

**Exposé for Doctoral Thesis**

preliminary title

**A Discussion of the Mechanisms for Resolving an Art-Restitution Dispute**

–

**with Particular Examination of the Role of Auction Houses**

by

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# Presentation of Dissertation Proposal

## 1. Introduction

Art-theft has occurred through the centuries. To this day the aftermath of the iniquity of war, colonization and state intervention has not yet been properly resolved and art-restitution claims are an ongoing phenomena in our current society.

My doctoral thesis addresses the procedural framework for an art-restitution dispute. It is divided into two parts. In the first, general, part I will examine the nature and types of art-restitution cases. Furthermore, I will present and compare the mechanisms that are available to resolve an art-restitution dispute, revealing the advantages and disadvantages of each dispute-resolution mechanism. In the second part I will discuss the possibilities auction houses may offer to parties in an art-restitution case and how auction houses may be legally classified.

## 2. The issues to be discussed

Art-related cases in general have a special nature as they involve objects that not only have a financial, but also a “cultural and immaterial value”.<sup>1</sup> In addition, art-restitution disputes often concern not only legal, but also sensitive issues, with political, moral, historical, religious or economic elements.<sup>2</sup>

Restitution is a non-contractual demand, it covers problems including situations where a work of art has been stolen from its original owner, or has been illicitly exported.<sup>3</sup> Art-restitution disputes may arise for various reasons, however, in most cases the act of restitution is “to compensate for the past, which touches on outstanding historical issues, such as European colonization, the Second World War, and discrimination against indigenous peoples”.<sup>4</sup>

Thus, when presented with an art-restitution case parties are confronted with many hurdles, ranging from questions of ownership, applicable law, good-faith, obtaining of evidence, to time limitations. As a result, even though the rightful owner is able to reconstruct the provenance, he will be faced with another problem: The law will frustrate justice, as for example when a statute of limitations is applicable. The rightful owner cannot claim an enforceable art-restitution before

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<sup>1</sup> *Quentin Bryne-Sutton*, Arbitration and Mediation in Art-Related Disputes, Arbitration International, Kluwer Law International 1998, 448; *Anne Laure Bandle/ Sarah Theurich*, Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre, JICLT 2011, 29.

<sup>2</sup> *Nicolai Boris Kemle*, Freiwillige Restitution vs Gesetzlich einklagbarer Anspruch auf Rückgabe, in *Gerte Reichelt* (ed.), Rechtsfragen der Restitution von Kulturgut. Symposium 12. Oktober 2007 BM für Unterricht, Kunst und Kultur (2008), 77; *Bandle/ Theurich*, JICLT 2011, 30.

<sup>3</sup> *Bandle/ Theurich*, JICLT 2011, 29.

<sup>4</sup> *Marie Cornu/ Marc-André Renold*, New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution, International Journal of Cultural Property 2010, 3.

national courts that do not offer a viable solution, and justice delayed may turn into justice denied.<sup>5</sup>

Alternative Dispute Resolution (ADR – in this context referring to conciliation, mediation and arbitration) is, however, available, with the advantage of not being limited by time or lack of sufficient evidence. The difficulty is obtaining agreement of the parties involved to engage in the process, and a binding decision at the end, (the latter only available in arbitration).<sup>6</sup> The flexible, neutral forum of ADR, plus its confidentiality, makes it possible to take sensitive non-legal issues into account in the process of finding an “interest-based”, mutually beneficial solution, allowing parties to adopt creative arrangements, beyond monetary remedies.<sup>7</sup>

Even states have resorted to ADR in Nazi-looted art disputes, by-passing the statute of limitations rule, by agreeing to find “a just and fair solution”, fulfilling the *Washington Conference Principles on Nazi-Confiscated Art*.<sup>8</sup> However, these are no more than “non-binding principles”.<sup>9</sup> The German and Austrian governments have established Advisory Boards that may be considered a form of non-binding ADR.<sup>10</sup> In Austria, the state’s Art Restitution Advisory Board makes recommendations to the Federal Minister for “Education, the Arts and Culture” has a discretion either to follow or ignore.<sup>11</sup> So far, international efforts have failed to create a system of adjudication resulting in enforceable rights.

The difficulty that must be addressed in art-restitution cases arises when a controversial artwork is put forward for sale. When selling disputed art-works the legal owner may have to find a compromise route cleansing the reputation of the object, since questionable provenance may decrease the object’s value drastically.<sup>12</sup> Who wants to buy “hot goods”?

Most auction houses distance themselves from selling works of questionable provenance, particularly Nazi-looted art, even when the rightful owner’s claims are legally barred, because their reputations are at stake. Yet, the auction houses recognize the benefits of alternative means of resolving the problem. For example, Christie’s has enacted its own guidelines on how to treat Nazi-

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<sup>5</sup>Magna Carta (1215) Cl. 40 (“[T]o no one will We deny or delay, right or justice”).

<sup>6</sup>Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958) (“New York Convention”), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>7</sup>*Bandle/Theurich*, JICLT 2011, 31; *Sarah Theurich*, Update on Alternative Dispute Resolution in the Art and Cultural Heritage Sector, International Bar Association – Art, Cultural Institutions and Heritage Law Committee’s e-bulletin 2009.

<sup>8</sup>Washington Conference Principles on Nazi-Confiscated Art, Washington, D.C., Dec. 3, 1998.

<sup>9</sup>Washington Conference Principles on Nazi-Confiscated Art, Washington, D.C., Dec. 3, 1998.

<sup>10</sup>See Joint Declaration by the Federal Government, the Länder (Federal States) and the National Associations of Local Authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, December 14, 1999, as amended.

<sup>11</sup>See Federal Law on the Restitution of Works of Art and Other Movable Cultural Assets from Austrian Federal Museums and Collections and Other Federal Property (Art Restitution Law - KRG), December 4, 1998, as amended.

<sup>12</sup>*Bryne-Sutton*, *Arbitration International – Kluwer Law International* 1998, 448.

looted art.<sup>13</sup> It suggests to “facilitate a dialogue” between the parties, and in case of ongoing disunity, to submit the problem to either litigation or “an appropriate alternative forum for resolution”.<sup>14</sup>

### **3. Objectives and proposals**

In the context of this thesis the dispute-resolution mechanism that offers the best framework to resolve an art-restitution case shall be explored. Frequently, finding a solution out of court will be the only possibility for rightful owners to receive some sort of compensation. However, with alternative means, like conciliation and mediation (but not arbitration), the problem of enforcement still remains. Using international arbitration, provides claimants with binding adjudication – enforceable virtually world-wide.<sup>15</sup>

Pointedly, I will examine the specific question whether auction houses can be legally classified as mediators or conciliators. Do they have the required neutrality to facilitate between the parties? Where does their scope end? In case of ongoing disunity which procedure shall the parties resort to?

Arbitration has the advantage of confidentiality but in my view, the costs of arbitration have become no longer tenable. Therefore, I would propose introducing a procedure combining the enforceable element of arbitration with flexible solutions, in an affordable manner at one institution.

My suggestion: “ARTbitration<sup>®</sup>”.<sup>16</sup>

This system would allow parties to choose an intermediary who is not part of the “legal apparatus of a given country”,<sup>17</sup> but who has the specific know-how in art-restitution and law. I believe that auction houses offer an appropriate forum for this form of arbitration, since they have experts able to judge the value of a specific art-work; generally the larger ones have a legal department to provide the legal framework, are present in different jurisdictions, and have restitution departments with the resources to reconstruct a provenance. My idea would be to establish a new niche with its own institution and especially developed rules within the auction house environment, covering these aspects of expertise. These rules would by-pass national statutes of limitations, raising the matter to that of international law, since “[n]o rule of international law specifies the time period which must elapse in order to render extinctive prescription operative ...

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<sup>13</sup> *Christie’s Guidelines for Dealing with Nazi-era Art Restitution Issues* (June 2009).

<sup>14</sup> *Christie’s Guidelines for Dealing with Nazi-era Art Restitution Issues* (June 2009).

<sup>15</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958) (“New York Convention”), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>16</sup> © Constanza Trofaier 2013; as opposed to ArTbitration referring to spoken, visual and musical domains, see *Artemis Moroni et al.*, ArTbitration: Human-Machine Interaction in Artistic Domains, Leonardo 2002, 188.

<sup>17</sup> *Bryne-Sutton*, Arbitration International, Kluwer Law International 1998, 449.

[t]he principle is flexible ... [and] left at the discretion of the Tribunal.”<sup>18</sup>

For cost-efficiency reasons, a standing panel at the ARTbitration institute, similar to the *Arbitration Panel for In Rem Restitution* in Vienna that decides on returning publicly-owned property pursuant to the General Settlement Fund Law,<sup>19</sup> would act as sole intermediary.

The proposal is to address art-restitution disputes to one single institution with arbitrators who have the specific know-how, applying specific rules, in the auction house environment bringing uniformity and transparency to the complex business of art-restitution disputes.

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<sup>18</sup>*United States of America v. Islamic Republic of Iran*, Iran Award 574-B36-2, 3 December 1996, 1996 WL 1171809 (Iran-U.S. Cl. Trib.), at ¶72.

<sup>19</sup>Further information, available at <http://www.en.nationalfonds.org/sites/dynamicdd6a.html?id=news20060412154051005&ln=>

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**Preliminary Time line**

Winter term 2011/12	<ul style="list-style-type: none"> <li>• Approached Supervisor with idea for thesis</li> <li>• Research for thesis</li> <li>• Completion of seminar “Judicature and text analysis”</li> <li>• Completion of seminar in the field of the doctoral thesis</li> <li>• Completion of seminar outside the field of the doctoral thesis</li> <li>• Completion of elective courses</li> </ul>
Summer term 2012	<ul style="list-style-type: none"> <li>• Research for thesis</li> <li>• Completion of course “Legal Methods”</li> <li>• Completion of elective courses</li> </ul>
Winter term 2012/13	<ul style="list-style-type: none"> <li>• Research for thesis</li> </ul>
Summer term 2013	<ul style="list-style-type: none"> <li>• Research for thesis</li> <li>• Completion of elective courses</li> </ul>
Winter term 2013/14	<ul style="list-style-type: none"> <li>• Research for thesis</li> <li>• Completion of seminar for presentation of the doctoral thesis project</li> </ul>
Summer term 2014	<ul style="list-style-type: none"> <li>• Research for thesis</li> <li>• Submission of exposé for doctoral thesis</li> </ul>
Winter term 2014/15	<ul style="list-style-type: none"> <li>• Pause of doctoral studies</li> <li>• Research in the United States of America</li> </ul>



Summer term 2015	<ul style="list-style-type: none"> <li>• Research in the United States of America</li> <li>• Completion of elective courses</li> <li>• Writing doctoral thesis</li> </ul>
Winter term 2015/16	<ul style="list-style-type: none"> <li>• Writing doctoral thesis</li> </ul>
Summer term 2016	<ul style="list-style-type: none"> <li>• Completion and submission of doctoral thesis</li> </ul>
June 2016	<ul style="list-style-type: none"> <li>• Aim to take Defensio of doctoral thesis</li> </ul>

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