

# HEINONLINE

Citation: 5 Int'l L.F. D. Int'l 288 2003

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Fri Feb 1 06:35:01 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1388-9036](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1388-9036)

## Conference Scene / Le tour des conférences

---

### International Law Seminar in The Hague: Resolution of Cultural Property Disputes, 23 May 2003

HANNES HARTUNG\*

Even decades after World War II has ended, the phenomenon of that period, and holocaust-looted art still deeply upsets many people around the globe. The enormous scale of art looted from Jews, and other private and state property plundered by the Nazis in the occupied zones is well-documented and common knowledge. The vast transfer of German cultural property (so-called *Beutekunst*) out of Germany to the former Soviet Union as a result of ruthless pillaging should not be forgotten either.

The experience of litigation before public courts has shown that there is a reasonable need for alternative dispute resolution mechanisms to obviate the need for drawn-out cases. Such court cases tend to be protracted with (largely) innocent parties on both sides endeavouring to cope with very specific problems created by the focus, ranging between public and private international law. In addition to this, well known legal issues such as the time bar imposed on a claim, acquisitive prescription and *bona fide* purchase are not to easy to deal with against a backdrop of war crimes and crimes against humanity.

For this reason, the international law seminar “Resolution of Cultural Disputes”, held at the Permanent Court of Arbitration in The Hague on 23 May 2003, discussed new perspectives for the restitution of World War II and holocaust-looted art by means of alternative dispute resolution methods, in particular arbitration. It has to be mentioned straightaway that the program of this seminar failed to concentrate sufficiently on arbitration issues. In fact only two presentations dealt with it directly.

The chairman of the PCA, Tjaco van den Hout, welcomed the participants who came from all parts of the globe and introduced Lyndel V. Prott, former director of the UNESCO Division of Cultural Heritage. She gave a special presentation on “Looting in Iraq: The Legal Remedies”. The systematic plundering of museums

---

\* Rechtsanwalt Hannes Hartung, J.D. candidate at the University of Zürich (Supervisor: Prof. Dr. Kurt Siehr, M.C.L.). Member of the law firm Diem & Partner Rechtsanwälte GbR, Stuttgart. Contact: hhartung@diempartner.de or via www.DiemPartner.de.

in Iraq bore witness to yet another chapter in the history of looting. It is hard to accept that although the Hague Convention of 1954 and the Protocols of 1999 are quite clear and well-defined, neither the United States nor the United Kingdom have ratified it. Iraq has been a party to the Hague Convention since 1967. The world heritage of the early Mesopotamian civilizations is under grave threat. At the same time, not all western civilizations seem to apply all the remedies necessary in order to protect this unique cultural property, and what can, at the very least, be considered to be the common heritage of mankind.

What are the dogmatic differences between restitution, repatriation and return? In his general observations, Professor Wojciech Kowalski, from the University of Silesia, introduced the audience to the relationship between factual background and legal concepts. Whilst *restitution* as a term of public international law reverses the effects of looting, *repatriation* represents the close connection (correlation) with an ethnic group as part of the territorial affiliations of cultural property. Moreover, cultural property that was illegally exported from former colonies was not transferred against a backdrop of war and persecution, therefore it should be *returned* too.

Session I was designed to provide new insights into provenance research, a new academic discipline, the purpose of which is to trace the entire pedigree of a work of art, based on an extensive knowledge of art and history with the objective of creating factual grounds for an appropriate answer in legal terms. The session was hosted by Michael Salzman, partner at Hughes Hubbard and Reed in New York. The Senior Director of Sothebys, Lucian Simmons, explained the significance of provenance for an auctioneer, the difficulties in establishing provenance, the scale of displacement and Sotheby's response to provenance issues and possible initiatives. Subsequently, Nancy H. Yeide, Head of the Department of Curatorial Records of the National Gallery of Art in Washington DC referred to several restitution cases which illustrated provenance research in US museums – provenance research was in fact first developed in the United States. As a reaction to the Schiele cases in New York, the AAM and AAMD recommended the review of existing collections to identify any unlawful appropriation during the Nazi era without subsequent restitution.

The afternoon was dedicated to art looted during World War II and legal issues associated with restitution. This was to be rounded off with a discussion about dispute settlement mechanisms relating to cultural property.

Laurie Stein, Vice President & Midwest Director of Christie's USA chaired Session II. It began with a presentation of Lyndel Prutt on the response to World

War II looting. A mere 20 minutes were insufficient to do full justice to the most important facts in this issue. In spite of this, the survey presented gave an impressive response to all the “patchy” historical and legal streams of art looted during World War II. In disputes in which emotional and sensitive issues run deep, binding principles resolving the complexity of problems between public and private international law are virtually impossible to enforce, but they are necessary nevertheless. Constance Lowenthal, former Director of the Commission for Art Recovery, reported on the practical difficulties arising in cases of restitution, especially those related to holocaust-looted art. Unfortunately she was forced to pass the remark that in many places in Europe, *e.g.* in museums in Eastern Germany, cooperation with a claimant is still not as good as it could be. Furthermore, she pointed out that she still felt uncomfortable with the legal situation surrounded by factual obstacles, and she provided a few telling examples. The well-known provenance researcher Konstantin Akinsha pointed out that the registries of art looted during World War II were still not working efficiently enough, because there was still no central registry. Since all the countless internet databases have still not been amalgamated to create a single comprehensive metasearch machine, whether legal questions such as due diligence have been dealt with is largely a matter of chance, depending on the fact whether you do your research in the “right” database and in the one in which the lost masterpiece might be found.

Session III followed, moderated by Michael Salzman.

Michael Carl, partner at Eversheds, London, shed light on the murky area of the conflict of law rules concerning ownership and statutes of limitation. The standard rule is the well established *lex rei sitae*. Its legal consequences are not appropriate when someone devalues it by forum shopping and hopping. Thus, new perspectives such as the *lex origio* have to be considered. Michael Carl concluded that a special protection of cultural property by the remedy of exclusion such as *res extra commercium* might ameliorate the current situation, although it is obvious that a proper definition of cultural property is not easy to make.

A claimant’s position is only strong when supported with facts to prove his case. Hans Das of the Catholic University of Leuven described the challenges concerning the administration of evidence due to the war, the long lapse of time since the war, lack of continuous and comprehensive records and the high cost of research through sources in search of evidence. These are all conditions which mean that evidence is difficult to acquire and is consequently patchy. He compared the burden of proof in cultural property disputes with analogous procedures (*e.g.* The United Nations Compensation Commission UNCC, the Claims Resolution Tribunal for Dormant Accounts CRT I, the Commission for Real Property Claims

CRPC and the German Forced Labour Compensation Programme GFLCP). He underlined the fact that strict *probatio diabolica* is being relaxed in these procedures by the preponderance of *prima facie* evidence. It should be emphasized that the German redress rules such as the *Bundesrückerstattungsgesetz* stipulate a primary presumption that cultural property of Jewish origin was unlawfully misappropriated. The so-called *freiwillige Selbstverpflichtung* (willingly self-binding principles) applicable in Germany from 1999 onwards, which makes the principles of the *Bundesrückerstattungsgesetz* applicable again asks all public museums to verify acquisitions made from 1933 to 1945 and to prove that the cultural property was sold voluntarily under normal circumstances excluding persecution.

The omnipresent question of good faith in the purchase of cultural property was portrayed by Marc-André Renold, attorney with Barreau in Geneva. He outlined the significance of good and bad faith in comparative law, referred to their definitions under statutes of Swiss and French civil law, analysed the 1995 UN-DROIT convention and from this he derived the legal consequences. Helped by the court decision dealing with the due diligence of an art dealer in France (dealing with a painting by Franz Hals), it can be said that the standards of due diligence required based on the personal experience of a buyer or seller confronted with the circumstances of war and persecution represented by the value of a work of art are becoming higher. The presumption of good faith is about to become irrelevant.

In Session IV, Professor Norman Palmer from the University of London weighed up the question: litigation, is it the best remedy? He reported from his own experience that litigation is not the most appropriate procedural remedy to meet the challenges of finding a just and fair solution within a reasonable time-span. Using many examples, he identified the need for arbitration by showing the typical factors found in a trial before a public court, such as the necessary professional background of a judge in respect of international art law issues, the typical behavioural patterns of the parties being confronted with such issues before a public court, the long lapse of time before a decision is reached, and finally the manifest urgency to act now because of the advanced age of the last witnesses still waiting for justice. The potential for arbitration was then balanced by Owen C. Pell, partner at White & Case in New York City. He postulated the establishment of a Specialised International Arbitral Tribunal that could take advantage of existing international law. Bringing such a tribunal to life, Pell outlined the prime conditions which would have to be fulfilled in the process of establishment, such as the necessary qualification of the members of the tribunal, the dollar limits on jurisdiction over at least \$ 250,000, the binding nature of its authority and, last but not least, the limit on protection for *bona fide* purchasers as developed from the system of laches.

Finally, Teresa Giovannini, from Lalive & Partners in Geneva, gave her closing comments.

The seminar did not refer to arbitration issues and its related issues to the extent originally intended. The success of any arbitration depends on specific circumstances which tend to be found in holocaust-looted art disputes rather than in the *Beutekunst* debate. In these procedures it is important that fair solutions are enforced within a reasonable time-span due to the advanced age of claimants. But arbitration can only lead to fair solutions when it is carried out on appropriate legal grounds in substantive and procedural law. In this respect a distinction has to be made between the nature of parties resorting to arbitration, since it only works efficiently between individuals. In disputes dealing with the restitution of art looted during World War II in the forum of public international law, nation states hardly seem to recognize arbitration. This can be seen by the fact that neither Russia nor Germany has signed the preliminary injunction under the jurisdiction of the Permanent Court of Justice. A more detailed discussion about the advantages of arbitration and mediation in respect of the restitution of holocaust-looted art would have mentioned the need for these alternative dispute resolution mechanisms as a prepared ground for remembrance, reconciliation and redress. The powerful advantage of arbitration is the option for customising the dispute and to give the parties the right to create their own forum where, not subject to the demands of law, non-binding principles (soft law) reflecting the moral and personal aspects can be emphasized.

To conclude, the legal treatment of restitution is still dependant on the law in force at the place where looted art is found. Consequently, the outcome of a cultural property dispute often depends on the “generosity” of a particular system of law for redress respecting the legal instruments reviewed during the seminar. While it is an established fact that much work has been done in this field, more work still has to be done in order to collate divergent laws into one binding legal framework for restitution.<sup>1</sup> The law was not designed to deal with civil actions brought as a result of (cultural) genocide and crimes against humanity before a public court. Here, arbitration has the capacity to deliver a much more flexible mechanism.

---

<sup>1</sup> See Hartung, “Holocaust and Art Looted during World War II Arbitrated between Great Dreams and Reality”, *Peace Palace Papers* 2003 (in print).