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ISSN 1748-944X

Stemming Illegal Trade of Works of Art - How can Private Law contribute?

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Abstract

Looted art has recently got more and more into the focus of international attention. This is due to a number of historical events concerning looted art. Two prominent examples are the looting of art from museums in Iraq in 2003 and the various ways the Nazis used for dispossessing owners of works of art in the period from 1939 until 1945. These and a wide range of other less prominent events such as the illegal excavation of archaeological objects have resulted in a flooding of the art market, as huge amounts of works of art that were illegally taken away from their former owners or original settings have been put on the art markets all over the world. Many of these objects have since become part of private or public collections.

There are various ways in which the law may respond to these challenges. First of all there exist a number of legally binding provisions in the field of public law. Furthermore there are politically binding declarations such as the Terezin Declaration dated June 30, 2009. However the focus of this intervention, which takes as an example works of art that were looted somewhere in the world and then imported into Germany, is on the instruments provided by *private law* that may be used to discourage the looting and illegal trade of works of art. The contribution argues that the rules of private international law as well as those concerning the substantive property law should be subject to some modifications as far as the restitution of works of art is concerned. Private law may thus contribute to the protection of works of art and help reduce looting as well as illegal trade.

Keywords

Looted Art, Illegal Exportation, Expropriation, Acquisition in Good Faith, Restitution, Private International Law

Introduction

Claims for the restitution of works of art that were looted somewhere in the world and then imported into Germany are quite frequently filed with German courts. In many cases such legal action is started with regard to the later execution of the judgment, which is obviously much easier if the piece of art is located in the very country where the title has been obtained. Apart from rules of private law, both European and public international law may provide rules on claims for restitution. For example, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property offers the legal basis for an action for the recovery of illegally exported cultural property of a state against the holding state. However this requires that the work of art has been inventoried, which, along with other requirements, reduces the impact of the convention considerably. In addition there are international agreements, such as the Terezin Declaration mentioned above, that aim at the restitution of looted art for moral grounds rather than based on a legal action in property. 1

Apart from these rules, which only cover a small portion of the relevant cases, one may claim that public law including penal law – while playing a predominant role for the protection of cultural heritage in more general terms – will only offer limited support in the battle for restitution of looted art. Therefore it seems well worth having a closer look at the contribution private law may offer in order to make the acquisition of looted art less 2

attractive to buyers and thus to reduce the interest in looting or illegally exporting works of art. In this field of the law there are basically two different areas which may contribute to a more efficient restitution of looted art. One of them is private international law (conflicts of law) and the other is the material law that governs the acquisition of ownership.

As a starting point, the relevant rules of private international law shall be examined below. In this area there exists the1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which aims at harmonizing the Conflict of Laws rules internationally. However this convention has only been ratified by a few states and it is widely considered as not offering a convincing solution for the legal problems. Therefore a proposal for a specific approach as far as works of art are concerned will be made later on. However, the main focus of this contribution is on the national material rules that govern the attainment of ownership. These rules include the preconditions of an acquisition in good faith as well as those of the right to recovery to be prescribed. As mentioned above, as far as national law is concerned, this intervention is based on the German legal system, but it includes the legal situation in the U.K., such as laid down e.g. in *City of Gotha v. Sotheby's / Cobert Finance S.A.*, 1993 C 3428, 1997 G 185 (Q.B.D.). 3

For the purpose of this intervention, the term *works of art* is used in the traditional sense which refers to man-made objects only. However basically the same rules apply for those archaeological objects that are not man-made. 4

Private International Law

Private international law usually provides that rights regarding movable property are subject to the *situs rule*. This rule means that the ownership of an object is determined by the laws of the state where the object is located at the respective moment. As to the question who is presently the owner of the object, if the latter is currently located in Germany the principle therefore refers to German law. In contrast any former transaction that has taken place on the territory of another state and that may have lead to a change of ownership is governed by the law of the respective state. The *situs rule* is basically acknowledged by private international law systems all over the world. 5

By submitting the transfer of property to the legal system of the territory in which the object is physically located at the moment when the transaction takes place, the *situs rule* respects the typical interests of the market, as this assures an easy, swift and reliable way of transferring property. However when works of art are concerned the interests of the market are not of such a key significance as would be the case, for example, with consumer goods. A different connection should therefore be established, which leads to the law with the *closer connection* to the work of art concerned. 6

In doctrine, the German academic *Erik Jayme* has proposed as the relevant connection the *law of origin* (*lex originis*) of the cultural object. The 1991 Basle resolution on the International Sale of Works of Art takes a similar approach. However it is far from easy to determine just what the *origin* of a cultural object is: Is it the location where it was originally created? Or rather the spot where it was found or discovered? Could it be the nationality of the artist? How about the significance of a landscape to which the depicted image of a painting refers? A lengthy discussion on each of these points may follow. A fine example for the difficulties of assessing the law of origin is offered by the work of Moscow-born artist *Wassily Kandinsky*. This painter spent much of his life in various parts of Germany, where he painted a considerable number of local landscapes. Later on he emigrated to France, where he continued his work and where he finally died. Obviously the criteria mentioned above point at different laws for most of the works of art that were created by *Kandinsky*. Hence the connection of the *law of origin* of the cultural object appears to create a lot of uncertainty. 7

Other academics propose to connect the question of ownership to the law of the country where the object has been lost. However this is a rather haphazard connection. It is by no means obvious why the loss as such should lead to a specific connection with the territory where that loss has occurred. This proposal therefore does not appear to be convincing either. 8

Yet another approach is to try and establish a connection to the law of the country from which the work of art has been exported contrary to a ban on exportation. Such bans exist in a lot of legal systems. In Germany this topic is regulated by a specific statute (*Kulturgüterschutzgesetz)*. A similar kind of ban is contained in the UNESCO Convention of 1970 that has been mentioned above. This proposal offers a rather close connection as a strong national interest to govern the legal status of the work of art concerned becomes manifest if a state considers the exportation to be illegal. The question is not to enact the foreign ban on exportation but to find a suitable *connection* for the purpose of private international law. This solution avoids the problem of a change of statute which the *situs rule* is confronted with and the application of a law that is "friendlier with regard to acquisition", like Italian law that, in contrast to German law, generally allows even stolen goods to be acquired 9

when there is good faith. Therefore the connection mentioned above, that points at the law of the state that has established the (first) ban on exportation of the piece of art concerned, should be favoured.

Restitution of goods that have been imported to another country

Apart from private international law there exists a second area of private law where the restitution of looted art may be facilitated, i.e. the rules governing the acquisition of property. In any action for restitution based on ownership, the claimants have to prove their former ownership according to the applicable foreign law. Furthermore they have to establish that they have not lost this title in the meantime. The position of former ownership may turn out to be difficult to prove. The following two areas of hidden cultural objects and expropriation may illustrate this point: 10

Many countries declare cultural objects that have been *hidden* in the soil as (public) property of the country. According to other jurisdictions property rights may arise later, i.e. at the moment of discovery of such an object. Alternatively works of art may be declared by statutory law to be expropriated at the moment of their illegal exportation from the territory of a country. In such cases the question arises whether the respective foreign rule is to be recognized by the *lex fori*. E.g., in Germany such an expropriation *de lege* is usually not considered contrary to the national *ordre public*. 11

As for the loss of property, the *situs rule* mentioned above is applicable. If a work of art has been imported into Germany in violation of a foreign ban on exportation the *situs rule* is not affected. However it has to be examined if and how mandatory *foreign laws* declaring any exportation or trade as illegal are to be applied if German property law is basically applicable. As a response to this question three different theories are being discussed: Firstly, the theory of the applicable material law of the contract (*Schuldstatutstheorie*); secondly, the *datum theory* which considers foreign law as a mere fact that has to be taken into account; and thirdly, the theory of a special connection (*Sonderanknüpfung*), which means that the foreign rules with regard to the consequences of an illegal exportation are to be applied. This latter theory is not only required by *comitas* which is the idea of being respectful to foreign jurisdictions but it also reflects the interest in achieving an international harmony of judgments. Therefore this approach should be given preference. 12

However this rule is subject to certain exceptions. For instance, sometimes foreign laws rule out any trade with cultural objects. They usually do this by declaring such objects to be *res extra commercium*. German law does not know such a ban, as it generally strives to avoid the creation of any area of *res extra commercium* that may never change ownership. Furthermore a German court may, with regard to the foreign statutes regarding the loss of property (e.g. automatic expropriation at the moment of illegal exportation), rule that no such loss will be acknowledged to have taken place or that at least the German *bona fide* rules for the acquisition of property are to be applied. 13

Obviously the *bona fide* acquisition of property at public auctions is of key importance for looted art. As objects are sometimes listed on websites such as the German official site *www.lostart.de* the former owner may either obtain a provisional injunction based on private law or a seizure by means of criminal law. However, practice shows that these instruments are not sufficient to protect the owner from losing ownership in an auction. Therefore it appears appropriate to submit not only the auction house but any purchaser as well to a strict duty to investigate the ownership record. In practice that kind of research has recently been facilitated a lot by the increasing information available online in lost art registers. The higher the economic or cultural value of a work of art the stricter the requirements with regard to an in-depth investigation should be. It is only just and fair to submit auction houses to a strict duty of diligence as they make profits by using a means of trade that submits the owners to an increased risk of losing their title at the moment when a bid is accepted. In addition there is no reason to lighten the duty of diligence with respect to purchasers of works of art, as they will more often than not have a considerable personal knowledge or may at least hire competent advisors. Therefore a comprehensive obligation to conduct a proper research appears to be fair and reasonable for purchasers as well. This includes a critical check of any statement made by the auction house or other interested parties about this topic - Similarly to acquisition in the course of a public auction, *acquisitive prescription* requires good faith as well. Furthermore the possessor of a piece of art has the burden of proof with regard to good faith. 14

Finally there is the topic of limitation of action (prescription). In a number of cases this has proved to be crucial for the restitution of works of art as any claim for restitution fails if the possessor successfully raises the objection of limitation. According to German law the claim for restitution is subject to a 30 year limitation period (Section 197 para. 1 no. 1 of the Civil Code, *BGB*). In contrast in Swiss law a claim for restitution is not at all subject to limitation. This solution is clearly more convincing; especially if at the same time there exists the possibility for a *bona fide* possessor to acquire property by law after a certain period of possession. In that case an additional limitation rule offers a privilege exclusively for possessors who cannot prove to have acquired possession *bona fide*. In the case of *City of Gotha* mentioned above, the High Court rightly considered the 15

German rule on limitation as contravening the English *ordre public* if it was to be applied to looted art. It is noteworthy that in this case it was the German government, acting on behalf of the claimant, that followed exactly the same track as limitation would have stood in the way of the claim to recover the painting that had been looted from the City of *Gotha*. Thus, in this case a state declared its own rule on limitation to be contrary to the *ordre public* in front of a foreign court, a move which is quite exceptional.

Claims of restitution based on dominion

According to German law claims of restitution based on dominion may be of relevance if the plaintiffs are unable to prove their ownership but can prove their former position as a factual possessor of the respective piece of art. Obviously this offers a somewhat weaker basis for a claim for restitution. However in practice a claim based on dominion may lead to a permanent return of the work of art concerned to its former owner and therefore bring about satisfactory results, as long as no action for restitution based on ownership is filed. 16

Conclusions

As we have seen in various ways private law may contribute to the restitution of looted works of art. Generally it is necessary and justified to modify the rules that usually apply to movables, thus taking into account the fact that works of art should not be treated the same way as ordinary merchandise. The reason for this modification lies in different interests: When industrial or consumer goods are concerned a swift transfer of property is often essential for an efficient functioning of the market. However when it comes to works of art there is no such need to accelerate trade while crucial interests of the legitimate owner of the work of art are at stake. 17

This leads to the following three conclusions: 18

(1) As to private international law, property rights regarding a work of art that was illegally exported should not be governed by the *situs* rule but by the law of the state where the object had been located prior to its exportation.

(2) With regard to material law, an increased standard of good faith shall be applied even when a work of art is purchased in a public auction. Therefore not only the auction houses but all purchasers have an obligation to investigate with due diligence the ownership record of the work of art.

(3) A claim for restitution based on private law should not be subject to limitation.

Link Selection

www.iuscomp.org/gla/judgments/foreign/gotha5.htm

www.lostart.de