
Schriften zum Kunst- und Kulturrecht

Edited by
Prof. Dr. Kerstin von der Decken, Universität Kiel
Prof. Dr. Frank Fechner, Technische Universität Ilmenau
Prof. Dr. Dres. h.c. Burkhard Hess,
    Max Planck Institute Luxembourg for International,
    European and Regulatory Procedural Law
Prof. Dr. iur. Dr. phil. h.c. Peter Michael Lynen,
    Hochschule für Musik und Tanz Köln
Prof. Dr. Rainer J. Schweizer, Universität St. Gallen
Prof. Dr. Armin Stolz, Universität Graz
Prof. Dr. Matthias Weller, Mag. rer. publ., Universität Bonn

Vol. 26

supported by
Matthias Weller

Rethinking EU Cultural Property Law: Towards Private Enforcement
Table of Contents

**Part I: Study on the European added value of legislative action on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil procedure**

Executive Summary

Chapter 1 - Terms of Reference

I. Mission: Tackling legal uncertainty within the civil law dimension of cross-border restitution claims by EU legislative action

II. Overall objective: Improving “private enforcement” against looting of art and cultural property

III. Reason: Limited scope and success of public enforcement

IV. Caveats: Procedural and material justice of civil law

V. Incomplete history of public and private “partnership” in the protection of cultural property

VI. Support for a comprehensive regulatory framework by the United Nations

VII. Focal points of an effective private enforcement for claims for restitution of looted cultural property by EU legislative action

Chapter 2 - On the scale of illicit trade with Looted Cultural Property

I. The global art market: Up to USD 57 billion per annum?

II. Illicit trade: Up to USD 8 billion per annum?

III. ILLICID: A German pilot project for investigating the illicit art market

IV. Figures from Databases in the field

1. INTERPOL

2. Art Loss Register
Table of Contents

3. Lost Art Database (Nazi Looted Art) 30
4. Central Registry of Information on Looted Cultural Property 1933 - 1945 (Nazi Looted Art) 30
V. Many more recent signs of concern 30
1. UN Security Council Resolution 2347 (24 March 2017) 31
2. Terrorism and Illicit Finance Subcommittee of the US House of Representatives (23 June 2017) 32
3. FBI Report “Art Theft” (3 May 2017) 32
5. European Commission Proposal for a Regulation on the import of cultural goods (July 2017) 34
VI. Recommendations 34

Chapter 3 - Focal Points of Private Law 36
I. International jurisdiction for the restitution of cultural property 36
1. General observations on the EU system of international jurisdiction for civil matters 36
2. Need for a special ground of jurisdiction based on the location of movable cultural property 37
3. Legislative Reaction of the EU: Article 7 no. 4 Brussels Ibis Regulation 39
4. Issues in relation to Article 7 no. 4 Brussels Ibis Regulation 39
   a. Definition of “cultural property” 40
   b. Fragmentation 42
      (1) Status quo 42
      (2) Different results without reason 44
      (3) In particular: Similar but not identical definition of cultural object under the UNIDROIT Convention and Article 7 no. 4 Brussels Ibis Regulation 45
   c. Declaratory Relief 46
5. Recommendation and Policy Options 46
   a. Option 1: Introducing jurisdiction in rem for movable property 46
II. Immunity for cultural property on loan in foreign states

1. Context

2. Fundamental distinction: Legislative immunity granted by a state and immunity from seizure under customary public international law

3. Case studies
   a. Exhibition “Treasures of the Sons of Heaven” at Bonn, Germany
   b. Exhibition “DYNA MIK! Kubismus / Futurismus / KINETISMUS” at the Belvedere, Austria
   c. Exhibition “From Russia” (Pouchkin Museum Moscow) in London
   d. Exhibition from the Stedelijk Museum of Amsterdam to New York (“Malevich case”)

4. State legislation (“anti-seizure legislation”)
   a. Fragmentation in the EU and beyond
   b. Unclear relation between national anti-seizure statutes and Directive 2014/60/EU
   c. Exception for Nazi Looted Art?

5. State Immunity under Public Customary International Law
   a. Legal Foundation
      (1) Treaty Law
      (2) Customary International Law
   b. Conclusion: Rule of customary international law exists, but uncertainties remain

6. Recommendations
   a. Joint Declaration on immunity from seizure for cultural property of foreign states on loan for the purpose of cultural exchange in other states
Table of Contents

b. Harmonization of state legislation on legislative immunity 68

c. Clarifying the relation between anti-seizure legislation of the Member States and Directive 2014/60/EU 68

III. Choice of law

1. Different concepts in the legal regimes on property law 69
2. Choice of law issues 72
   a. Design elements of a choice of law rule for the acquisition of cultural property 72
   b. Recommendation: Harmonized choice of law rule along the lines of Article 90 of the Belgian Code of Private International Law 73
   c. Application of foreign public law 75
3. Recommendation 76

IV. Substantive Law

1. Fundamental differences in the substantive laws of the Member States 78
2. Recommendation and Policy Options 79
   a. Policy Option 1: Encouraging the remaining EU Member States to accede to the 1995 UNIDROIT Convention 79
   b. Policy Option 2: Incorporating Chapter II of the 1995 UNIDROIT Convention into EU secondary law (e.g. as new part of Directive 2014/60/EU) 81
   c. Policy Option 3: Adopting Articles VIII.-3:101 and VIII.-4:102 DCFR 82
   d. Policy Option 4: Introducing a general prohibition of sale and acquisition for stolen and illegally exported/imported cultural property 84

V. The special issue of Nazi Looted Art 87

1. No retroactive legislation 88
2. Sales law for transactions in the future 90
   a. Case study: The auction of Lodovico Carraci's “St. Jerome” (Max Stern Gallery) by Lempertz 90
   b. Recommendation: Defining the sellers due diligence and the buyer's remedies under a European sales law when Nazi looted art is sold 92
3. Property law in respect to Nazi looted art 95
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Invalidity of “foiced sale” transactions from 1933 to 1945</td>
<td>95</td>
</tr>
<tr>
<td>b. Validity of “non-forced sale” transactions from 1933 to 1945</td>
<td>98</td>
</tr>
<tr>
<td>c. Burden of proof for invalidity of transaction during 1933 to 1945</td>
<td>98</td>
</tr>
<tr>
<td>d. Valid post-war good faith acquisition / prescription in many (not all) cases</td>
<td>100</td>
</tr>
<tr>
<td>e. No retroactive legislation on good faith acquisitions / prescription in the past</td>
<td>100</td>
</tr>
<tr>
<td>f. Case study: The Schwabing Art Trove (“Gurlitt case”)</td>
<td>101</td>
</tr>
<tr>
<td>g. Recommendation: No retroactive legislation</td>
<td>102</td>
</tr>
<tr>
<td>4. Just and fair solutions beyond the law</td>
<td>103</td>
</tr>
<tr>
<td>a. Background</td>
<td>104</td>
</tr>
<tr>
<td>b. Increasingly diverging and contradictory restitution recommendations</td>
<td>105</td>
</tr>
<tr>
<td>c. Recommendation: (Non-binding) Restatement of Restitution Principles</td>
<td>108</td>
</tr>
<tr>
<td>VI. Complementary Measures</td>
<td>109</td>
</tr>
<tr>
<td>1. Cross-linking provenance research amongst local and national institutions and entities</td>
<td>109</td>
</tr>
<tr>
<td>2. Common Cataloguing System / Object IDs</td>
<td>112</td>
</tr>
<tr>
<td>3. Alternative Dispute Resolution</td>
<td>113</td>
</tr>
<tr>
<td>4. EU Agency on Cultural Property Protection</td>
<td>114</td>
</tr>
<tr>
<td>Chapter 4 - European Added Value by Proposed Measures</td>
<td>116</td>
</tr>
</tbody>
</table>

### Part II: Conclusions of the European Added Value Assessment

*(Christian Salm)*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>117</td>
</tr>
</tbody>
</table>

The illegal art market, legal challenges and indicators on the amount of restitution claims

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU Policy Context</td>
<td>126</td>
</tr>
</tbody>
</table>

Weaknesses in the existing EU legal system

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weaknesses in the existing EU legal system</td>
<td>128</td>
</tr>
</tbody>
</table>
Table of Contents

Possible EU legislative action 132
European Added Value 135

Part III: Draft Opinion of the Committee on Culture and Education 137

Part IV: Amendments 141

Bibliography 163
  A. Secondary Sources 163
  B. Legislative and Governmental Materials 169
  C. Treaties/Conventions 171
  D. EU instruments 172
  E. National legislation 172
  F. Cases 173