LawArt
Rivista di Diritto, Arte, Storia
Journal of Law, Art and History
www.lawart.it

doi: 10.17473/LawArt-2023-4-5

4 (2023) 161-188

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# Methods of Dispute Settlement, Post-Colonial Restitutions and the Increasing Importance of Due Diligence in the International Art Trade

# Metodi di risoluzione delle controversie, restituzioni post-coloniali e la crescente importanza della *due diligence* nel commercio internazionale di arte

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ABSTRACT. The historical window opened by President Macron in Ouagadougou on November 28, 2017, preparing the path toward the restitution of African cultural heritage objects currently held in French national collections, has established a new era in cultural relations between the North and the South of the planet. The issue of providing the financial, legal, and methodological framework to ensure the return of cultural heritage particularly in post-colonial times, is raising several questions about the existence of the legal and moral grounds of such an approach, as well as about the obstacles in its concrete achievement. Starting from the analysis of some concrete outcomes of this process, this paper explores the consistency between the fulfilment of legal duties, ethical principles, and identity links, in the light of the due diligence tools and procedures in art related transactions.

ABSTRACT. La finestra storica aperta dal presidente Macron a Ouagadougou il 28 novembre 2017, che ha aperto la strada verso il recupero dei beni del patrimonio culturale africano attualmente custoditi nelle collezioni nazionali francesi, ha stabilito una nuova era nelle relazioni culturali tra il Nord e il Sud del pianeta. La questione di fornire la cornice finanziaria, legale e metodologica per garantire la restituzione del patrimonio culturale, in particolare in epoca postcoloniale, sta sollevando diversi interrogativi sull'esistenza dei fondamenti giuridici e morali di tale approccio, nonché circa gli ostacoli al suo concreto raggiungimento. Partendo dall'analisi di alcuni esiti concreti di questo processo, il contributo esplora la coerenza tra adempimento degli obblighi giuridici, principi etici e legami identitari, alla luce degli strumenti e delle procedure di due diligence nei negozi relativi all'arte.

KEYWORDS / PAROLE CHIAVE: Provenance; Due Diligence; Post-Colonial Restitutions / Provenienza; due diligence; restituzioni post-coloniali

# Methods of Dispute Settlement, Post-Colonial Restitutions and the Increasing Importance of Due Diligence in the International Art Trade

Manlio Frigo



## 1. *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

[1] See Cornu/Renold (2009), p. 504.

doi: 10.17473/LawArt-2023-4-5 LawArt 4 (2023) 161-188
ISSN 2724-654X

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. 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. Some 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].

[2] See Schyllon (2003), pp. 133-148.

Just to mention a few other examples, in October 2021, Germany and Nigeria signed a pre-accord featuring the restitution of Benin bronzes (more than 1000 items) starting from the year 2022, although some artifacts will remain on loan to German museums [3]. In the Fall of 2021, the Dutch Government announced its support for proposals leading to the return of looted objects from state-owned collections, based on recommendations made by a government-appointed Advisory Committee set up in 2019 to establish a national policy framework for colonial collections [4]. Lastly, in February 2022, the Government of Angola started discussions with the Portuguese Government concerning the return of its cultural heritage which had been illegally removed from Angola and exhibited in Portuguese museums [5].

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

[3] Harris (2022). On a different note, it is noteworthy that the British Universities of Cambridge, in 2019, and Aberdeen, in 2021, returned to Nigeria bronzes looted by the British soldiers from Benin City, in Southern Nigeria in 1897; see Adebola (2021).

[4] Government of the Netherlands, *Redressing an Injustice by Returning Cultural Heritage Objects to their Country of Origin* (29 January 2021); https://www.government.nl/latest/news/2021/01/29/government-redressing-an-injustice-by-returning-cultural-heritage-objects-to-their-country-of-origin. See also Returning Heritage, *Dutch Recognise Colonial Injustice and Aim to Return Stolen Objects from State Collections* (22 March 2021) https://www.returningheritage.com/dutch-recognise-colonial-injustice-and-aim-to-return-stolen-objects-from-state-collections.

[5] Carlos (2022).

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.

## 2. *The Current Debate on the Post-Colonial Restitutions and the Recent Practice in Europe: The 'Belgian Approach'*

The historical window opened by President Macron in Ouagadougou on 28 November 2017, during an official visit to Burkina Faso, preparing the path toward the restitution of African cultural heritage objects currently held in French national collections, has probably established a new era in cultural relations between France and Africa and, from a broader perspective, between the North and the South of the planet.

As is known, just a few months later after his address to Sub-Saharan Africa, President Macron commissioned a report, today known as the 'Sarr-Savoy Report', from academics and researchers Bénédicte Savoy and Felwine Sarr, to implement the return of thousands of artworks and objects of historical, ethnographical, archaeological interest [6].

The Sarr-Savoy Report aims at providing the chronological, legal, methodological, and financial framework to ensure the return of African cultural heritage items back to Africa, raising several questions about the existence of the legal and moral grounds of such an approach, as well as in terms of the obstacles to its concrete achievement.

In such a context, it is a fact that, the special law which – by way of derogation from the principle of inalienability – ordered the return of a saber to Senegal and 26 plundered objects to Benin was adopted only in December 2020 [7]. The ceremony, held in Paris on 9 November 2021, for the restitution of the Treasure of Kingdom of Abomey, seized in the 19th century, to the Republic of Benin was certainly meant to represent an event of highly symbolic importance, as witnessed by the presence of

[6] Sarr-Savoy (2018).

[7] *Loi No. 2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Benin et à la République du Sénégal* (O.J. No. 312, 28 December 2020). See also *La France acte la restitution définitive d'objets d'art au Sénégal et au Bénin*, «Le Monde» (Paris, 16 July 2020), https://www.lemonde.fr/afrique/article/2020/07/16/la-france-acte-la-restitution-definitive-d-objets-d-art-au-senegal-et-au-benin_6046342_3212.html.

both President Emmanuel Macron and President Patrice Talon[8]. As a matter of fact, this is not a French problem and has little to do with some (unavoidable?) resistance manifested within certain sectors of the institutional apparatus of that country.

What is more important to underline is, however, the effect that this complex series of events has produced in the debate that has developed in recent years, particularly, but not exclusively, in Europe and Africa. From this point of view, it would be rather ungenerous not to record the emulative effect that Macron's declaration and the Sarr-Savoy Report have produced even before the concrete restitution initiatives, except, possibly, for Italy where a real comprehensive debate about the colonial and postcolonial issues has yet to be seriously addressed[9]. In fact, as a follow-up of the Sarr-Savoy Report, Jean-Luc Martinez in his quality as *ad honorem* chairperson of the *Musée du Louvre* – has published on April 27, 2023 a Report for the attention of the President of the French Republic entitled *Patrimoine partagé: universalité, restitutions et circulation des oeuvres d'art. Vers une législation et une doctrine françaises sur les "critères de restituabilité" pour les biens culturels*, proposing steps and criteria for the restitution of items of cultural significance that belong to a 'shared heritage'[10].

In the above scenario, Belgium's approach deserves a separate mention due to both the choice of adoption of a general legal tool concerning the fate of cultural property connected with the past colonial experience, and to the substance of such regulatory intervention.

In June 2022, the Chamber in plenary session approved the *Projet de loi reconnaissant le caractère alienable des biens liés au passé colonial de l'État belge et determinant un cadre juridique pour leur restitution et leur re-*

[8] *France Formally Hands Back 26 Looted Artworks to Benin*, *RFI* (Paris, 9 November 2021), https://www.rfi.fr/en/africa/20211109-france-formally-hands-back-26-looted-artworks-to-benin.

[9] Visconti (2021), p. 551.

[10] See https://www.vie-publique.fr/rapport/289235-universalite-restitutions-circulation-des-oeuvres-d-art-rapport-martinez.

*tour*, subsequently published on July 3, 2022[11]. By the approval of this law, Belgium is the first State to create a general legislative framework for the restitution of colonial collections. The 'Belgian approach' is also quite interesting because the scope of application of the new bill includes objects acquired during the political and administrative domination of the State of origin by Belgium, starting from the signature of the Act of the Berlin conference in 1885, up to the date of the independence of the State of origin[12]. The bill aims at consolidating close cooperation with the State of origin of items of dubious or questionable provenance, and at involving the State of origin in the restitution process. For this purpose, bilateral agreements of cultural and scientific cooperation will be concluded between Belgium and the State of origin to define the methods of cooperation that will make it possible to establish whether the property must be returned, as well as the preservation guarantees required to ensure its return to the State of origin[13].

Each bilateral agreement will establish a joint scientific commission, which will receive the requests of restitution, confirm the origin of the objects and determine how the property was acquired, in order to assess the importance of the requested object for the heritage of the State of origin and to render its reasoned opinion concerning the fate of the object[14]. The decision concerning the deaccessioning and the restitution of the object – based on the opinion rendered by the joint commission – will

[11] *Loi reconnaissant le caractère alienable des biens liés au passé colonial de l'État belge et determinant un cadre juridique pour leur restitution et leur retour*, «Moniteur Belge», n° 41, p. 70607. See also Chambre des Représentants de Belgique, *Projet de loi reconnaissant le caractère aliénable des biens liés au passé colonial de l'état belge et déterminant un cadre juridique pour leur restitution et leur retour* (25 April 2022) Doc. 55 2646/001, https://www.lachambre.be/FLWB/PDF/55/2646/55K2646001.pdf. *Passé colonial: la Chambre adopte le cadre juridique pour la restitution des biens*, *RTBF* (30 June 2022) https://www.rtbf.be/article/passe-colonial-la-chambre-adopte-le-cadre-juridique-pour-la-restitution-des-biens-11022973.

[12] See Article 3, para 2.

[13] Article 4.

[14] Articles 5-6.

be adopted by the King and will result in the transfer of title of the object to the State of origin.

International practice concerning the circulation of cultural goods and the fight against illicit trafficking has accustomed us to consider the difference between the notions of restitution and return, referring to two consistent and recurring definitions. Even the wording that relevant international conventions use to make a clear distinction between these two figures is based on the need to provide two different legal regimes, in accordance with distinct cases of illicit trafficking [15].

Typically, restitution should be granted to the owner of a cultural property, which was stolen. Conversely, the issue of return should be raised in the case of objects illegally exported from a state's territory. In the first case, the rightful owner has been dispossessed and requests the restoration of the infringed right; in the second case, it is not the right of property, which is being violated, as the person responsible for the violation arising from the illegal export may in fact be the legitimate owner.

In this respect, probably the most precise and detailed separation between the two notions may be found in Article 1 of the 1995 UNIDROIT Convention, which clearly states that

> This Convention applies to claims of an international character for: (a) the restitution of stolen cultural objects; (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law reg-

[15] *Convention for the Protection of Cultural Property in the Event of Armed Conflicts* (14 May 1954) entered into force 7 August 1956 249 UNTS 358 (hereinafter: 1954 Hague Convention), Protocol I; *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (14 November 1970) entered into force 24 April 1972 823 UNTS 232, Articles 7, 13, 15; UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* (24 June 1995) entered into force 1 July 1998 2421 UNTS 457 (hereinafter: 1995 UNIDROIT Convention), Articles 1, 3, 4, 5, 6, 8, and 9. At a European Union level, see Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 [2014] OJ L159/2, Articles 2, 3, 8, and 10.

> ulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects") [16].

In the above contexts, the common element to the two distinct terms to which we have referred is that both the restitution and the return imply the physical transfer of the objects in the hands of the owner, or in the territory of the requesting State.

Unlike the current international legal practice, the 'Belgian approach' inspiring the new bill under discussion includes a quite different and original characterization of the two notions of restitution and return. In fact, pursuant to Article 3 of the Belgian law, *restitution* means «the transfer of legal ownership of the object to be restituted, decided in accordance with the present law» (Article 3.4), while *return* means «the material transfer to the State of origin of the object to be restituted, the restitution of which has been decided in accordance with the present law» (Article 3.5) [17]. In other words, the model proposed by the Belgian law makes for the first time a clear distinction between the transfer of title (*propriété juridique*) and the material transfer (*remise matérielle*), thus inaugurating the new category of the 'intangible restitution' of cultural property.

The logic of the above choice is clearly explained in the *Exposé des motifs,* which is published together with the text of the law. With a view to bypassing the problems posed by the 'material restitution' (*restitution matérielle*)

> […] the law will clearly affirm that the goods which are linked to the Belgian colonial past are, under the conditions it provides, alienable exclusively with a view to restitution and return, free of charge, to the State of origin. By distinguishing between the transfer of the legal ownership of the property and the material delivery of the latter to the State of origin, this draft law deviates from the principle laid down by Article 3.50 of the

[16] 1995 UNIDROIT Convention, Article 1.

[17] See the Belgian law, Article 3.4 (defining 'restitution' as «le transfert de propriété juridique du bien restituable, décidé conformément à la présente loi») and Article 3.5 (defining 'retour' as «la remise matérielle à l'État d'origine du bien restituable dont la restitution a été décidée conformément à la présente loi»).

> Civil Code, according to which the right of ownership confers directly on the owner the right to use what is the subject of his right, to enjoy it and to dispose of it [18].

And even more clearly, the spirit of the new law emerges where it is explained that

> In this case, the material return of the property will not 'directly' follow the legal restitution of this property, the bilateral agreement on scientific and cultural cooperation having to provide for the methods according to which this return will operate. This process is justified by the status of goods belonging to a movable cultural heritage, which require specific protection and, therefore, to ensure in advance that they are conserved in good conditions [19].

Whatever the assessment of the appropriateness of the Belgian legislator's choice, there is no doubt that the solution proposed by splitting the ownership of the assets and their material availability constitutes a precedent, which should be discussed in the future.

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[18] Projet de Loi, 'Exposé des motifs'7: «La loi affirmera clairement que les biens qui sont liés au passé colonial belge, sont, dans les conditions qu'elle prévoit, aliénables exclusivement en vue d'une restitution et d'un retour, à titre gratuit, à l'État d'origine. En distinguant le transfert de la propriété juridique du bien et la remise matérielle de ce dernier à l'État d'origine, le présent projet de loi s'écarte du principe posé par l'article 3.50 du Code civil, selon lequel "le droit de propriété confère directement au propriétaire le droit d'user de ce qui fait l'objet de son droit, d'en avoir la jouissance et d'en disposer"».

[19] Projet de Loi, 'Exposé des motifs'7: «En l'espèce, le retour matériel du bien ne suivra pas 'directement'la restitution juridique de ce bien, l'accord bilatéral de coopération scientifique et culturelle devant prévoir les modalités selon lesquelles s'opérera ce retour. Ce procédé se justifie par le statut particulier des biens relevant d'un patrimoine culturel mobilier, qui nécessitent une protection spécifique et, donc, de s'assurer préalablement de leur conservation dans de bonnes conditions».

### 3. *Advantages and Drawbacks of In-Court Dispute Resolution*

If we now turn to the more general practice of international art related disputes, it is to be noted that some legal scholars have explored the advantages and disadvantages of in-court resolutions to such disputes 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 [20].

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 is 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 [21]. 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

[20] See Shapiro (1999), p. 17, Gazzini (2004), p. 52, Roodt (2015), p. 161 ff.

[21] Roodt (2015), p. 161 ff.

case is not an attempt to enforce export restrictions, but to assert rights of ownership» [22].

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 State is a party [23]. 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* to determine the title to movables and that, under French domestic law, the defendant had lawful title to the fragment [24].

## 4. *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* [25], *Attorney General of New Zealand v. Ortiz and Others* [26], *Republic of Ecuador v. Danusso* [27], or *Ministère français de la culture v. Ministero italiano dei beni*

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

[23] 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.

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

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

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

[27] See Court of Turin, Decision of 25 March 1982, in «Rivista di diritto internazionale privato e processuale», 1982, p. 625.

*culturali and De Contessini*[28] suggest that even the general accepted principle of *lex situs* may bring about different and frequently unpredictable 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[29].

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[30]. 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[31]. The possibility, now admitted

[28] See Italian Court of Cassation, Decision No. 12166 of 23 November 1995, in «Il Foro italiano», 1996, I, p. 907.

[29] Frigo (2015), p. 409 ff.

[30] Siehr (1993), p. 48.

[31] 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

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 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 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 interpretation of the notion of due diligence, which the possessor must prove to have exercised to obtain fair compensation for the return of the cultural object [32].

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 with-

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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 seised».

[32] Cornu/Frigo (2015), p. 5 ff.

in 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 [33].

## 5. *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 interpretation 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.

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[33] 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».

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.

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.

## 6. *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 *Confédération Internationale des Négociants en Oeuvres d'Art* (CINOA) and the American Alliance of Museums (AAM) [34]. It is a fact that frequently museums and cultural institutions are among the privileged recipients of requests for the return of goods, and it is certainly no coincidence that many codes of conduct are addressed precisely to them. It has been lately the case with the release by Arts Council England (ACE) of the guidance *Restitution and Repatriation: A Practical Guide for Museums in England* (August 2022): the Guide addresses, *inter alia*, the ethical, practical, and legal concerns for museums and suggests a step-by-step procedure to be followed, providing best-practice principles [35].

## 7. *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. Naturally, the verification of authenticity and provenance

[34] Frigo (2020), p. 787-807.

[35] See ACE, *Restitution and Repatriation: A Practical Guide for Museums in England, Arts Council England*, Manchester, 2022. See also Bursey (2022), p. 341 ff.

concerns an investigation relating to two entirely separate problems which should be carried out with the aid of a plurality of instruments.

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) [36]. Accredited labs and research centres (such as the *Opificio delle Pietre Dure* in Florence) [37] 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.

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 raisonné*. [38] This is because it removes the main 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

[36] https://www.rics.org/uk/.

[37] http://www.opificiodellepietredure.it/.

[38] 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).

(e.g., Interpol's Stolen Works of Art Database [39], the Italian Carabinieri's database for stolen cultural property *Banca Dati dei beni culturali illecitamente sottratti* [40], and the Art Loss Register [41]). 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.

## 8. *Provenance and Nature of Cultural Goods*

Legal due diligence during a transaction involving a cultural good must consider the good's provenance and nature and the transaction's features.

[39] https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database.

[40] http://www.carabinieri.it/cittadino/tutela/patrimonio-culturale/la-banca-dati-tpc.

[41] https://www.artloss.com/.

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

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.

Specific attention should be paid to historical events from which frequent disputes regarding requests of return goods have arisen. Historical periods that saw systematic looting are a special cause for concern: e.g., with regards to recent events 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 [42].

[42] Washington Principle 2 reads as follows: «Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the Internation-

Some countries have implemented the Washington Principles by establishing special advisory committees to resolve cases concerning Nazi-looted art [43]. 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 [44]. Other advisory bodies around Europe include the Spoliation Advisory Panel in the UK [45], the CISV in France (*Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'occupation*) [46], the Dutch Restitutions Committee in the Netherlands, [47] the *Beratende Kommission* in Germany [48], and the *Kommission für Provenienzforschung* in Austria [49].

In 2016, the US passed the Holocaust Expropriated Art Recovery Act, to «provide the victims of Holocaust-era persecution and their heirs

al 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».

[43] 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.

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

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

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

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

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

[49] https://www.kunstkultur.bka.gv.at/kunstruckgabe For more details on commission/committee work, see Campfens (2018), pp. 185-220; see also for an appraisal of the issues confronting museums and claimants Palmer (2021), pp. 1-50.

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» [50].

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» [51].

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 [52]. 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

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

[51] 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 (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» (p. 185).

[52] Bundesgericht 8 June 1948, in «Annuaire Suisse de droit international Privé», 1949, pp. 139 ff.

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 [53].

### 9. *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 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 [54]. The return procedure under Art. 10 of EU Directive 2014/60

[53] 267 N.Y.S. 2d, pp. 804 ff. (Sup Ct. 1966); see also Siehr (1993), pp. 25 ff., and p. 129, Frigo (2015), pp. 93 ff., and p. 230.

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

is substantially identical to that under Art. 4.4 of the UNIDROIT Convention [55].

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

[55] 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».

an import certificate serves to confirm a good's provenance and lawful export.

## 10. *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, a purchaser must 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.

In this regard, the importance of the recent reform which introduced the new title relating to crimes against cultural heritage into the Italian penal code cannot be overlooked.

In particular, the new article 518-decies of the code punishes with a fine and imprisonment anyone who imports cultural property deriving from a crime, or found following unauthorized research, or exported from another State in violation of its laws for the protection of cultural heritage [56].

The *erga omnes* character of the above rule is clear and – together with the other rules already foreseen in the Italian legal system and today made more severe, not only expresses an evident tightening of the legal response in the fight against illicit trafficking, but makes even more evi-

[56] Pursuant to article 518-decies of the penal code, «Whoever […] imports cultural property deriving from crime, or found as a result of requests carried out without authorization, where provided for by the legislation of the State in which the discovery took place, or expropriated from another State in violation of the law on the protection of cultural heritage, is punished with imprisonment from two to six years and a fine from Euro 258 to Euro 80.000».

dent the unavoidability of an adequate due diligence in international art related transactions.

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).

## 11. *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)[57], 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

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

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'.

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