Convention for the Protection of Cultural Property in the Event of Armed Conflict

The unprecedented destruction wrought in the First World War and the wholesale destruction, pillage, plunder and looting of cultural heritage during the Second World War, galvanised international action to create an international regime that would protect cultural heritage during armed conflicts - the 1954 Hague Convention (Forest, 2010, p. 56). The aim was, *inter alia*, to overcome the shortcomings in the Hague Conventions from 1899 and 1907, but also to

introduce the revolutionary notion of '*the cultural heritage of all mankind',* which was emphasised in the preamble.

However, despite success in mentioned areas, the Hague Convention did not impose a binding mechanism for dispute resolution. Instead, in its Article 22 it states: 'Protecting Powers shall lend their *good offices* in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention or the Regulations for its execution', while Article 14 of the Regulations for the Execution of the Convention establishes the procedure in the case of objection given by the State Party regarding the registration of cultural property in the International Register of Cultural Property under Special Protection.

Therefore, this Convention is supplemented with the First Protocol, which imposes strict prohibitions for retaining cultural property as war reparations, and the Second Protocol, which is especially relevant due to the following facts: 1) it enhances the scope of application to the event of an armed conflict not of an international character which occurs within the territory of one of the Parties; 2) it establishes individual criminal responsibility for serious violations; 3) and the most important, for this paper's purpose, it offers various alternative possibilities for dispute settlement. Conciliation and mediation powers are distributed between the Protective Powers and the Director-General, while the chairman of the newly-established Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict 'may propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict.'

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property

The 1970 UNESCO Convention was the immediate response to the concern with the growing market demand for cultural heritage and the resulting illicit trade, thus probably it represented the most important international instrument dealing with the problem of the illicit movement of cultural heritage, during peacetime. Therefore, it is somewhat surprising that the question of dispute settlement is being addressed at only one point – Article 17 (5) states that 'at the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation, UNESCO may extend its *good offices* to reach a settlement between them' (Forrest, 2010, p. 166).

The emphasis on 'diplomatic cooperation' rather than the judicial settlement of disputes was confirmed in 1978 when The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) was created (Chechi, 2014, p. 102). Its mandate was, *inter alia*, to 'assist the UNESCO Member States in dealing with cases falling outside the framework of existing – non-retroactive – conventions, such as the disputes concerning historical cases of cultural objects lost as a result of colonial or foreign occupation, or as a result of illicit appropriation prior to the operation of the 1970 UNESCO Convention'.

However, in 2005 the Statute of the Committee was amended, thus the Committee was empowered to 'submit proposals with a view to *mediation* or *conciliation* to the Member States concerned'. The UNESCO Member States and Associate Members of UNESCO could represent not only their own interests, but also the interests of public or private institutions located in their territory or the interests of their nationals. Nevertheless, this provision confirms the State-centric approach of mediation and conciliation procedures: States remain the protagonists of the dispute settlement process - as a result, the mediatory and conciliatory functions of the Committee will not apply to cases where the holder of a contested object is an individual (Chechi, 2014, p. 106).

The Convention on Stolen or Illegally Exported Cultural Objects

Having in mind the fact that the 1970 UNESCO Convention, among other shortcomings, does not deal with private actions, the 1995 UNDIROIT Convention is drafted in order to reach a compromise between market states[3] and source states[4], but at the same time, to provide a framework for international litigation (Blake, 2015, p. 41) – claims for restitution of stolen objects can be filed by States, individuals, and legal entities, while in the case of illicitly exported cultural objects only States can be entitled to submit a claim. The 1995 UNIDROIT Convention provides in its Article 8 that claims 'may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States' and that the state parties 'may agree to submit the dispute to any court or other competent authority or to arbitration', but still with no instruction regarding arbitration rules.

[3] States which usually advocate universal attainability and free market of cultural goods, such as the US, Japan, Germany, Switzerland etc.

[4] States which own plenty of cultural heritage and thus take a retentionist, nationalist view towards preserving it, such as China, Italy, Mexico, etc.

However, the 1995 UNIDROIT Convention has succeeded in achieving a delicate compromise between the different interests of the source and market nations and between civil and common law jurisdictions, (Chechi, 2014, p. 108) personified in the clash between the *nemo dat quod non habet*[5] principle and *bona fide* of the purchaser. It is important to emphasize that the 1995 UNIDROIT Convention does not attempt to pre-empt the 1970 UNESCO Convention, rather the two treaties tend to complement each other, thus to create a legal amalgam constituted of public and private law mechanisms.

The Convention Concerning the Protection of the World Cultural and Natural Heritage

The idea of '*cultural heritage of all mankind',* which was introduced in the 1954 Hague Convention, was further elaborated in The Convention Concerning the Protection of the World Cultural and Natural Heritage, known as the 1972 UNESCO Convention. This document recognized the interest of humankind as a whole, therefore it established an international regime of cooperation and assistance between State parties, in order to protect the cultural and natural heritage of 'outstanding universal value'. While it has been emphasized that international community carries the duty to cooperate in this regard as an *erga omnes* obligation, the 1972 Convention still remains silent regarding dispute settlement clauses, thus it has often been described as a soft law instrument. The most effective enforcement mechanisms do not, therefore, lie in the hands of State Parties, but in the hands of the World Heritage Committee, which is established as an executive body of the Convention with the power to place a cultural heritage site on the Danger List[6] and the power to remove a property from the List itself (Forrest, 2010, p. 278). Evidently, a diplomatic way of dispute settlement is characteristic for UNESCO, but it is also subjected to certain criticism for the fact that the Committee is composed of State representatives, hence loaded with political considerations.

[5] *Nemo dat quod non habet* (literally meaning "no one gives what he does not have") is a legal principle which states that the purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title.

[6] Under the 1972 World Heritage Convention, a World Heritage property can be inscribed on the List of World Heritage in Danger by the Committee, when it finds that the property is being exposed to ascertained or potential danger.

The Convention on the Protection of the Underwater Cultural Heritage

In 2001, the UNESCO Convention was enacted by the General Conference of UNESCO, in order to, *inter alia*, deal with the problems left unresolved by the United Nations Convention on the Law of the Sea (UNCLOS), but also as the first legal framework created to internationally protect underwater cultural heritage. As far as the dispute settlement is concerned, Article 25 establishes that disputes between contracting states concerning the interpretation or application of the Convention are subject to 'negotiations in good faith and other peaceful means of settlement of their own choice'. If negotiations do not settle the dispute within a reasonable amount of time, the state parties may agree to submit it to UNESCO for mediation.

If the parties do not resort to mediation, or if mediation fails, the dispute settlement provisions provided in UNCLOS apply *mutatis mutandis* to any dispute between states parties to the 2001 UNESCO Convention, concerning the interpretation or application of the 2001 UNESCO Convention, whether or not they are also parties to UNCLOS. In that case, the State parties could choose between four dispute settlement procedures: The International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS. However, the 2001 Convention dispute settlement is limited to inter-State claims, whereas strictly private disputes, such as those between competing salvors, lie beyond the treaty's competence (Chechi, 2013, p. 185).

MOST FREQUENTLY USED ADR OPTIONS IN CULTURAL HERITAGE DISPUTES

Good offices and mediation

As illustrated above, provisions on good offices are provided by the 1954 Hague Convention, its Second Protocol, and by the 1970 UNESCO Convention. Good offices are often understood as a mere form of mediation. However, there is a difference – a third party while lending its good offices acts as some sort of courier aiming to bring disputants, which are not in contact due to the unresolved issues, to the negotiating table. On the other side, if the offer of good services is accepted successfully, mediation occurs where the active role of a neutral third party (a state or an individual) is important in reaching a compromise solution. Thus, it may be asserted that good offices represent more likely a stage towards mediation rather than a synonym.

Passing to mediation, the ability to create value through the meditation process is particularly suitable to Holocaust-era disputes as well as disputes between first nations or indigenous peoples and drug/pharmaceutical companies, and/or large-scale companies and power providers (Hoffman, 2006, p. 464). The reason behind it is that indigenous and traditional communities consider themselves in a weaker bargaining position than industry members, thus they will rather choose neutral, affordable and third-party assistance proceedings (Wichard, Wendland, 2006, p. 476). Mediation certainly represents a highly flexible, informal and effective manner through which disputants can obtain a mutually satisfactory solution while addressing not only their legal positions but also numerous ethical, moral and cultural issues.

The International Council of Museums (ICOM) and the World Intellectual Property Organisation Arbitration and Mediation Center (WIPO) have developed a special mediation process for art and cultural heritage disputes with a clear and efficient procedural framework set out in the ICOM-WIPO Mediation Rules. ICOM and the WIPO Center also provide their "Good Offices" to ease the relations between the parties to a dispute and provide procedural advice to facilitate the submission of disputes to mediation on a confidential basis. Additionally, disputants have the possibility to combine this ICOM-WIPO Mediation procedure with other procedures under the auspices of the WIPO ADR Service for Art and Cultural Heritage (such as WIPO Arbitration, Expedited Arbitration or Expert Determination.) Nevertheless, it has been emphasized that since cultural property disputes are often politically loaded, the involvement of ICOM in this arena would jeopardize the organisation's prestige (Shehade, 2016, p. 347).

Negotiation and conciliation

Conciliation, on the other hand, appears not to be so widespread in this field. It involves a procedure in which a body (often called the commission), examines the dispute, and concerning all the legal and factual circumstances suggests the non-binding solution, thus representing a combination of mediation and inquiry commission. Conciliation seems particularly appropriate in sensitive cases where no legal basis exists, for example, where the statute of limitations has expired but also as an instrument for avoiding disputes. Negotiation represents the most frequently employed means of dispute resolution with respect to restitution claims and has also sometimes led to bilateral arrangements between disputants.[7]

[7] One of the most notable in this regard is the agreement between Italy and the United States from 2001.

It allows the disputants to participate in direct negotiations rather than leaving the outcome to a third party, therefore, it encourages mutual understanding, dialogue and respect for the different backgrounds of the parties.

Arbitration

In the cultural heritage law, much attention is dedicated to this settlement method because, *inter alia*, it represents a combination of formal and binding decisions,[8] like in the court proceedings, but also manifests a certain amount of flexibility. It is often underlined that only through an international arbitration tribunal, contesting parties will be able to achieve the best and most equitable results because arbitration represents a superior forum to resolve the legal questions raised in a cultural property dispute under the current international framework (Gegas, 1997, p. 154). Arbitration shares some common advantages with mediation, such as confidentiality and efficiency,[9] but still, there are some differences – while in mediation the parties can negotiate and resolve any possible issue related to the dispute, the arbitral tribunal is limited to the request for relief and cannot go outside of its scope.

TOWARDS A SPECIALISED ARBITRAL TRIBUNAL AS AN APPROPRIATE FORUM?

Having in mind that the role of UNESCO in the normative conventional regimes is rather modest, limited to requests for technical assistance (Forrest, 2010, p. 418) and the States' hesitations in filing a dispute to the existing international organisations, it became obvious that centralised, efficient and independent authority is a necessary element in international cultural heritage disputes. Therefore, scholars and professionals in this area have put forward different solutions. Chechi, for example, argues that cross-fertilization, the practice through which judges - whether belonging to the same legal system or not – refer and borrow decisions from each other in order to better cope with the disputes pending before them, together with the common rules of adjudication might ultimately lead to the development of a *lex culturalis* – that is, a composite body of rules aiming to enhance the protection of cultural heritage. He suggests that UNESCO could play a decisive role by introducing two new

[8] The Arbitral tribunal renders a final and binding decision on the dispute which can be internationally enforced under the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

[9] However, recent trends show that arbitral awards tend to be published, except in the cases when the parties are explicitly against.

instruments: a list of rules to guide adjudicators as they handle cultural heritage disputes and a database of successful examples of adjudication (Chechi, 2014, pp. 200-312).

On the other hand, some scholars advocate for establishing a new, international court with exclusive jurisdiction over cultural property issues in a form of a supranational body, which would have the ability to perform government-like functions (Parkhomenko, 2001, p. 159). However, in the realm of international relations, it seems that States are reluctant to endanger their sovereignty by accepting the compulsory jurisdiction of the new international court. Cultural heritage disputes involve many branches of international law, such as human rights law, environmental law, the law of State succession, treaty law, etc. thus it could be argued that disputants would be reluctant to agree on submitting a dispute to a specialised court because of the belief that it would be unable to understand and accommodate their concerns (Chechi, 2014, p. 213). Also, differences between market and nation states are sometimes irreconcilable, so the reluctance of former colonial powers to entrust the control over the proceeding to a new court certainly does not contribute to dispute settlement. According to *ArThemis*[10], states are more inclined to resolve a dispute via the alternative dispute resolution methods, rather than traditional, adversarial litigation, as evidenced by the great number of cases resolved through negotiations and diplomatic channels. Moreover, with the exception of the European Court of Human Rights and the European Court of Justice, international courts are generally not an appropriate forum for the non-state entities. In the end, whether it is the judicial or the non-judicial means of the settlement being chosen by the states, that choice is voluntary. However, plenty of available alternative dispute settlement options and a possibility to combine them while at the same time controlling the course of the dispute, makes alternative means of cultural heritage dispute resolution a more suitable option.

An appropriate solution for the wide range of cultural heritage disputes would be the composition of a new, specialised arbitral tribunal. The tribunal could be equipped with specific rules of procedure and a multistage structure. For example, in the first instance, disputed parties would enter into the negotiation or conciliation phase. In the case of an unsuccessful outcome, they would proceed towards mediation. Eventually, in the absence of the agreement disputants could choose arbitration as a final and binding stage in the process of resolving a dispute. Disputants would have the chance to choose experts, scholars and practitioners on cultural heritage law as conciliators, mediators or

[10] ArThemis is a fully searchable database containing case notes about art and cultural property disputes settled through alternative resolution methods or traditional judicial proceedings.

arbitrator, which is a great advantage compared to litigation where judges are often not equipped with much needed expertise on this subject. An alternative dispute resolution system which is confidential and tailored to the parties' needs, but still binding in the last (arbitral) instance, would offer them a possibility to participate actively in resolving their dispute, while at the same time controlling the proceedings course.

Furthermore, with the exception of the 1995 UNIDROIT Convention, none of the above instruments allow non-state entity claims, which is a major setback. The field of cultural heritage law is pervaded with numerous stakeholders and their multiple interests - individuals, states, indigenous populations, museums, galleries, auction houses, libraries, academic institutions, ethnic groups, etc. Including non-state entity claims would represent an added value and could be more efficiently achieved through a specialised tribunal. In addition, it is of the utmost importance to acknowledge not only legal and political facts, but also ethical, moral, historical, and cultural considerations which shaped the dispute in question, which can be achieved by applying the culture-sensitive approach.

Moreover, this multistage, consensual structure of the tribunal would certainly encourage an amicable solution, cooperation and an open-dialogue atmosphere in comparison to the traditional adversarial litigation based on a strictly legal approach where antagonism between the parties is inevitable. The tribunal would represent an attractive and neutral forum, capable to tackle all aforementioned factors, but also to provide an incentive to states, which are often hesitant in giving their trust to national courts and to the often passive international organisations. In that manner, the tribunal could contribute to reconciliation through practicing cultural diplomacy, thus having a positive impact on the reputation and mutual trust between states and other disputants. However, in order to ensure that cultural heritage disputes are impartially and effectively resolved, it is important that these disputes be submitted to a single arbitral body embodied in a specialised tribunal. Otherwise, the multiplicity of authorised tribunals would surely decrease the possibility of reaching a legitimate solution through uniform interpretations of UNESCO conventions. At the present moment, in the absence of such specialised tribunal, it seems that the Permanent Court of Arbitration (PCA) may serve as an excellent example of an international body capable of handling cultural heritage disputes, given its widely accepted membership,[11] as well as the variety of offered legal services. PCA represents the first permanent intergovernmental body founded to assist States in resolving disputes through peaceful means, such as arbitration,

[11] At the moment (December 2018) PCA has 121 Contracting Parties which have acceded to one or both of the PCA's founding conventions (1899 and the 1907 Convention for the Pacific Settlement of International Disputes.)

conciliation, mediation and fact finding, but in time, has expanded its jurisdiction to private parties also. Furthermore, in 2003, PCA organized its Fifth International Law Seminar, choosing as its topic: "The Resolution of Cultural Property Disputes". It was noted that PCA may be well positioned to act as an effective platform for resolving cultural heritage disputes (Daly, 2006, p. 465).

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ALTERNATIVNO REŠAVANJE SPOROVA U PRAVU KULTURNOG NASLEDJA – KA SPECIJALIZOVANOM TRIBUNALU?

Apstrakt: Ovaj rad prikazuje problem koji proističe iz nedostatka efikasnog mehanizma posvećenog alternativnom rešavanju sporova iz oblasti kulturnog nasleđa. Prvo, analiziraju se relevantne međunarodne konvencije I procedure za rešavanje sporova koje su u njima sadržane. Zatim, ispituju se alternativni metodi rešavanja sporova koji su najčešće korišćeni u ovoj oblasti, I konačno, izlažu se savremeni predlozi u tom pogledu, te se predlaže uspostavljanje novog, specijalizovanog arbitražnog tribunala.

Ključne reči: Sporovi u oblasti kulturnog nasleđa, UNESKO Konvencije, dobre usluge, pregovori, mirenje, posredovanje, arbitraža, specijalizovani tribunal, kulturno osetljiv pristup.