UNIVERSITÉ PARIS II
PANTHÉON-ASSAS

REVUE DE DROIT INTERNATIONAL D'ASSAS

ASSAS INTERNATIONAL LAW REVIEW

Numéro 4, 2021 / ISSUE 4

DOSSIER THÉMATIQUE

L'art et le droit international

LIBRES PROPOS

LA RECHERCHE À L'ÉCOLE DOCTORALE

THÈSES

UNIVERSITÉ PARIS II
PANTHÉON-ASSAS

LexisNexis

Revue de droit international d'Assas
Assas International Law Review

Revue éditée par l'École doctorale de droit international, droit européen, relations internationales et droit comparé (ED 9) de l'Université Panthéon-Assas,
12 place du Panthéon – 75005 Paris

Directeur de la publication : **Stéphane Braconnier**
Directrice scientifique : **Sabine Corneloup**
Directeur scientifique adjoint : **François Mailhé**

Auteurs ayant contribué à ce numéro
Contributors to this issue

Marie-Elodie Ancel
Professeur à l'Université Panthéon-Assas

Cassandre Benoit
Doctorant CIFRE à l'Université Paris 1-Panthéon Sorbonne et au Cabinet Corinne Hershkovitch

Alejandra Blanquet-Angulo
Maître de conférences en droit privé à l'Institut catholique de Paris

Aude Brejon
Docteur de l'Université Panthéon-Assas
Chercheur associé au CRDH et au CEDIN

Ronan Bretel
Doctorant à l'École Normale Supérieure Paris-Saclay et ATER à l'Université Panthéon-Assas

Lara Cramer
Docteur de l'Université Panthéon-Assas

Pierre-William Fregonese
Docteur de l'Université Panthéon-Assas,
Chercheur associé au Centre Thucydide et Professeur associé à l'Université de Kobe (Japon)

Manlio Frigo
Professeur à l'Université de Milan
Of Counsel et Membre de l'Art & Cultural Property Focus Team chez BonelliErede, Milan

Florence Guillaume
Professeur à l'Université de Neuchâtel
LexTech Institute (Suisse)

Noémie Gundogar
Doctorant à l'École Normale Supérieure Paris-Saclay et l'École du Louvre

Corinne Hershkovitch
Avocat au Barreau de Paris

Laurence Mauger-Vielpeau
Professeur à l'Université de Caen-Normandie

Rüdiger Morbach
Docteur des universités Panthéon-Assas et de Wurtzbourg (Allemagne)
Référendaire au Tribunal de Leipzig

Capucine Nicolas
Brand development au Musée du Louvre
Lecturer à l'Université Panthéon-Assas

Diana A.A. Reisman
Éditeur en chef du Georgetown Journal of International Law (USA)

Sven Riva
Doctorant à l'Université de Neuchâtel
LexTech Institute (Suisse)

Marine They
Professeur à l'Université Sorbonne Paris Nord

Sommaire

Dispute Settlement and Due Diligence in the International Art Trade

Manlio Frigo
Professeur de droit international à l'Université de Milan
Of Counsel et Membre de l'Art & Cultural Property Focus Team chez BonelliErede, Milan

I. Alternative and "traditional" dispute settlement approach in the art market

Contemporary international practice in dispute settlement methods concerning the circulation of cultural property is showing remarkable developments that some prominent scholars have described as a "renewal of restitutions"[1]. The alternative nature of the dispute settlement may concern not only the selected methods, but also the proposed solutions, in three different respects. First, the above available settlement mechanisms may be considered alternative to judicial dispute resolution and to the traditional diplomatic channels leading to the application of a bilateral or multilateral international treaty.

Second, the choice of an (alternative) settlement mechanism may have some significant consequences on the legal effects of the preferred tool. Indeed, an arbitration concludes with a binding arbitral award, whereas both conciliation and mediation aim to help parties reach an agreement and have entirely different legal effects.

Third, the above dispute settlement mechanisms are also alternative in terms of the material outcome of the agreement, which may be quite different from the traditional restitution or return of the object to the claimant.

In cases concerning illicit or dubious provenance, recent and contemporary international practice is marked by a variety of possible combinations: the settlement could involve an agreement on a long-term loan, the deposit of the requested object, a donation, the restitution accompanied by scientific and artistic cooperation between the parties, or an agreement to establish a trust with a view to future restitution. Evidently, alternative solutions may be found – and have indeed been found – notably in disputes between States and individuals or public or private foreign entities. But even in disputes involving States, a dispute is rarely settled through an international treaty, for several reasons. The first and most recurring reason is that States tend, where possible, to avoid an officially diplomatic approach and instead prefer to settle disputes with a less publicised contractual tool. The few examples of international disputes settled through bilateral agreements include the disputes between France and Nigeria concerning the Nok and Sokoto statuettes, or the dispute between France and South Korea concerning the royal manuscripts of the Joseon dynasty.

In the France/Nigeria dispute, the three statuettes that the French government purchased in 1999 from a Belgian art dealer had, according to the Nigerian government, been illicitly excavated and exported. They were returned to the Nigerian government in accordance with a first agreement reached in 2000 and a second agreement reached in 2002, which provided for the transfer of the ownership to Nigeria and a parallel 15-year renewable loan of the statuettes to the Quay Branly Museum in Paris[2].

[1] See CORNU, RENOLD, *Le renouveau des restitutions de biens culturels : les modes alternatifs de règlement des litiges*, JDI, 2009, p. 504.
[2] See SCHYLLON, *Negotiations for the Return of Nok Sculptures from France to Nigeria-An Unrighteous Conclusion, in Art, Antiquity and Law*, 2003, 8, pp. 133–148.

In terms of the dispute resolution mechanisms used in this area, resorting to the courts to settle a dispute frequently remains the first option for parties after all other preliminary possibilities of reaching an amicable resolution have been exhausted unsuccessfully. Moreover, depending on the situation and specific circumstances, resorting to the courts may either entail a fixed course that the parties must follow, to their regret, in the absence of an alternative, or an instrumental tool used by the claimant to put the defendant under pressure, in the hope of reaching a future agreement after negotiations appear impossible. This is, of course, a situation that has little to do with the specific features of disputes concerning the circulation of cultural property. Other specific characteristics also need to be considered that may facilitate or hamper the effort to provide a legal answer or convenient solution that is acceptable for all parties involved.

Particularly, in claims for the restitution of cultural property, the owner may need to bring legal action against the possessor before a foreign jurisdiction where the possessor is domiciled and/or where the property has been transferred. In this case, the claimant frequently faces an uncertain outcome for several reasons. These include doubts as to the law that the court will apply, the task of giving evidence of the title (namely in claims for the recovery of archaeological items that have been illicitly excavated and declared as State property in the country of origin), and the possible burden of proof of the possessor's bad faith. But if the defendant is also affected by the same or equivalent level of uncertainty, resorting to the courts may be a good starting point to make both parties aware of the risks they each face and to create the material and psychological conditions for negotiations.

The different capacity and status of the parties (i.e., States, companies, public or private institutions, or individuals) may have a significant impact on how a dispute develops. In disputes between individuals concerning the authenticity or the ownership of an art object stolen from the legitimate owner and transferred to another country where it has been purchased in good faith, the main issue is determining the competent jurisdiction and applicable law. This issue is resolved in the same way as other transnational disputes, with one additional step: the identification of the sources of private international law, uniform law or domestic law that may come into play in the specific case. Should the same dispute occur between States, or between a State and an individual or a legal person, this "detail" may affect the choice of applicable law in different ways in terms of: (a) the decision to resolve the dispute in or out of court, and (b) the problem of the substantive law and its applicability in concrete terms. This would be the case with a request from a State to recover an illegally exported cultural object, as the choice of law and jurisdiction would be based on a declaration of public ownership established under the law of the claimant State.

II. Advantages and drawbacks of in-court dispute resolution

Some legal scholars have explored the advantages and disadvantages of in-court resolutions to disputes in this field and have pointed out that the competent jurisdiction is chosen, whenever possible, considering the rules of private international law and substantive law that will apply to the case[3].

[3] See SHAPIRO, "Litigation and Art-Related Disputes", in BYRNE-SUTTON, GEISINGER-MARIETHOZ (ed.), *Resolution Methods for Art-Related Disputes*, Zurich, 1999, p. 17; FELLRATH

As to the advantages, resorting to resolving disputes in court is advisable given both the wide competence entrusted to the judge and the definitive nature of the judge's decision. Furthermore, the judge's decision – not to mention the structural differences between the common law and continental law systems – is, by definition, aimed at resolving the dispute once and for all.

As to the disadvantages, the uncertainty that accompanies judicial claims in this field is a major problem and the result of a combination of factors.

In disputes regarding rights *in rem* concerning cultural objects, the claimant – be it a State or an individual – should consider not only the differing (and, thus, uneven) protection granted to the *bona fide* purchaser under different domestic legal systems, but also the different attitudes of domestic jurisdictions regarding the recognition and enforcement of foreign public law[4]. In this respect, the landmark decision rendered by the British Court of Appeal in *Islamic Republic of Iran v. Barakat* (2007) must be mentioned. The case concerned a claim by Iran seeking the restitution of some illegally excavated archaeological objects that had been illicitly exported and put on sale at auctions in Britain. Under Iranian law, the objects were State property, and the Court of Appeal, refusing to follow the more traditional view that a foreign public law could not be applied, upheld the claim, declaring that "the claim in this case is not an attempt to enforce export restrictions, but to assert rights of ownership"[5].

In international judicial practice, domestic jurisdictions are frequently asked to interpret and apply not only specific domestic legislation – regardless of whether it is the substantive law of the *forum* or of another legal system – but also the relevant rules of international law in force in the *forum*, such as the international conventions to which that particular State is a party[6]. But the decision in *Islamic Republic of Iran v. Berend* from a few months earlier demonstrates how some details can influence different court decisions in similar circumstances. Indeed, the Queen's Bench Division, in dismissing the State's claim to a title of a fragment of an ancient limestone relief purchased by the defendant in Paris in 1974, held that public policy did not require English law to introduce the French doctrine of *renvoi* so as to determine the title to movables and that, under French domestic law, the defendant had lawful title to the fragment[7].

III. Applicable law and jurisdiction issues

As to the law applicable to the merits, some well-known and conflicting decisions, such as Winckworth v. Christie's, Manson & Woods[8], Attorney General of New Zealand v. Ortiz and Others[9], Republic of Ecuador v. Danusso[10], or Ministère français de la culture v. Ministero italiano dei beni culturali and De Contessini[11] suggest that even the general accepted principle of *lex situs* may bring about different and frequently unpredictable

GRAZZINI, *Cultural Property Disputes*, Ardsley (NY) 2004, p. 52; ROODT, *Private International Law and Cultural Heritage,* Cheltenham, Northampton, 2015, p. 161 ff.

[4] *Idem.*

[5] See *Islamic Republic of Iran v. Barakat*, 21 December 2007, [2007] EWCA, Civ. 1374.

[6] This commonly happens whenever a court must apply domestic or foreign law; the role of domestic courts in enforcing international treaties is rather well explained in the *Barakat* case.

[7] See *Islamic Republic of Iran v. Berend*, 1 February 2007, [2007] EWHC, 132 (QB).

[8] See *Winkworth v. Christie Manson and Woods Ltd. and Another*, [1980] 1 ER (Ch) 496, [1980] 1 All ER 1121.

[9] See *Attorney General of New Zealand v. Ortiz and Others*, (1982) 2 WLR, p. 10

[10] See Court of Turin, Decision of 25 March 1982, *Rivista di diritto internazionale privato e processuale*. 1982, p. 625.

[11] See Italian Court of Cassation, Decision No. 12166 of 23 November 1995, *Foro italiano*, 1996, I, p. 907.

outcomes. Conversely, the option proposed in doctrine for an alternative and special conflict of laws rule, leading to the application of *lex originis*, is not generally accepted and may not itself always represent a reliable and predictable solution[12].

The choice of competent jurisdiction can play a prominent role in the choice of law applicable to the merits. Indeed, it is by applying the private international law rules of the court – together with the rules of international law in force in the same legal system – that the substantive law applicable to the merits is determined[13]. Furthermore, the effectiveness of this decision may typically become a crucial issue whenever recognition and enforcement in a different country are needed. As a result, there should be little doubt that the above factors add further uncertainty not only to the outcome of the claim, but also to the concrete effect of the decision.

Through international legal cooperation, some positive efforts have been made to reduce some of the disadvantages of resorting to litigation to settle disputes, particularly as to the uncertainty of the outcome that relates to claims for the restitution or return of cultural goods. As is well known, Regulation 1215/2012 (Brussels I bis) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in introducing some new provisions in this domain at European level, added a supplementary special jurisdiction for disputes concerning the recovery of cultural objects[14]. The possibility, now admitted under Article 7.4 of the Regulation, to bring legal action against a person domiciled in a Member State in another Member State in the courts for the place where the cultural object is situated at the time when the court is seized in civil claims for the recovery of a cultural object (based on ownership), should at least result in reducing the defendant's ability to challenge the jurisdiction, and thus represent a concrete support to the claimant.

From a substantive applicable law perspective, some legal initiatives taken at an international, regional and national level also introduce special uniform and private international law rules.

At international level, this is particularly true of the 1995 Unidroit Convention and its uniform rules concerning the duty of restitution of stolen cultural objects (Article 3) and return of illicitly exported cultural objects (Article 5).

At regional level, this is true with the recent EU Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State, which aims to better reconcile the free circulation of cultural objects with the need for more effective protection of cultural heritage. Directive 2014/60 definitely improves the previously applicable EU Directive 93/7, particularly by widening the notion of cultural object falling under its scope of application, and by extending the statute of limitations within which return proceedings may be initiated. The directive also approximates the laws of Member States in terms of the requirements that must be met, particularly by ensuring a more common interprÉtation of the notion of due diligence, which the

[12] See FRIGO, *Circulation des biens culturels*, p. 409 ff.
[13] See SIEHR, *International Art Trade and the Law*, Collected Courses of the Hague Academy of International Law, vol. 243, (1993-VI), 25: 9-2421993, at 48.
[14] See Regulation of the European Parliament and of the Council No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (recast). Under Article 7.4, a person domiciled in a Member State may be sued in another Member State "*as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seized*".

possessor must prove to have exercised in order to obtain fair compensation for the return of the cultural object[15].

At national level, this is the case with the 2004 Belgian code of private international law, which introduces an interesting and rather original choice between *lex situs* and *lex originis*. In fact, under Article 90 of this code, whenever a domestic law of a State includes a cultural object within its national heritage at the time of its illicit exportation, the claim for the return of that cultural object is governed by the law of that country, or – at the claimant State's request– by the law of the country where the cultural object is located at the time the claim is filed[16].

IV. Advantages and main features of a legal due diligence

After considering the uncertain outcome of art related disputes in the international practice, one should explore the ways to avoid or reduce the risk of judicial or extra-judicial claims. The task of identifying appropriate precautions to take when trading in a complex market such as the art and cultural property one, is certainly not easy. As we have seen, when it comes to cross-border transactions, questions arise about applicable law, jurisdiction and judicial interprÉtation criteria to assess title of ownership, authenticity, and so on.

In a global art market where transparency is sometimes lacking, in this respect legal due diligence is crucial for all transactions. Verifying the factual and legal circumstances surrounding a transaction is equally as important as collecting and safeguarding the fundamental information of the good in question if one is to avoid or at least significantly reduce transactional risks, be it in relation to a donation, a loan, or a deposit.

Legal due diligence entails a multifaceted investigation, especially for cross-border transactions. First, the authenticity and provenance of the artwork or cultural property must be checked: author, date, type, historical period, materials used – all these things must add up.

Second, the seller must prove that he/she owns the artwork and that no special liens, guarantees, or other constraints prevent its free transfer. This aspect becomes more complex when one considers the differences between civil- and common-law systems. The former hinges on possession as envisioned in the Napoleonic Code of 1804 (*en fait de meubles la possession vaut titre*), and thus stolen goods may sometimes be lawfully transferred based on possession alone. Whereas in common-law systems like in the UK and the US, the legitimate owner of an artwork generally has superior title of ownership to a good-faith purchaser, thus precluding lawful transfer of stolen goods. The lawfulness of a given transaction thus depends entirely on the applicable law.

---

[15] See CORNU, FRIGO, *Nouvelle Directive 2014/60/UE en matière de restitution de biens culturels. L'alliance entre le droit de l'Union et le droit international*, EUROPE, 2015, n° 4, p. 5 ff.

[16] Article 90 of the Belgian code of private international law, 16 July 2004 provides as follows:

> "Lorsqu'un bien qu'un Etat inclut dans son patrimoine culturel a quitté le territoire de cet Etat de manière illicite au regard du droit de cet Etat au moment de son exportation, sa revendication par cet Etat est régie par le droit dudit Etat en vigueur à ce moment ou, au choix de celui-ci, par le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication.
>
> Toutefois, si le droit de l'Etat qui inclut le bien dans son patrimoine culturel ignore toute protection du possesseur de bonne foi, celui-ci peut invoquer la protection que lui assure le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication".

Third, an artwork's provenance and materials can also raise red flags, for example if composed of patented or banned materials. The seller's identity is also a key consideration: transactions with unknown counterparties or never-ending chains of intermediaries ought to be avoided. A significantly higher or lower price than the market value for a particular type of artwork also raises a red flag, as do uncommon payment methods (e.g., Bitcoin), blatant conflicts of interest, and particular situations of the seller (e.g., marital separation).

Finally, checking that international circulation is carried out to the letter of the law is a must to ensure the highest attainable transactional security and avoid nasty surprises.

V. A multidisciplinary team of experts makes the difference.

Unwelcome surprises often emerge when it is too late to do anything – which is the reason why the legal due diligence should be completed during the negotiation phase. And this regardless of whether it is a collector purchasing an artwork on the market, an art dealer wanting to resell an artwork, or a museum being donated or loaned an artwork.

A key question concerns what skills are essential to a successful outcome of an artwork's purchase? Oftentimes, legal experts from multiple jurisdictions need to work as a united team to ensure comprehensive legal due diligence. And working in synch is especially key given the complexity of the legal framework: (a) national civil, criminal, tax and administrative law; (b) international conventions on property circulation and smuggling; (c) EU regulations and directives on import, export and return of cultural goods; and (d) national and international codes of ethics, e.g., those issued by the International Council of Museums (ICOM, particularly with its Red Lists), by the the *Confédération Internationale des Négociants en Oeuvres d'Ar*t (CINOA) and the American Alliance of Museums (AAM)[17].

VI. Authenticity and provenance

What does legal due diligence on artworks entail?

A complete due diligence should start with the basics: this would include a detailed check on all the documentation and information that, combined with the assessment of the artwork's history and authorship, and should by providing a clear picture of the artwork's authenticity and provenance.

Historical bibliographies, scientific studies, valuations and appraisals by independently accredited appraisers and art historians always prove useful. International valuation standards are applied by, for example, the likes of the Art & Antiques division of the London-based Royal Institution of Chartered Surveyors (RICS, established in 1868 and accredited by King George VI in 1946)[18]. Accredited labs and research centres (such as the *Opificio delle Pietre Dure* in Florence)[19] are a similarly key piece of the puzzle, as they can analyse the materials of an artwork to determine the historical period it hails from. This can be especially useful given that, when it comes to artworks attributed to an artist based on connoisseurship alone, the appraiser's opinion can always be challenged.

[17] See FRIGO, *Codes of Ethics*, in FRANCIONI, VRDOLJAK (ed.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford, 2020, p. 787-807.
[18] https://www.rics.org/uk/.
[19] http://www.opificiodellepietredure.it/.

Things are obviously much simpler if the artist or foundation to which an artwork belongs issues a certificate of authenticity, and even more so if the artwork is included in a *catalogue raisonne*[20]. This is because it removes any doubts as to who the artist is, and foundations always keep archives documenting the ownership history of their artworks. As to the value of an artwork, the collection of reference plays a key role, and as auction records show, artworks from renowned collections attract much higher bids.

Exhibition records and museum loan records are just as crucial – not just to retrace an artwork's journey on the international scene but also to document the importance of the curators who arranged for its exhibition and to attest to the authoritativeness of the critics who have critiqued it.

Lastly, red flags and unlawful dealings (e.g., stolen, or misappropriated artworks) can also be identified from public and private databases (e.g., Interpol's Stolen Works of Art Database[21], the Italian Carabinieri's database for stolen cultural property [*Banca Dati dei beni culturali illecitamente sottratti*][22], and the Art Loss Register[23]). Naturally, a red flag should be raised whenever an artwork lacks a certificate of authenticity, has undergone restoration when there ought to have been none, has an unclear provenance, or is by an artist whose work is known to be the frequent target of forgery.

Knowledge - or at least an approximate acknowledgment - of the legal framework of reference is also vital. A few regulatory instruments come into play at EU level: (a) Council Regulation (EC) No 116/2009 on the export of cultural goods; (b) Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State; and (c) Regulation (EU) 2019/880 on the introduction and the import of cultural goods.

As a rule, for cultural goods that come from abroad countries, the applicable rules in the country of provenance need to be checked. In Italy, for instance, the export of cultural goods without a valid export licence is a criminal offence that can entail the additional penalty of seizure and confiscation. Italian legislation also sets strict requirements for archaeological objects: it must be proven that they date back to before 1909 to avoid automatic state ownership under Law No. 364 of 1909. Proof can be provided through export documents (such as free circulation certificates and export licences), wills that list the object in question, auction listings, and even family photographs and letters.

VII. Provenance and nature of cultural goods

Legal due diligence during a transaction involving a cultural good must take into account the good's provenance and nature and the transaction's features. The goal of legal due diligence will vary on a case-by-case basis – for example, it could be to:

a) prevent the acquisition of archaeological or ethnological objects obtained from unlawful excavations or that come from certain countries (e.g., Iraq and Syria, which are subject to UN Security Council resolutions and EU regulations); and

[20] According to the International Foundation for Art Research – IFAR, *catalogues raisonnés* are "scholarly compilations of an artist's body of work […] critical tools for researching the provenance and attribution of artwork" (https://www.ifar.org/cat_rais.php).
[21] https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database.
[22] http://www.carabinieri.it/cittadino/tutela/patrimonio-culturale/la-banca-dati-tpc.
[23] https://www.artloss.com/.

b) assess whether constraints or bans on trade/export of certain categories of goods are imposed by the country of provenance, e.g., ivory and human remains.

Historical periods that saw systematic looting are a special cause for concern: e.g., 1933–1948 in Europe (Nazi-looted art), 1949–1990 in Eastern Europe and the USSR, and 1953–1959 in Cuba (during the revolution). As to Nazi-looted art, the American Association of Museums published 'Guidelines concerning the unlawful appropriation of objects during the Nazi era' in 1999, which set out "reasonable steps" that museums should take to ascertain the provenance and status of Nazi-era cultural goods before acquiring them or accepting them as donations. ICOM's 'Recommendations concerning the return of works of art belonging to Jewish owners' (1999) echo the above by recommending that efforts be made to track down owners who were unlawfully stripped of sold or donated cultural property. The Washington Conference Principles on Nazi-Confiscated Art (1999) were adopted at an intergovernmental conference that saw government officials from 44 countries meet to discuss how to resolve issues relating to artworks confiscated in Nazi-occupied territories between 1933 and 1945 and never returned to their rightful owners. The principles – which were reaffirmed at the intergovernmental conferences of Vilnius (2000) and Terezin (2009) – set out criteria to identify confiscated artworks and their lawful owners as well as methods for resolving ownership disputes[24].

Some countries have implemented the Washington Principles by establishing special advisory committees to resolve cases concerning Nazi-looted art[25]. In Italy, this was the Anselmi Commission, which was specifically tasked with reconstructing the actions undertaken by public and private bodies in Italy to acquire property of Jewish citizens (*Commissione per la ricostruzione delle vicende che hanno caratterizzato in Italia le attività di acquisizione dei beni dei cittadini ebrei da parte di organismi pubblici e privati*) until 2001, when it published its final report[26]. Other advisory bodies around Europe include the Spoliation Advisory Panel in the UK[27], the CISV in France (*Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'occupation*)[28], the Dutch Restitutions Committee in the Netherlands[29], the *Beratende Kommission* in Germany[30], and the *Kommission für Provenienzforschung* in Austria[31].

[24] Washington Principle 2 reads as follows: "Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives". Washington Principle 3 reads as follows: "Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted". Washington Principle 4 reads as follows: "In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era".

[25] Austria, France, Germany, the Netherlands, and the United Kingdom; see European Parliament, Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations (2016), p. 20 https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf.

[26] http://presidenza.governo.it/DICA/7_ARCHIVIO_STORICO/beni_ebraici/index.html.

[27] https://www.gov.uk/government/groups/spoliation-advisory-panel.

[28] http://www.civs.gouv.fr/.

[29] https://www.restitutiecommissie.nl/en.

[30] https://www.kulturgutverluste.de/Webs/DE/BeratendeKommission/Index.html.

[31] https://www.kunstkultur.bka.gv.at/kunstruckgabe. For more details on commission/committee work, *see* CAMPFENS, *Resolving Looted Art Claims: What About Access to Justice?*, in *Santander Art and Culture Law Review*, 2018, p. 185-220; *see also* for an appraisal of the issues confronting museums and claimants

In 2016, the US passed the Holocaust Expropriated Art Recovery Act, to "provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover artworks confiscated or misappropriated" and "to ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner"[32].

Although the Washington Principles are not binding, their impact is far from tenuous: courts have taken these very principles into consideration when ruling on restitution claims. A prime example took place two years before the US adopted the (binding) Holocaust Expropriated Art Recovery Act: In Von Saher v. Norton Simon Museum of Art at Pasadena, the US Court of Appeals for the Ninth Circuit overturned the district court's decision and ordered the return of two Nazi-looted Cranach paintings to Dutch collector Jacques Goudstikker's heirs. The paintings had been acquired in 1971 by the Norton Simon Museum in Pasadena (CA), but the court reasoned that "federal policy also includes the Washington Conference Principles on Nazi Confiscated Art"[33].

In fact, courts were applying international law to uphold claims for the restitution of cultural property looted during the Second World War even before the collective call to action that culminated in the Washington Principles. In Rosenberg v. Fischer (1948), for instance, the Federal Supreme Court of Switzerland ruled that German troops in occupied France had violated Swiss and international law when they confiscated the works of art in question; the court thus ordered them to be returned to their rightful owners[34]. In the famous case Menzel v. List (1966), the New York Supreme Court ordered that a Chagall painting looted in 1941 by the Reichsleiter Rosenberg Taskforce and purchased by a New York gallery owner be returned to the claimants, who had purchased it in Belgium in 1932 but were forced to leave the painting behind when they fled for their lives[35].

VIII. Title of ownership and international circulation

Legal due diligence can entail investigating the validity of the possessor's title of ownership of an artwork, and this is especially advisable when the seller is not the artist. In this case, the due diligence entails (among other things): (a) analysis of sales invoices and other administrative documentation, (b) verification of the existence of a will or other documentation proving rightful heirship or of deeds of donation, and (c) checks as to whether the artwork is encumbered by a pledge or other guarantee.

Naturally, investigations into legal ownership necessarily entail ascertaining the law applicable to the transaction. As mentioned, civil law and common law differ in this

PALMER, *Museums and the Holocaust*, 2nd edition (edited by R. Redmond-Cooper), Builth Wells, 2021, p. 1-50.

[32] https://www.congress.gov/bill/114th-congress/house-bill/6130/text.

[33] See *Marei Von Saher c. Norton Simon Museum of Art in Pasadedna, Norton Simon Art Foundation,* 754 F.3d 712; 2014 US App. LEXIS 10552 of 6 June 2014. On the effectiveness of this and other non-binding principles, see DEMARSIN, *Let's not talk about Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, BROOKLYN JOURN. INT'L L., 2011–2012, pp. 118 ff., who sums up as follows: "The only way for the international community to achieve the spirit of the Washington Principles is to broadly implement the existing framework, not to add yet another non-binding recital of good intentions" (ibid., p. 185).

[34] Bundesgericht 8 June 1948, in *Annuaire Suisse droit int. privé*, 1949, pp. 139 ff.

[35] 267 N.Y.S. 2d, pp. 804 ff. (Sup Ct. 1966); *see also* Siehr, *International Art Trade and the Law*, in Recueil des Cours, t. 243 (1993-VI), pp. 25 ff., and p. 129, FRIGO, *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges*, Recueil des Cours, t, 375 (2014), pp. 93 ff., and p. 230.

regard, so an investigation based on one or the other can produce very different outcomes.

International conventions and national legislation based on international norms underline the importance of in-depth due diligence to avoid unwittingly purchasing illegally obtained cultural property. Examples include the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and, even more famously, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995), which establishes criteria to determine whether a possessor of a stolen cultural object required to return it exercised due diligence when acquiring the object, as only then are they entitled to fair and reasonable compensation on returning it[36]. The return procedure under Art. 10 of EU Directive 2014/60 is substantially identical to that under Art. 4.4 of the UNIDROIT Convention[37].

In any case, purchasers need to carefully assess the import/export rules for cultural goods in the country of provenance to avoid extremely unpleasant surprises. Italy, for example, prohibits the permanent export of cultural goods that have been declared of national cultural interest (Art. 13 of the Italian Cultural Heritage Code); and if an artwork was created 70 or more years ago by an artist who is no longer living, and it's worth over EUR 13,500, it may be exported only if authorised by the competent export office (Art. 65 of the Italian Cultural Heritage Code). In these cases, legal due diligence entails checking not only whether constraints exist (typically a declaration of national cultural interest) but also whether the good in question had previously been exported from Italy without authorisation or was imported from a country banning its export.

To cite but one example of due diligence in action: in case a cultural good was to be temporarily imported into Italy, the competent Italian export office - i.e., the local unit of the Ministry of Culture - would issue a certificate of shipment or an import certificate, which would also allow the good to subsequently leave Italy for five years without the need for a certificate of free circulation or an export licence. Indeed, a shipment or an import certificate serves to confirm a good's provenance and lawful export.

IX. Criminal liability for partial or total failure to exercise due diligence.

In-depth legal due diligence on authenticity, provenance, ownership, and import/export status avoids the risk of criminal liability and penalties. In other words,

[36] See Arts. 4 and 5 of the UNIDROIT Convention.

[37] Art. 10 reads as follows:

> Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object.
>
> In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.
>
> In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by those means.
>
> The requesting Member State shall pay that compensation upon return of the object.

a purchaser has to gather sufficient information to be able to rule out that a given cultural good has not been the subject of a criminal offence, such as receipt of stolen goods, forgery, unlawful export or unlawful excavation. When international circulation is involved, failure to comply with export regulations can result in seizure if the purchaser is aware that the cultural good was unlawfully exported or should have been aware of this circumstance had the proper due diligence been exercised.

As mentioned, comprehensive due diligence is a multifaceted process – indeed, it sometimes extends beyond the legal aspects of a cultural goods or artwork's circulation. Such is the case when tax aspects are involved, e.g., when a trust fund with artworks is dissolved and the works are distributed among the beneficiaries. Due diligence in this case should focus on the proper application of succession or donation taxes (i.e., direct taxes) and VAT (i.e., indirect taxes).

X. Responsible Art Market's guidelines and the end goal: a successful transaction.

The increasing complexity of the art market has prompted efforts to provide the market appropriate tools to exercise due diligence before purchasing cultural goods. One notable example is Responsible Art Market (RAM)[38], a non-profit based in Geneva that has spearheaded an initiative to keep market operators up to speed on the associated risks. To this end, RAM manages a platform for the exchange of best practices and publishes practical guidelines and other materials free of charge. The guidelines include a toolkit for a comprehensive, risk-based approach to due diligence in art transactions, complete with a checklist of red flags and risk-mitigation assessments.

To sum up, the preliminary checks and assessments touched on in this article are an inextricable part of the very concept of due diligence and an invaluable means of averting the risks associated with art and cultural property transactions. Be it an acquisition, a donation, a sale of movable or immovable property, or a more complex transaction such as an art investment, a loan that involves putting up an artwork as collateral, or the management of an entire art collection, a successful transaction requires a team of experts who can reassure the client that they have used criteria and tools like those set out in RAM's toolkit to address all the risks.

Legal due diligence is part and parcel of the increasingly recommended standards under the codes of ethics in the field, and even sometimes obligatory under national, EU and international regulations. Legal due diligence is truly the embodiment of the adage "better safe than sorry".

[38] http://responsibleartmarket.org/.