

January 20, 2021

## ADR Case Update 2021 - 2

### Federal Courts

- **PARTY SEEKING TO DISCOVER MATERIALS RELATING TO A PRIVATE CONFIDENTIAL MEDIATION MUST SATISFY A HEIGHTENED STANDARD OF NEED**

*Accent Delight International Ltd., et al., v. Sotheby's, et al.*  
18-CV-9011  
United States District Court, Southern District of New York  
December 8, 2020

Accent Delight hired art dealer Yves Bouvier to purchase a world-class art collection. Accent later alleged that Bouvier acted as both agent and dealer and that Sotheby's assisted in his fraud when it facilitated the sale of da Vinci's *Christ as Salvador Mundi* from a group of sellers to Bouvier for \$83 million. Bouvier then sold the painting to Accent for \$127.5 million. Sotheby's filed a separate lawsuit against the da Vinci sellers. The parties settled in private mediation, which was not ordered by the judge. Accent served the da Vinci sellers with subpoenas seeking their confidential settlement agreement with Sotheby's and other documents related to the mediation, which Sotheby's sought to quash. The court granted Sotheby's motion only as to the settlement agreement. The da Vinci sellers produced their mediation statement and other documents, but Sotheby's blocked their production of communications directly related to the mediation. Plaintiffs moved to compel the production of the blocked materials and Sotheby's mediation statement and communications about the mediation.

The United States District Court for the Southern District of New York denied the plaintiffs' motion to compel. The court considered whether the mediation materials sought by the plaintiffs were subject to the heightened standard adopted by the Second Circuit in *In re Teligent*, which involved a mediation conducted subject to a court order providing for confidentiality of the mediation process. This Court found that the heightened standard of *Teligent* (that a party seeking disclosure of mediation materials must demonstrate: a special need for the confidential material; resulting unfairness from a lack of discovery; and that the need for the evidence outweighed the interest in maintaining confidentiality), also applied to confidential private mediations. Providing weaker protections to communication during a confidential private mediation than to communications during a court-sponsored mediation would discourage parties

from agreeing to engage in private mediation. Applying the same standards to confidential private mediations and court-ordered mediations is likely to “facilitate settlement, which courts are bound to encourage.” Using the *Teligent* standard, the Court found that the fact that the mediation materials concerned one of the transactions at issue did not, in itself, establish a special need, result in unfairness, or demonstrate that the need for evidence outweighed the interest in maintaining confidentiality.

*Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.*