

# SKELETONS IN YOUR CLOSET?

## PRIVATE COLLECTORS AND UNIDENTIFIED NAZI-LOOTED ARTWORKS

Why are unidentified Nazi-looted artworks still a problem in the year 2018? What can private collectors do if they discover a problematic artwork in their collection? Till Vere-Hodge (Senior Associate) and Emelyne Peticca (Paralegal) of Constantine Cannon LLP's specialist Art and Cultural Property practice, explore.

### **An era of unprecedented looting**

From 1933 to 1945, the Nazis looted a staggering 650,000 artworks, both within the Third Reich and in territories controlled or occupied by Nazi forces beyond Germany's borders. Looted treasures included paintings, drawings, sculptures, ceramics, tapestry, books, religious artefacts and many other cultural objects. Although World War II ended more than seventy years ago in defeat for the Nazis, the long shadow of this dark chapter of history continues to hang over many artworks produced before 1945. This is because most of the looted artworks have neither been returned to the heirs of a dispossessed person, nor have the heirs' potential claims been settled by the current owners or possessors.

As a result, private collectors who discover in their collection an artwork that was seized, looted or otherwise misappropriated by the Nazis, should be aware of the risks stemming from such a discovery. At the same time, they should also be careful not to add to their collection any newly-acquired "red flag" artworks, unless they can satisfy themselves that any claim for restitution in respect of such an artwork has been settled in full.

### **Could there be Nazi-looted artworks in my collection and, if so, what are the consequences?**

Many artworks in private collections evade the market's scrutiny, sometimes over decades. Because such artworks typically pass from one generation to the next by way of succession, they may not have been offered for sale, loaned or exhibited to a wider audience for a long period of time.

Such privacy may have unintentionally prevented "red flags" from being discovered, thus leaving undisturbed as yet unidentified skeletons in collectors' closets.

To make this issue even more acute, today's standards of art due diligence (in particular concerning provenance research) are vastly different from the standards applied throughout the 20th century. Artworks with a high-risk provenance may easily have entered a private collection at a time when the international art market paid little or no attention to problematic provenances.

In sum, private collectors are uniquely susceptible to being affected by this problem, because

- of the sheer number of artworks looted by the Nazis in the first place;
- private collections tend to contain artworks that remain "private" and evade scrutiny for long periods of time; and
- the due diligence goalposts have shifted dramatically over the last two decades.

In today's world, a private collector will struggle to sell an artwork that is subject to a potential restitution claim. Any reputable auction house or dealership will likely refuse to be associated with the sale or attempted sale of a "tainted artwork". Because the legitimate channels for selling such an artwork are effectively blocked, the artwork becomes virtually unsaleable. That, in turn, means that the market value of an otherwise highly desirable artwork may plummet, until such time as the potential claim is settled.

If a claim is fought out before the courts, as opposed to being resolved amicably or before an ad hoc panel, the proceedings can incur substantial legal fees and continue for many years. The publicity that goes with such proceedings can

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undermine a collection's reputation as a whole, not just in relation to the tainted artwork.

Potential restitution claims almost inevitably draw in moral or ethical considerations. Often, the "court of public opinion" makes moral judgments that diverge sometimes dramatically from a purely legal analysis. Private collectors thus need to be aware of the potential reputational risks involved, both in relation to their own standing and that of their collection.

**How can I minimize the risks of acquiring further "red flag" artworks?**

Several forward-looking steps can be taken to minimize the risk of inadvertently acquiring Nazi-looted property.

Firstly, the provenance of the artwork to be acquired should be carefully reviewed. Gaps in the provenance between 1933 and 1945, or the names of persons known to have been persecuted by the Nazis or known to have collaborated with the Nazis indicate that an artwork should be classified as a "red flag" artwork. Where that is the case, further research may be needed. At a basic level, online research concerning previous owners' names (where known) and/or a review of the Art Looting Intelligence Unit's Red Flag Names List (available on the website of the Commission for Looted Art in Europe, [www.lootedart.com](http://www.lootedart.com)), can provide useful information.

Secondly, checks should be carried out against registers and looted-art databases. The Lost Art Database ([www.lostart.de](http://www.lostart.de)), for instance, records thousands of artworks

relocated, moved or seized during the Nazi dictatorship. Other providers, such as the Art Loss Register or non-profit organisations, such as the Commission for Looted Art in Europe, offer to check artworks against various databases.

Thirdly, the back of paintings and the frame should be inspected. The information found at the back, such as stamps or other references may be extremely useful.

Nonetheless, complete provenance information is often difficult to obtain, especially from one source alone. If any doubts remain, the services of provenance researchers may help to shed light on the provenance of an artwork. In addition, it is important to regularly re-run searches as the above databases are frequently updated. Provenance information obtained at a certain point in time cannot be assumed to be accurate indefinitely.

Private collectors (and public museums alike) should note that these steps are not only useful to prevent "red flag" artworks from entering a collection, but may also help spot inadvertent past acquisitions of Nazi-looted artworks.

**Can a claimant sue me for an artwork looted by the Nazis?**

Potential claimants may try to pursue a claim through a court of law. The legal analysis of this area of the law, however, is complex and often involves two or more jurisdictions.

Potential claimants have to overcome a number of legal obstacles when they try to enforce restitution in the courts. Examples of technical legal defences include time-bars and the acquisition of good title by an owner

in the chain of provenance after the person who was dispossessed between 1933 and 1945. In addition, looted artworks have been spread far and wide, partly because of the large number of displaced people in the context of World War II and partly because the Nazis sold a good proportion of confiscated art to bankroll their war machine.

Nevertheless, since the 1990s, claimants have become increasingly confident in taking forward restitution claims. This is due to the adoption of several international conventions, such as the Washington Conference Principles on Nazi-Confiscated Art of 1998, which stipulate that “steps should be taken expeditiously to achieve a just and fair solution” to cases where a previous owner who was dispossessed by the Nazis could be identified. The Washington Principles were followed by the Terezin Declaration in 2009.

In the US, there have been several noteworthy instances of litigation, such as Maria Altmann’s claim against the Republic of Austria for six Klimt paintings or Claude Cassirer’s claim against the Kingdom of Spain for Camille Pissarro’s work Rue St. Honoré, effet de pluie from the Thyssen-Bornemisza collection. Further, renewed efforts at provenance research by museums and private collections have raised claimants’ awareness.

Certain jurisdictions, notably the US, tend to be more claimant-friendly than others. The lack of consistency between jurisdictions has made it notoriously difficult to anticipate how future cases will unfold before the courts.

In certain jurisdictions, such as England and Wales, it will help the current possessors if they can establish that they or a previous possessor purchased the artwork in good faith. This typically also impacts the applicable limitation period under English law. Where a looted artwork has changed hands multiple times, it may be necessary to establish which law governs each transfer of ownership. The application of the statute of limitation is also subject to conflicts of law rules. Each country applies different rules with respect to conflicts of law.

A powerful counter-argument against reliance on technical legal defences is that this would be contrary to the Washington Principles and the Terezin Declaration. However, these international declarations are not (directly) applicable to private collectors.

In any event, potential claimants may unilaterally register an artwork as stolen or looted on a relevant database, thus impeding collectors from selling

the artwork or otherwise dealing with it in any way. Where a private collector or a public museum holds an artwork registered on a relevant database, this fact can undermine the collection’s reputation overall.

Other steps available to potential claimants include going to the press. Holding Nazi-looted artworks is likely to adversely affect a collector’s and/or a museum’s reputation.

### **Settlements and Alternative Dispute Resolution**

Litigation over Nazi-looted art is complex and costly; therefore litigation remains a last resort. Conversely, settling through negotiations or mediation may be more cost-effective and bear other benefits. For instance, alternative dispute resolution (‘ADR’) mechanisms, such as mediation or negotiation, generally permit confidentiality. In many cases, confidentiality and discretion are key considerations.

In addition, ADR may allow for moral considerations to be taken into account, which a court of law may not be allowed to consider. These mechanisms may also allow the parties to benefit from innovative solutions which may be more suitable to the dispute in question, but may not be available in the context of litigation.

### **Other considerations**

Claimants, courts, mediators and negotiation facilitators alike typically appreciate proactive and diligent collectors. A proactive approach to this issue tends to result in smoother and more fruitful negotiations.

Public relations management is integral to managing restitution claims. Because of the atrocities of the Second World War, Nazi-era claims are particularly sensitive and attract a great deal of media attention. Careful PR management can also be a crucial tool in building rapport with the claimant and demonstrating the private collector’s good intentions.

When faced with a claim, acting in a timely manner and taking legal advice as early as possible can help minimize the risk of being drawn into litigation, which could result in protracted proceedings and an unsatisfactory outcome. In addition, other methods of resolving a dispute, such as mediation or negotiation, should be kept in mind.

Extensive private or public art collections are well advised to audit their collections, where applicable, with the assistance of a team comprising of external counsel, provenance researcher and PR specialist.