

INTERNATIONAL LAW WEEKEND PANEL ON LITIGATING THE HOLOCAUST IN U.S. COURTS

*Monica Dugot Esq.**

I joined Christie's a little over a year ago as Director of Restitution, coordinating Christie's restitution issues globally. Restitution is a complex mix of ethical, legal, and commercial concerns and raises ongoing challenges for an auction house, both in terms of policy and practice. Before I share a few thoughts on our approach to these issues, I'd like to begin by giving you some background on what I was doing before joining Christie's, make a few remarks about Holocaust-era art claims in general and finally give a brief history of Nazi-era art looting to put all of this in context.

Most recently and for seven years, I was Deputy Director of the New York State Banking Department's Holocaust Claims Processing Office, where I assisted owners and heirs in seeking to recover art collections that were lost or looted during the Nazi-era. The aim was to assist claimants in resolving art claims, in a fair and non-litigious manner, through an open exchange of information and cooperation. As an office within a state bank regulatory agency, the office was and continues to be an especially valuable advocate for claimants whose objects have been found in public or financial institutions, for claimants with well-documented claims, and for claimants seeking to recover paintings not necessarily of high monetary value.

Resolving these claims was facilitated to some degree by an expansion of the legal framework in the last decade, through diplomatic initiatives, class action lawsuits, new laws, and guidelines which include the 1998 Washington Conference Principles on Nazi-Confiscated Art.

Given that each art claim involves a specific and identifiable object, art claims have been resolved on a case-by-case basis. Because looted art has been carved out of every Holocaust asset settlement to date, art claims have not been funneled into a large process or commission. This differs substantially from the more "wholesale approach" on the bank and insurance fronts where Holocaust-era litigation resulted in the establishment of settlement funds, claims processes, and tribunals set up to resolve claims.

Art claims are very fact-specific. The ability to find a resolution or to even pursue a claim often depends on a myriad of factors including: in what country

* Monica Dugot, Esq. is a Senior Vice President and Director of Restitution at Christie's. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.

or state the object is found or in which countries the object changed hands, whether the painting is located in a public institution or in private hands, the monetary value of the object, how much the current holder actually paid for the painting, whether the current holder is a good faith purchaser and whether the heirs are all in agreement as to a particular course of action.

Nazi-era art cases can be difficult to resolve because, as these works may have been traded multiple times since the end of WWII, passed through many individuals, through several nations, many might have ended up in the hands of good faith purchasers who had no knowledge that the work they acquired ten years ago or more, from a reputable gallery, might have a tainted provenance and may be stolen property. As a result, one often ends up with two victims: the original owner and the unknowing purchaser.

Depending upon the claim, litigation might be the only way to reclaim Nazi looted property but as is evident from the handful of lawsuits filed in the United States involving WWII looted-art, litigation is not the most productive avenue for reaching fair and appropriate solutions to these types of cases. The emotional and financial costs associated with litigation are high. The legal costs can easily end up being a sizable percentage of the actual value of the work. Indeed, the legal costs can easily exceed the value of the work. The Nazis looted across the board and many of the paintings they seized were not limited to the museum quality seizures for the Fuhrermuseum that Hitler was planning to build in Linz, Austria but rather, objects whose value was largely sentimental. Finally, litigation results in resolutions that are unpredictable, often cash-driven and anything but amicable.

Not surprisingly, to date, most WWII looted art cases have resulted in settlement. To provide a bit of background on this, as is now known, vast amounts of art were looted or displaced during the Nazi-era. Much of that art was not restituted to its true owners. The looting of art by the Nazis before and during WWII was not a mere incident of the German war effort, but was an official Nazi policy. The Nazis systematically stole millions of pieces of art, cultural artifacts and other objects from museums and private collections in Europe. Those works and many collections were scattered across Europe, often far from their countries of origin. Between 1933 and 1945, art was displaced in a number of different ways which included forced sales, Aryanisations, Degenerate Art de-accessioned by German museums, seizures by the Gestapo, and theft by Russian and American soldiers. In the years immediately following the end of World War II, art was also displaced by the Communists' extensive nationalization of private art collections.

After the war, consistent with Allied policy, collecting points were set up and looted objects generally were returned to the country of origin in cases where that could reasonably be determined. These nations were then to make restitution to victims under systems established in each country. However,

thousands of looted objects remain in government hands. In addition, thousands of looted works remain unaccounted for, but often surface in the hands of dealers, auction houses and museums around the world. As has become clear, many of the stolen pieces have ultimately ended up in private collections and governments here and in Europe. Despite increased attention to Holocaust-related gaps in provenance and so-called “red flag names,” once having entered the market, Nazi-looted art continues to be passed on, often inadvertently.

More and more information concerning the ownership of these pieces has emerged and continues to surface regularly. In addition to the opening up of governmental archival records in many parts of Europe, there are a number of databases that are and continue to become available. Books continue to be published on the subject as well, many documenting pre-War collections and supplying much-needed information to families who wish to pursue these claims, as well as to current holders and dealers who are also faced with these issues. Not surprisingly, as additional information continues to become available, and given the greater access to information, the number of Nazi-era claims is increasing.

Moreover, these displaced works are likely to surface more frequently in the next few years as collections are passed on from one generation to the next. As children and grandchildren inherit these objects, some will end up selling them, in all likelihood largely unaware of the complete provenance and therefore totally unaware of a possible restitution problem.

As with others in the art world, Christie’s is aware of the importance of being proactive with regards to these issues—from a moral, commercial as well as legal standpoint. It has become clear that WWII spoliation issues are with the art world for the long term. We are well aware that a number of these objects will surface when offered up for sale. As intermediaries in the art world, we have a responsibility to properly research property consigned to us and to document the provenance of an object as accurately as possible so that a purchaser can be confident that they are receiving clear title to the work.

From a commercial standpoint, given the art market’s increased awareness of these issues, it is unlikely that potential buyers at auction will bid on works if they are not convinced that the work comes with a clear provenance. As one example, the American Association of Museums guidelines now require that museums take all reasonable steps to resolve the Nazi-era provenance status of objects before acquiring them for their collections. One must also keep in mind that provenance research is not only important with regards to questions of title, but also important in terms of authenticity issues; and what we call a “good provenance” can impact the value of an object.

A few brief comments on Christie’s response to Holocaust-era looted art issues—Our aim is to ensure that sales are handled as responsibly as possible

and that we do not inadvertently sell looted or spoliated objects. In order to achieve this, we make certain that internally there is a high level of awareness with regards to these issues and we work on ensuring that that awareness is incorporated into Christie's day-to-day business and culture. If there is a possible restitution problem with an object consigned to us, the goal is to identify the problem early so that there is sufficient time to resolve the problem.

To the extent that Christie's can act as a neutral intermediary, helping to seek a resolution that is fair to both parties, we do so. Where issues arise, we strive to act as an "honest broker" amongst the parties. Presently, there is no viable dispute resolution mechanism to resolve claims that arise as an alternative to avoiding lengthy judicial proceedings. To be sure, Christie's role is not to adjudicate these claims but where we discover a problem and find ourselves in a situation where we can encourage a dialogue between consignor and claimant, assisting the parties in reaching a settlement is a service we can provide. Where the original owner is a private individual, a dialogue often results in restitution, some monetary compensation or the sale going forward. Where the original owner is a Government or museum, a deal often results in the object being returned.

Although we ask our sellers to warrant that they have good title to the property, as well as warrant that the property is free from third party claims, this alone is no longer sufficient because of the complexities of these issues. Most often, sellers legitimately believe that the work in their possession is free and clear of claims. Christie's generally sells as agent rather than as principal. This means that we are not the owners of the property that we sell and often have or start off with incomplete provenance information when an object is consigned to us.

What is often most critical to resolving Holocaust era art cases is access to provenance information—once the facts are known, there is a greater chance of reaching a solution. Although the perception is that auction houses have access to all provenance information, it is worth pointing out that in the course of researching objects consigned to us, we too run into roadblocks in trying to obtain relevant documentation quickly. On occasion, key information simply no longer exists. This is a problem for most wrestling with these issues, trying to solve claims. Where Christie's can be helpful to third parties such as heirs or museums in their research, we endeavor to do so. Similarly, given the difficulties of this research work, we are grateful for the cooperation and assistance of archivists, experts and others in this field.

Christie's completes various steps to ensure that objects are being offered with as accurate and complete a provenance as possible. As I mentioned, company-wide awareness of restitution issues is a critical step and involves ongoing education and training of Christie's staff globally. In addition to what we ask of the consignor which I described earlier, proper due diligence includes

physically examining the object for marks and labels on the reverse of the picture, researching the provenance of the object itself with the assistance of in-house resources and tools, looking out for key gaps in provenance, as well as checking lots against the published lists for art that was looted from individuals and museums in all relevant countries.

As a final leg in our process, our catalogues are sent to the Art Loss Register for checking. Complimentary catalogues are sent to claimant representatives such as the Holocaust Claims Processing Office and others in the field so that they can review our sales and make certain there are no matches in our catalogues with objects they may be pursuing.

It is clear that the work that needs to be done is laborious and extremely time-consuming but given where things stand at the moment, for instance the lack of one single repository of archival information or central global database which would greatly facilitate and expedite provenance research, these are the steps we complete in order to ensure that we are not offering a lot we know or suspect may have been spoliated and where they might be a dispute as to ownership. Given the constant flow of paintings that pass through our doors (Christie's offers around 200,000 objects a year), as well as the significant time pressure under which we work as compared to, for instance, a museum with a relatively unchanging collection, the task is a challenging one.

As a final thought, I should say that Christie's would support ideas and initiatives that would facilitate the handling and resolution of some of the Holocaust-era looted art issues I've talked about this morning, for instance organizing all key information into a cost-neutral easily accessible centralized repository or possibly supporting a more uniform set of laws governing the adjudication of these issues, in a way that fairly balances the interests of all parties. Although, as I've described, progress has been made with regards to access to information, it is in everyone's interests that more be done, whether it be working towards centralizing relevant data or digitizing often hard to obtain archival data.