Why are Common law and Civil law so different?

1. Two historical reasons

1.1 Middle Ages

A great many historians consider the Carolingian empire as the starting point for a common (European) civilization. It was then that the *imperium occidentale* separated itself from the (East-) Roman empire and went its own way, developed a common code of chivalry, used the same language (Latin) and developed a common scholarship in the fields of theology, philosophy and Roman law.

As a separate and principal discipline Roman law as such was taught at the university of Bologna in the late 11th century, and from there it spread all over Europe in the next centuries. The *ius commune* in continental Europe is based on two great codifications. The first one was compiled, by order of the (East-)Roman Emperor Justinian (527–65) from Roman law material. This codification of 533, which consists of three parts is called Corpus Iuris Civilis The other codification derives from the Roman Catholic Church, and is known by the title of Corpus Iuris Canonici. Its key part consists of the Concordia discordantium canonum, a compilation of canon (church) law which was accomplished by the monk Gratian in 1139.

The study of law taught as a separate discipline of learning at the universities in western Europe, to begin with Bologna, was modelled on the programme and method which had been developed by Irnerius (who died around 1125) and his successors. Important faculties of law were to be found at the universities founded from the 12th century onwards: in Italy, Bologna, Naples and Padua; in France, Orléans and Montpellier; in Spain, Salamanca and Valladolid; and in Portugal, Coïmbra; also in Cologne and Erfurt in Germany, and Louvain and Douai in the Southern Netherlands.

By the time of this Reception of Roman law on the Continent, however, England had, to begin with the Conquest, already developed its own system of common law and its own legal education (in the Inns of Court). For that reason Roman law had a totally different meaning in Britain. Roman law was taught at the universities of Cambridge and Oxford, canon law only until Henry VIII abolished it as too closely linked to the Roman Catholic Church. Roman and canon law provided notably a technical vocabulary and a conceptual structure with which local customary law could be explicated, but the laws of England remained the starting point for the legal practice. The Civilians, as those scholars were called, the experts of Roman law, were never called to a more than marginal role in the English courts, at best in those rare courts which applied Roman law, such as the Court of Admiralty.

1.2 the Age of the Enlightenment

Here we have the first reason why Civil law and Common law are so different, The second reason dates back to the Age of the Enlightenment, when manifold criticisms of the administration of justice and its sources of law led to an enhanced appreciation of national legislation, or even codification. Codes were considered the panacea for all the evils which stuck to the old system of law. This quest for codification was part of a political programme, since this endeavour played a part in the struggle for one state created by unification of the various provinces, which struggle initially took place between the king (later the central government of the revolution) and the provincial powers that tried to maintain their autonomy. France serves as the best example. Royal power and the increasing national consciousness of the French people were opposed to the particularistic law system of any part of France and against the hopeless fragmentation of local customs. Codification implied the quest for unity. Inherent to the quest for codification is the endeavour to create a complete, unitarian, well ordered law book that is

easily accessible to the citizen. This endeavour goes hand in hand with an absolutistic and centralistic concept of the state. It was the Enlightenment which offered the theoretical framework, within which a new view about what the law should be could be developed. The primacy of the law given by the central authority was in this way confirmed. This holds true for the codifications which, saw the light in the German countries, such as the Codex Maximilianeus bavaricus civilis (1756), the Allgemeines Landrecht für die Preussischen Staaten (1794) and the Austrian Allgemeines Bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie, which was published in 1811 and came into force in 1812. It is, however, specifically a striking feature of the French Civil Code, which came into existence in 1803. It has to be noticed, that England escaped the French Revolution and consequently remained outside the codification movement, that became dominant in the realm of the Civil law.

2. Law of property

2.1 Ownership of movables in the Civil law

Here we have a few historical, and – admittedly: to a large extent- theoretical explanations, why common law and civil law are so different. The practical consequences of these differences, however, are felt even today. They come to the surface on various levels, also on the level of the law of property. At first glance it might seem that life goes on in the two systems in strikingly similar fashion. Ownership under the civil law and fee simple ownership of land in the common law show a notable resemblance. Ownership both in Civil law and Common law encompasses a possessory right to prevent invasions by third parties and the right to reclaim the object in case of involuntary loss from the whosoever where the owner might find his thing, the so-called *droit de suite*, formulated in the a well-known principle: *Ubi rem meam invenio, ibi vindico.* On closer look, however, the differences emanating from the very different points of departure, are, notwithstanding a certain similarity in terminological respect, important. The civil law, departing from the tradition of Roman law, focusses on a concept of holistic ownership, whereas the common law, departing from feudal fragmentation, emphasizes pieces of ownership called estates and its many methods of carving up property, from life estates to defeasible fees and various future interests. Institutions such as the trust are largely unknown in the civilian tradition. The greater part of the Civil law jurisdictions, furthermore, developed a general limitation – based on the perceived interests of commerce- of the owner's right to recover property, notably in case of movables. Generally speaking the owner loses his right on the property after it had passed into the hands of third parties: *mobilia non habent sequelam,* in French: *meubles n'ont pas de suite* or in German *Hand muss Hand wahren*, hand must guard hand. A purchaser on a free market or from a pawnbroker or another dealer may acquire good title. The conflict of interests between the injured owner and the buyer of movables is in these cases decisively resolved in favour of the buyer. The most rigorous way of cutting the knot is found in France. In other jurisdictions, however, this soup is not eaten as hot is it is served. Some jurisdictions require that the buyer acquired the thing in good faith, others give some protection to the injured owner in cases of theft. The German principle, for example, shows already by its wording that it distinguishes between voluntary and involuntary loss of possession. In the former instance we think of contracts of loan or lease, which enable the other party to use the thing involved. If the borrower or lessor violates his obligation to return the thing after lapse of the time agreed upon and sells it, the injured owner can only bring an action against the borrower or the lessor: *Hand muss Hand wahren* or, in other words: *Wo Du deinen Glauben gelassen hast, musst Du ihn auch finden,* Where you have left your faith, you must find it too*.* the acquirer, provided he acted in good faith and for a consideration, is not to be blamed. In the latter instance, however, we think of theft or similar instances of involuntary loss of possession. Several jurisdictions opt in these cases for a protection of the injured owner, although in some of them under the obligation to restitution of the price paid by the defendant. After a certain lapse of time statutory provisions of limitation and/or prescription come to the aid of the third party/acquirer. In short, Civil law systems

derived from Roman law the principle that the owner has the right to reclaim his assets from anyone under whom he may find them, but already Roman law itself knew of a number, albeit rather unimportant, exceptions to that principle, e.g. that nobody reclaims any object from the Emperor. From the Middle Ages onwards the need to protect the developing commerce was strongly felt and entailed the tendency to protect the rights of the buyers in good faith, even against the claims brought by an injured owner. This exception to the general rule, however, in itself gave rise to a rather detailed, autonomous body of law, called Law Merchant, respectively Commercial Law. The protection of the buyer was limited to the buyer of movables and the provisions concerning stolen goods might vary according to local custom. The most far-reaching exception to the principle of absolute vindication of property was found in France, where the *meubles n'ont pas de suite* doctrine led to the consequence that movable property was not at all subject of restitution. This principle was eventually laid down in article 2279 of the French Code Civil: *En cas de meubles possession vaut titre*/with regard to movables, possession is equivalent to title. This article formulated the presumption of ownership in favour of the actual holder of movable property. This presumption might in case of stolen goods be rebuttable, but the burden of proof is upon the claimant, not upon the actual holder, the defendant against the claim of the injured owner. In that situation the claim is subject to a limitation period of three years, after which the presumption becomes irrefutable. In Germany that limitation period is much longer, thirty years.

2.2 Ownership of movables in the Common law

The Common law, however, maintained the protection of the ownership title on a much more unyielding basis and knew much less exceptions to the general rule that nobody transfers more rights to another than he had for himself/*nemo plus iuris in alium transferre potest quam ipse haberet.* Sale by a non-owner passed no property: *nemo dat quod non habet.* In the course of the 15th century the principle of the *market overt* saw the light. It seemed desirable that the claim of the original owner should give way to the demands of commerce. Consequently a bona fide buyer acquired full title if he bought a chattel in a royal grant open market or in a market or fair established by prescription. The city of London even asserted a custom that every shop within the city was a market for the purpose of the rule. Injured owners had the opportunity, it was felt, to verify there, whether their goods were merchandized at that place. Consequently the balance of interests between the injured owner and the bona fide buyer threw more weight in the scales of the latter. Nevertheless, this exception to the general principle did not apply to the purchase of stolen property, provided that the thief had been successfully charged. A magnificent illustration is the *Case of Market Overt,* which dates back to 1596, a case of the bishop of Worcester's silver (Hil. 38 Eliz.). The court held "that that if plate be stolen and sold openly in a scrivener's shop on the market-day (as every day is a market-day in London except Sunday) that this sale should not change the property, but the party should have restitution for a scrivener's shop is not a market-overt for plate; for none would search there for such a thing; … But if the sale had been openly in a goldsmith's shop in London, so that anyone who stood or passed by the shop might see it there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands, so that one that stood or passed by the shop could not see it, it would not change the property: so if the sale be not in the shop, but in the warehouse, or other place of the house, it would not change the property, for that is not in market-overt, and none would search there for his goods." The principle of the *market overt* ruled that, if we may borrow the formula of art. 22 (1) of the Sale of Goods Act 1979: 22.-(1): Where goods are sold in market overt , according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. Sir John Baker remarks that in four centuries few changes were made in the law of market overt until it was abolished in 1994 by the Sale of Goods (Amendment Act 1994), but the principle of protecting those who deal in good faith with non-owners in the open market has received some statutory extension, to begin with the Factor Act 1823 (4 George IV, c. 83). Under that Act any

person who entrusted goods to a factor (or agent) for sale took the risk of the factor's selling them beyond his authority; anyone buying from a factor in good faith, relying on his possession of the goods and without notice of limitations on his authority took good title against the true owner.[1] Before John Baker Daniel E. Murray had already stressed, that the law of market overt was and remained always an exception to the principle that a non-owner does not transfer title: "it must not be inferred that the English rule of market overt has run roughshod over the orthodox common law rule that *nemo potest plus juris ad alium transferre quam ipse habet …* It is not an exception which has engulfed the rule", and he focusses for the denial of the rule in American courts the attention upon the case of *Wheelwright* v *De Peyster* in which Chancellor Kent flatly rejected the rule of market overt by uttering the dictum that: "I have no difficulty in saying that I know of no usage or regulation within this State, no Saxon institution of market overt, which controls or interferes with the application of the common law".[2] Gilmore remarks that the Factor Acts (which were in time expanded to protect people) as much in derogation of the common law as it is possible for a statute to be, were restrictively construed and consequently turned out to be considerably less than the full grant of mercantile liberty which they had at first appeared to be. Nevertheless American case law shows a number of other techniques to shift risks, e.g. the concept of voidable title or the introduction of the distinction between sales on credit (which leave the seller only with a claim for the unpaid price, without any title to the goods except when the delivery is induced by buyer's fraud) and sales for cash (which leave the defaulting buyer because of his larceny by trick or device without any title to the goods), but these techniques belong mainly in the realm of commercial law and the Law Merchant is a separate branch of the law, which we cannot explore further.

3. Exceptions to the principle: *Nemo dat quod non habet*

3.1 in the Civil law

These observations lead to the interpretation that both law families, the Common law and the Civil law, depart from the principle that *nemo dat quod non habet.* In the majority of the Civil law countries, however, substantial exceptions to that principle are found, notably with regard to movables. A person in possession of a movable with consent of the owner can convey good title to a bona fide vendee at any type of sale, public or private. Several Civil law jurisdictions, however, do not give this protection to the bona fide vendee in case of stolen movables, albeit that the claim of the dispossessed owner is generally speaking subject to a limitation statute, i.e. a time limit of a small number of years after the theft, independent of a discoverability test. After the lapse of a period of three or five years the claim of the injured owner will be time barred, irrespective whether he knew or did not know against whom to bring the claim. In some jurisdictions the claim of the owner can only be brought against reimbursement of the purchase price paid by the bona fide vendee. In any case, the greater part of the civil law jurisdictions codified furthermore a long term limitation period: any claim whatsoever will be time barred after the lapse of twenty or thirty years after the occurrence of the fact that gave rise to the cause of action.[3]

3.2 in the Common law

The Common law, on the other hand, recognized less exceptions to the principle that serves as the point of departure: *nemo plus iuris in alium transferre potest quam ipse habet.* The most important

[1] J.H. Baker, An Introduction to English Legal History, 4th ed. London 2002, p. 386; G. Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale Law Journal (1953-1954), p. 1057-1122, at p. 1058 ff.

[2] D.E. Murray, Sale in Market Overt, in [1960] The International and Comparative Law Review 9, p. 24-52, at 27.

[3] § 985 BGB, Phillip Hellwege, Precluding the statute of limitations? how to deal with nazi-looted art after Cornelius Gurlitt, in 22 Southwestern Journal of International Law (2016), p. 105-161.

exception is that the English Common law vested indefeasible title in the purchaser in all purchases in market overt with the exception of goods obtained by theft from the owner. In the event of theft the vendee must restore the thing without receiving reimbursement of his purchase price. Lord Coke, in his report of the *Market Overt case* of 1596 stated: " So every shop in London is a market-overt for such things only which by the trade of the owner are punt there to sale…". The court held that by a peculiar custom of London every shop qualified as a market-overt for those things which the shop customarily sells. The regulation as such, however, is abolished. The Factor Acts admittedly respected commercial convenience, but in legal practice they led to the outcome that the rights of property definitely were not to be sacrificed. It is to be observed that in the conflict of interests between the bona fide vendee and the injured owner the Common law is more inclined to give heavier weight to the owner than the Civil law systems do. An owner should not be deprived of his property rights without his consent.

4. Limitation and prescription

The same conclusions seem to be valid if we consider the notions of limitation and prescription.[4] Within both the Civil law and the Common law we find means of acquiring and losing rights, or freeing ourselves from obligations by the passage of time. The ratio thereof is at least twofold: At one side, for a claimant or creditor prescription and limitation imply stimuli to actually bringing the action, if they are of the opinion to have one. If a creditor is negligent in protecting his assets, the law does at a certain stage no longer protect him. As Oliver Wendell Holmes, Jr. said aptly some 100 years ago: "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example".[5] On the other hand, for the possessor and debtor prescription and limitation imply a certain protection against claims which have been at rest for too long, i.e. claims against which defences might have been lost. In the common-law tradition these policy goals behind statutes of limitations are found in *Riddlesbarger v Hartford Insurance Company*, 74 U.S. 386, 390 (1868): [Statutes of limitations] are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. A claim should not hang above the head of the debtor as if it were a Damocles' sword. Generally speaking a claimant may be cut off from pursuing his right in court for the simple reason that he has been guilty of negligence in bringing suit. The exercise of a right is considered contrary to good faith, when and if the creditor's inactivity had lulled the debtor into believing that the right would not later be claimed. It is an old equitable maxim, that the loss should fall on the person who made the loss possible. Related to the rules governing time bars to claims are the rules on acquisition by virtue of uninterrupted use or enjoyment over a long period. The relation between the two is not always clear. In some jurisdictions the simple fact that the claim of the original owner is time barred does entail the transfer of title to the actual possessor. The position of the owner, who can no longer bring a claim is therefore rather obscure. We used to refer to that position as *dominion sine re.* In other jurisdictions, e.g. the Netherlands, the lapse of time and the loss of the action entail the transfer of title to the actual possessor. We should realize, however, that the whole issue of limitation and prescription in case of movables is in several Civil law jurisdictions of rather limited significance. In France by operation of the *possession vaut titre* principle of art. 2276 of the Code civil the good faith possessor of a movable acquires upon the transfer a new title, distinct from that of the transferor. The same holds true for Italian law, where good faith acquisition of movables

[4] this paragraph is for a substantial part taken from a forthcoming publication.
[5] O.W. Holmes, Jr., The Path of the Law, Harvard Law Review 10 (1879), p. 476.

qualifies as a form of original acquisition. Consequently the new title is free from encumbrances, provided the acquirer was in good faith (art. 1153 of the Codice Civile). The fact, however, that the transferee, by behaving in conformity with a reasonable standard of care, could have gained knowledge of another person's right, could constitute an obstacle to his being in good faith. In Belgium it is sometimes argued that in this cases the prescription period is reduced to zero. However, an exception should be made in case of goods stolen from the owner. During a certain, albeit limited time the Civil law grants stronger protection to the interests of owners whose goods have been stolen. When, however, the acquisition of stolen goods took place in the ordinary course of business and the acquirer acts in good faith, the exception of stolen goods will be dismissed. This is utterly opposite to the common law. At common law, a thief's title is void and consequently the thief cannot give a buyer, even not a bona fide purchaser, good title, nor can the bona fide purchaser give good title to a subsequent buyer, and so on. The common law protects an original owner's title to stolen chattels. This phrase, however, needs some elucidation. The first remark is, that in the course of the 19th and 20th century several States of the United States enacted legislation concerning statutory provisions of limitation periods, which provide that a cause of action will be barred in a forum if it is barred where it arose, accrued or originated. In this respect New York, probably the most important State when it comes to restitution-cases, went through a specific development. Since *Gillet v. Roberts*, 57 N.Y. 28 (1874) it is in New York trite law that a good faith purchaser of stolen goods does not commit a wrong until he refuses to return the goods to the injured owner. That refusal to return is considered to be the last act that establishes the wrong and consequently the cause of action only accrues at the moment of that refusal. This rule is known under the name of demand-and-refusal rule. [6] See *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E. 2d 426 (1991). That demand-and-refusal rule places the accrual of the limitation period largely in the hands of the injured owner, since he has the discretion when to demand the restitution of the stolen work of art. California ruled in § 338 (c) originally that actions for the recovery of personal property have to be filed within the limitation period of three years from the taking, detaining or injuring of the goods or chattels, but in 1983 California amended the limitation statute by providing for a discoverability test. The limitation period starts when the plaintiff discovers or should have discovered by exercising reasonable diligence that he has a remedy and against whom he can file the action. The recent federal Holocaust Expropriated Art Recovery Act of 2016 (HEAR) did in principle bring little change, except for the length of the limitation period. The new HEAR Act purports to extend the statute of limitations for actions to recover art and certain other items stolen during the Holocaust. The new statute of limitations would be either the old statute or a six-years-from actual discovery statute, whichever is longer. In recent years these statutes of limitation do no longer qualify as procedural, but rather as substantive. The difference between the two views is, that if the statute is considered to be procedural, the law of the court will govern the case, whereas in the other instance a substantive statute implies that the choice-of-law rules provide for the applicable law, which might be the law of another state or country. This is in accordance with the Uniform Conflict of Laws-Limitation Act. The court applies the normal choice-of-law rules to resolve conflicts between statutes of limitation. In 2002 the State of California extended its statute of limitations, as part of a policy of providing a reasonable opportunity for claimants to commence actions in respects of wrongfully taken Holocaust-era artworks. The Californian Code of Civil Procedure § 354.3 provides since 2005 … (b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in § (1) of subdivision (a), i.e. [any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific or artistic significance] (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the

[6] H.I. Lazerow, Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016, to be published in 52 The International Lawyer (2018)

action is commence on, or before December 2010.[7] In short: the Common law is much more inclined to protect an original owner's title to stolen chattels than the Civil law. This seems to be generally the case, and furthermore the laws of New York and California provide proof of that valuation. The former US Special Envoy for Holocaust Issues, Douglas Davidson, spoke recently about "a provision in American law not common in continental European legal systems – the idea that a stolen good is always just that. Unlike in civil systems, in the US good faith purchasers cannot wait years and then know that their hold on what turns out to be a stolen good is secure. As American lawyers like to say: *nemo dat quod non habet* ('No one gives what he does not have') or, more colloquially: 'A thief can't pass good title.'[8]

5. Three examples

5.1 *Renaissance Art Investors LLC and Old Master Properties LLC* v. *Galleria Cesati*

We will mention a few examples and discuss them. The first instance is the decision of the 's Hertogenbosch Court of Appeal in the case between *Renaissance Art Investors LLC* and Old Master Properties LLC against Galleria Cesati.[9] The second one is a Californian case, *Adler* v *Taylor*, the case concerning ownership of a painting by Vincent van Gogh, *Vue de l'Asile et de la Chapelle de Saint-Rémy.* The third one is an Austrian case, *Maria Altmann v. Austria.* In order to meet the requirement of full disclosure I mention that I was involved in the first case at the side of the defendant.

Renaissance Art Investors is a Nevada Limited Liability Company, seated in New York, and well known in legal circles for their numerous litigations. On January 1, 2006 they acquired all the shares in Old Masters Properties, also a Nevada Limited Liability Company, seated in New York. Among the principals of Renaissance Art Investors were Donald Schupak, then chairman of Apparel Corporation and Lawrence Salander, a man of a longstanding reputation as a prominent art dealer and holder of the Salander-O'Reilly Galleries, a private art gallery created by Salander for the purpose of holding objects of art purchased by Renaissance Art Investors. In total Renaissance Art Investors had paid Salander-O'Reilly Galleries $ 42 million for 328 pieces of art, which they then consigned back to the gallery for resale at higher prices. These works were, according to Renaissance Art Investors, mentioned on two inventory lists. Also quite a few others, among whom celebrities such as Robert de Niro Sr., the actor's father, and the tennis star John McEnroe, put up substantial sums of money for Salander-O'Reilly to buy art and then resell it at a profit. In the last few months of 2007, however, the Salander-O'Reilly Galleries and its principal, Lawrence Salander, became the subjects of complaints and a growing number of lawsuits by people who say they consigned artworks to the gallery and were not paid, or even notified, when they were sold. In November 2007, Salander filed for personal bankruptcy. . On March 26, 2009, Manhattan District Attorney Robert M. Morgenthau issued a press release in which he announce the arrest of Salander, stating (i.a.), that "Salander also intentionally withheld from RAI the reporting of millions of dollars in sales of Rai artworks after the closing of the deal and failed to turn over the proceeds from the sale." In March 2010 Salander pleaded guilty to 29 felony counts of grand larceny. He admitted to selling dozens of pieces that he was supposed to hold without permission to a total amount of $ 120 million, which he had been due to pay over to his clients.

[7] Quoted after J.A.R. Naziger, R.K. Paterson, A.D. Renteln, Cultural Law: International, Comparative and Indigenous, Cambridge 2010, p. 564.

[8] D. Davidson, Just and Fair Solutions – A view from the United States, in E. Campfens (ed.), Fair and just solutions? : alternatives to litigation in Nazi-looted art disputes: status quo and new developments, Den Haag 2015, p. 91-102 at p. 100.

[9] Gerechtshof 's Hertogenbosch, June 6, 2017 , ECLI:NL::GHSHE:2017:2512, NJF 2017/468

Eventually he was sentenced to six to eighteen years in prison.[10] Renaissance Art Investors filed suit against their insurer, AXA Art Insurance Corporation, but the claim with respect to their losses was dismissed. The Supreme Court, Appellate Division, First Department, New York (134 S.CT. 792 (2013)ruled:[11] "The policies purchased by RAI, which covered "losses" as that term is defined in the policies, contained an unambiguous exclusion, precluding coverage in the event of "[a]ny fraudulent, dishonest or criminal act or acts by: (a) You, anyone else with an interest in the property or your or their employees *605 whether or not committed alone or in collusion with others, whether or not such act or acts be committed during the hours of employment; or (b) Anyone entrusted with the Covered Property." We reject the assertion that the exclusion does not apply because RAI believed it was purchasing "all risk" coverage and that the term "all-risk" *33 implies comprehensive coverage—including fraud. "[A]s a matter of law[,] insurance coverage, even under an all risk policy, extends only to fortuitous losses" and "[w]hether or not a loss is fortuitous [ ] is a legal question to be resolved by the Court" (*Redna Marine Corp. v. Poland*, 46 F.R.D. 81, 86 [S.D.N.Y.1969]), at 87). Here, the motion court correctly determined that the fraud engaged in by Lawrence Salander, one of RAI's principals, and the Gallery, one of RAI's members, created by Salander for the purpose of holding objects of art purchased by RAI, was not fortuitous…. " The defendant, Alessandro Cesati is the owner of an art gallery in Milano. On a regular basis he participates in The European Fine Art Fair, in Maastricht, better known under the abbreviation TEFAF, an important, if not the most important Fair for fine art antiques and design. In March 2010 he offered for sale a so-called triptych, named "Madonna della Candalabre" and made by Antonio Rosselino. In Italian it is called a *rilievo stacciato*, In fact a work of art in painted stucco somewhere halfway between drawing and low relief, representing the Holy Virgin absorbed in the act of supporting and contemplating her son on her lap. *Inde lacrimae et irae.* Renaissance Art Investors came to know where this triptych was located and identified it as a work it had previously consigned to Salander O'Reilly Galleries. They filed an action for recovery of the triptych and obtained a court order to seize the work of art during the procedure. They alleged that the triptych was mentioned in their inventory lists of works consigned to Salander O'Reilly Galeries and that it consequently was their personal property. Salander had no authority to sell the triptych and to embezzle the proceeds. Consequently ownership remained vested in Renaissance Art Investors. Furthermore, in the course of the lawsuits in the last months of 2007 brought by people who stated that they had consigned artworks to the gallery and were not paid, the New York District Judge had issued on October 12, 2007 a judicial restraining order, forbidding any replacement of any work belonging to the RAI-collection. The adjoining list indeed mentions a Madonna and child by Antonio Rossellino. Registration with the Art Loss Register took place on April 7, 2008. Renaissance Art Investors reclaimed the triptych from Cesati and they founded their claim on conversion, respectively on an unlawful act by exhibiting the art work at the TEFAF.

The first legal question, the Maastricht district court had to answer, is whether it has any competence in this case. It held, that the defendant, Cesati was domiciled in Italy and the subject matter of the debate primarily concerned the ownership-issue. Consequently EU-Regulation nr. 44/2001 rules that the case should be brought before the court that is competent where the defendant is domiciled. The simple fact that Renaissance Art Investors had also mentioned a second plea, based on the law of torts, leaves the first basis, the ownership-issue, untouched. Consequently the District Court declared itself incompetent to hear the case. The Court of Appeal, however, ruled in the opposite direction. The claim lodged by Renaissance Art Investors, was also based on a presumed tort and art. 5 § 3 of the EU-Regulation rules that the court of the *locus delicti* is competent. It is doubtful, whether this decision of the 's Hertogenbosch Court of Appeal is indeed in accordance with European law, but in any case the Maastricht District Court had to decide the case. Which they did.

[10] https://www.barrons.com/articles/what-art-collectors-can-learn-from-art-thief-larry-salander-1431741126 (retrieved February 22, 2018)

[11] http://www.courts.state.ny.us/REPORTER/3dseries/2013/2013_00438.htm (retrieved February 22, 2018)

Thereupon the second legal question arose, namely to which law the case is subject. Renaissance Art Investors contended, that the law of New York governs the case, alleging that they are the owner, whereas Cesati was of the opinion that Italian law should be applied, since he had purchased and personally taken delivery of the work in Florence, as a consequence whereof full title had been vested in him. This question is of the utmost importance for the outcome of the case, as the more or less similar New York case of *Bakalar v. Vavra* shows.[12] That case involved a dispute over the ownership of a drawing by Egon Schiele known as "Seated Woman with Bent Left Leg (Torso)." between Bakalar, the current possessor of that drawing, and the heirs to the estate of Franz Friedrich Grunbaum, an Austrian cabaret artist of Jewish descent. He was arrested by the Nazis and imprisoned at Dachau, where he died. The Schiele-drawing was purchased by Galerie Gutekunst, a Swiss art gallery, in 1956. Later the same year, on September 18, 1956, the drawing was purchased by the Galerie St. Etienne and was shipped to it in New York. On November 12, 1963, the latter sold the drawing to David Bakalar. The district judge ruled that Swiss law applied.[13] Under Swiss law, "a person who acquires and takes possession of an object in good faith becomes the owner, even if the seller was not entitled or authorized to transfer ownership." One "relevant exception to this rule is that if the object had been lost or stolen, the owner who previously lost the object retains the right to reclaim the object for five years." The district judge held, that, even if the drawing had been stolen at some point prior to the Galerie Gutekunst's purchase in 1956, "any absolute claims to the property" by those from whom the drawing was stolen "expired five years later, in 1961," pursuant to Swiss law. The Court of Appeal for the Second Circuit, however, quashed this part of the judgment of the district judge. The Court of Appeal held: "Swiss law places significant hurdles to the recovery of stolen art, and almost "insurmountable" obstacles to the recovery of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it. ..Unlike Switzerland, in New York, a thief cannot pass good title. This means that, under New York law … "absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." … The manner in which the New York rule is applied reflects an overarching concern that New York not become a marketplace for stolen goods and, in particular, for stolen artwork." [14] Thus the question which law applies to the case is decisive for the outcome. If the case is decided under the Law of New York the burden of proof that the object is not stolen by the Nazis rests upon the plaintiff; if any Civil law system rules the case the claim for restitution will have to face the application of the limitation statute. New York law is much more favourable to the claimant, provided that there is no other crucial reason to dismiss the claim, but there are similar precedents to be found elsewhere in common law jurisdictions. On September 9, 1998 the High Court of England and Wales gave judgment in the case of *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.*,[15] the first reported decision of a common law court on § 221 of the German Civil Code on limitation of proprietary actions when a third party acquires possession of the property. The facts are extremely complicated, but in its essence the case is about a painting by the Dutch mannerist Joachim Wtewael who around 1603 created this small piece (only 21 x 16 cm on copper) depicting *The Holy Family with Saints John and Elizabeth.* The Russian general Kozlenkov could easily put the painting in the pocket of his uniform, when he left the town of Gotha in Thüringia in 1945. A small detour along the museum in Schloß Friedenstein *(nomen est omen)* was therefore sufficient. Whether this was a spontaneous action of Kozlenkov (or not) remained unclear; apparently from the very outset of Soviet occupation in July 1945

[12] *Bakalar v. Vavra*, 550 F. Supp. 2d 548 (S.D.N.Y. 2008); 619 F.3d 136 (2d Cir. 2010); 819 F. Supp. 2d 293 (S.D.N.Y. 2011); 11-4042-cv (2d Cir. 2012).

[13] *Bakalar v. Vavra*, 2008 WL 4067335, at *6 (S.D.N.Y. Sept. 2, 2008) (citing Bakalar v. Vavra, 550 F. Supp. 2d 548, 550 (S.D.N.Y.2008)).

[14] *Bakalar v. Vavra*, 619 F.3d 136 (Court of Appeals for the Second Circuit, September 2nd, 2010).

[15] M.H. Carl, H. Güttler, K. Siehr, *Kunstdiebstahl vor Gericht. City of Gotha v. Cobert Finance S.A*. [Schriften zum Kulturgüterschutz/Cultural Property Studies], Berlin-New York 2001.

members of the Russian secret service SMERSH were in Thüringia and acted as "official" trophy brigades, Mr Moses J. relates in his judgement. During the last years of Communist rule in Moscow the painting went from hand to hand, was acquired by a Panamas company (Cobert Finance S.A.) and eventually offered for sale at auction by Sotheby's. Thereupon Federal Republic of Germany brought an action in conversion and claimed ownership of the painting, whereas the City of Gotha asserted a possessory title to it. The defendants raised the defence, that these claims were time barred. The German Civil Code (BGB) knows in § 195 a limitation statute of 30 years, and § 221 BGB gives a mode of calculation of that limitation period, reckoning with *accessio temporis.* Mr Moses J. used this translation of § 221 BGB: If a thing, with regard to which a claim in rem exists, comes by succession (Rechtsnachfolge) into the possession of a third party, the time of prescription which elapsed during the time of possession by the predecessor in title is reckoned in favour of (translated before me as benefits) the successor in title. After having discussed the scholarly literature on the nature of the *accessio temporis*, Moses J. reached the conclusion that the successor may only add the time during which his predecessor had possessed the asset to his own if he had acquired possession in good faith. Cobert, however, had conceded, that neither it nor anyone else acquired the painting in good faith. As a consequence the claim of the Federal Republic of Germany was not time barred, but (and this is parallel to *Bakalar v Vavra*) Moses J rules explicitely: "(II.4) Had the claim been time-barred, German law conflicts with public policy."

The choice of lthe law the case is subject to might be decisive for the outcome of the case. Which law applies is, both in the common law and in the civil law, a matter of the *lex fori*. According to Dutch private international law the question whether the defendant has acquired full ownership is a matter of the *lex rei sitae.* Indeed in *Bakala v. Vavra* the decision of the district judge, that Swiss law should be applied is in accordance with Dutch international private law. Consequently in our case, *Renaissance Art Investors v. Cesati*, the court had to face the provenance of the triptych. The court found that on December 16, 2006 Dr. Andrea Pittas had purchased the work at auction from San Marco Auction House and had gotten an export license for the work, that Dr. Pittas had made no use of that license but instead sold the work and delivered to Mr Botticelli, who in his turn had sold and transferred the triptiche to Cesati, accompanied by the San Marco Auction House Catalogue, in which the work was published on a double page and with the history of the work since the auction. The bill of the latter transaction mentioned the work as '*Trittico con pannello centrale in stucco dipinto 'Madonna delle Candelabre' Bottega di Antonio Rossellino, Fine sec. XV*, Cm 102 x 68*'. Under these circumstances there is no doubt that the Cesati bought the piece and got it transferred in Italy. Consequently the case is subject to Italian law. The court left undecided the question whether the contract of sale between Botticelli and Cesati is in accordance with art. 64 of the Italian Codice Culturali (which provision imposes on the professional seller of a work of art to deliver to the buyer the documentation certifying the authenticity of that work of art) since it is only the Italian State who can nullify a contract on the basis of non-fulfilment of that provision, which the State had not done. Consequently the court ruled that the contract of sale and the following delivery constituted a valid transfer of title. As to the good faith of Cesati at the moment of the acquisition the court ruled that according to the Italian Codice Civile good faith is presupposed, whereas the burden of proof of the contrary rests upon the plaintiff. The facts submitted by Renaissance Art Investors constituted insufficient proof. The court therefore dismissed the claim and the court of appeal confirmed the decision of the district court, with costs.

5.2 *Mauthner Heirs* v. *Elizabeth Taylor*

In 1889, a few months after cutting off the lower part of his left ear following a dispute with Paul Gauguin, Vincent van Gogh entered the Saint-Paul de Mausole asylum near the town of Siant-Rémy de Provence.[16] In the summer or fall of that same year 1889 Van Gogh painted his *Vue de l'Asile et de la*

[16] The most recent biography is: S. Naifeh, G. White Smit: *Vincent van Gogh, De biografie*. Amsterdam, 2011.

Chapelle de Saint-Rémy. Less than a year later he committed suicide by a self-inflicted gunshot. Ownership of the painting passed firstly to the brother of Vincent van Gogh, Theo, and after the death of Theo to the widow of the latter, Johanna. She sold it to Berlin art dealer Paul Cassirer, who in his turn, in 1907, sold it to Margareth Mauthner (1863-1947). She was Jewish and fled Germany in 1939. She settled eventually in South Africa, where she passed away. Jacob Baart de la Faille lists in his *L'oeuvre de Vincent van Gogh: catalogue raisonné* (Paris 1928), the standard catalogue of Van Gogh's works, Mauthner as the painting's current owner; the same reference gives the second edition (by A.H.Hammacher, Paris 1939; the 1970-edition, fully revised and updated, compiled by an editorial committee, mentions Alfred Wolf, a Jewish businessman, who left Germany for Switzerland in 1934 and ultimately relocated to South America as the next owner.[17] The painting came up for sale at a Sotheby's auction in London in 1963. The auction catalogue traces the provenance from Mauthner to Paul Cassirer, to Marcel Goldschmidt and then to Alfred Wolf. At auction the painting was sold for £92.000, From the buyer, Francis Taylor, it passed over to his daughter, the actress Elizabeth Taylor, on whose behalf the father had purchased the painting. Taylor's acquisition was widely publicized at the time. She put it up for auction at Christie's in London in 1990. The catalogue for that auction mentions Taylor as the current owner , with the prior owners being Alfred Wolf, Frankfurt art dealer Marcel Goldschmidt, Mauthner, Cassirer and Johanna van Gogh-Bonger. At that auction the painting remained unsold. 40 Years after the purchase by Taylor the heirs to Margarete Mauthner demanded the return to them of the painting, claiming that they were the rightful owners. Margarete Mauther, they alleged, had lost the painting involuntarily when leaving Germany as a direct consequence of Nazi persecution. Negotiations remained unsuccessful. Elizabeth Taylor filed a declaratory judgment action in the District Court, requesting a judgement that she was the rightful owner of the painting. Thereupon, in October 2004 the Mauthner heirs filed a motion to dismiss the claim and they brought a counterclaim, contending that they were the rightful owners and they sought recovery of the painting under theories of specific recovery, replevin, conversion, constructive trust and unjust enrichment, basing their claims on the common law, legislation of the state of California and on the federal Holocaust restitution legislation, i.e. the Holocaust Victims Redress Act, the Nazi War Crimes Disclosure Act, and the United States Holocaust Assets Commission Act. all of 1998. The district court decided both cases jointly. The court denied the Mauthner heirs' motion to dismiss Taylor's claim and granted Taylor's motion to dismiss the case.[18] The common law claims, the court ruled, were barred by California's three year statute of limitations. The painting being purchased by Taylor in 1963 the limitation period of the action brought by the heirs Mauthner expired three years later. The court ruled that the discoverability test as introduced in 1983 did not have any retro-active effect upon periods of limitation which had already expired before 1983. The case went to the Court of Appeals, which upheld the decision by the district court, albeit with on the basis of different reasoning. The court of appeals did apply a discoverability test, as to when the claim had accrued. Reasonable diligence on the heirs' part would have revealed the existence of their claim against Taylor after his highly publicized purchase of the painting in 1963, the public exhibition of the painting at the Metropolitan Museum of Art in New York from November 1986 until March 1987 and the fact that the 1970-edition of Van Gogh's *catalogue raisonné* mentioned Taylor as the owner of the painting. In fact the court recognized that Taylor could assert a "laches defense" under Californian law, that the heirs and their predecessors had made no effort to locate or claim title to the drawing or to pursue a claim prior to the enactment of the Holocaust Victims Redress Act in 1998. The court of appeals came to the same judgment as the district court in regard of the exception laid down in § 354.3 of the Californian Code of Civil Procedure, which

[17] B.L. Hay, Nazi-Looted Art and the Law: The American Cases, ch. 5;

[18] *Adler* v *Taylor*, 2005 WL 4658511 (C.D. Cal. 2005); discussed by A. Chchi, A.L. Bandle, M-A Renold, Case View of the Asylum and Chapel at St. Rémy – Mauthner Heirs v. Elizabeth Taylor, Platform ArThemis (http://unige.ch/art-adr) Art-Law Centre, University of Geneva (https://plone.unige.ch/art-adr/cases-affaires/case-view-of-the-asylum-and-chapel-at-st-remy-2013-mauthner-heirs-v-elizabeth-taylor/case-note-2013-view-of-the-asylum-and-chapel-at-st-remy).

provides for actions commenced before 2010 (the Mauthner heirs filed their suit in2004) that, notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover that artwork from any museum or gallery. This exception did not apply to this case, since Elizabeth Taylor did not qualify as a museum or gallery. Furthermore the district court ruled (and the court of appeals agreed) that the federal legislation, the Holocaust Victims Redress Act and other statutes of 1998 had no direct effect: Congress expressed its view that governments should facilitate restitution of Nazi-looted property, but it "did not create individual rights or, for that matter, any enforceable law" (if we may borrow the words used by the court of appeals for the Ninth Circuit in its affirmative judgement[19]). The court of appeals mentions that the Supreme Court of the United States of America in *Cort v. Ash.* 422 US 66. 95 S.Ct. 2080 45 L. Ed. 2d 26 (1975) had established a four-factor test for discerning whether a specific statute creates a private right of action. Under this test, judges must ask: "(1) whether the plaintiff is a member of a class that the statute especially intended to benefit; (2) whether the legislature explicitly or implicitly intended to create a private cause of action; (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action; and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate." According to the court of appeals the plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action. On the contrary, the legislative intent was to encourage state and foreign governments to enforce existing rights for the promotion of Holocaust victims. In short, the Act does not satisfy any of the *Cort* factors; none of the relevant indicia of intent supports the conclusion of the Mauthner heirs that Congress intended to create an implied private right of action in this case. Thereupon the Mauthner heirs filed a petition for writ of certiorari to the Supreme Court of the United States, but the Court denied certiorari, thereby finalising the decision of the court of appeals. Elisabeth Taylor kept her painting. This leads to the conclusion that private owners of looted art are relatively safe after the lapse of the limitation period, and for those works for which possession of the property by way of prescription has ripened into title by the doctrine of adverse possession because another decision would be an unconstitutional taking of property. The federal Holocaust Expropriated Art Recovery Act of 2016 (HEAR) does in principle bring little change, except for the length of the limitation period. The new HEAR Act purports to extend the statute of limitations for actions to recover art and certain other items stolen during the Holocaust. The new statute of limitations would be either the old statute or a six-years-from actual discovery statute, whichever is longer. As seen in the Taylor-case the discoverability test implies an important increase of the limitation period. Nevertheless in a forthcoming paper Herbert Lazerow gives his opinion, that the scope of the new HEAR Act is likely to be much less broad than imagined.

5.3 *Altmann* v. *Republic of Austria*

Adele and Ferdinand Bloch-Bauer lived comfortably in a large house in Vienna.[20] In 1907 they had commissioned Gustav Klimt to paint a portrait of Adele Bloch-Bauer, but that painting was not the only Klimt they had on the walls. At a certain stage there were seven of them, known as *Buchenwald* (1903), *Adele Bloch-Bauer I* (1907), qualified by the actual owner, Ronald Lauder as *everyone's Mona Lisa*,[21]

[19] *Orkin* v *Taylor*, 487 F.3d 734 (9th Cir.), at 738-740; cert. denied, 552 U.S. 990 (2007)

[20] H. Czernin, Die Fälschung, Vol. I, Der Fall Bloch-Bauer, Vol. II: Der Fall Bloch-Bauer und das Werk Gustav Klimts, Vienna 2003, C. Renold, A. Chechi, A.L. Bandle, M.A. Renold, Case Six Klimt Paintings – Maria Altmann und Austria, Platform ArThemis (http://unige.ch/art-adr) Art-Law Centre, University of Geneva, March 2013; B. Unfried, Vergangenes Unrecht: Entschädigung und Restitution in einer globalen Perspektive, Göttingen 2014, S. 419-433 (Kap. 11, Ein spezielles Terrain: Kunstrückgabe, § 11.4: Wie ein Fall gemacht wird: Bloch-Bauer als Exempel). R. Welser, C. Rabl, Der Fall Klimt/Bloch-Bauer. Die rechtliche Problematik der Klimt-Bilder im Belvedere, Wien 2005

[21] Alexandra Peers, The Remarkable Story of the 'Viennese Mona Lisa' and Its Recovery From Nazi Hands, The Obeserver July 4, 2015, http://observer.com/2015/04/the-remarkable-story-of-the-viennese-mona-lisa-and-its-recovery-from-nazi-hands/ retrieved 28-02-2018

Schloss Kammer am Attersee III (1910), *Adele Bloch-Bauer II* (1912), *Apfelbaum I* (1912), *Häuser im Unterach am Attersee* (1916) and *Amalie Zuckerkandl* (1917-1918). Mrs. Adele Bloch-Bauer died young (43) unexpectedly, likely of meningitis, in 1925. In her will she had asked her husband that two Klimt portraits of her and other art be left to Austria upon her husband's death.[22] In 1936 he donated one of those paintings, *Schloss Kammer am Attersee III*, to the Österreichischen Galerie. Although there is apparently a statement delivered by Ferdinand before the *Verlassenschaftsgericht* (court of succession) that he was willing to respect the will of his wife and to act in conformity with that will, there is no knowledge about any other arrangement between Ferdinand and the Gallery, let alone any other transfer. When Germany annexed Austria in March 1938, Ferdinand Bloch-Bauer fled to Switzerland. The government confiscated his property. The *Verwalter*, the administrator of the estate, Dr. Führer, swapped two paintings, *Adele Bloch-Bauer I* and *Apfelbaum I* for *Schloss Kammer am Attersee III,* which he sold to a son of Gustav Klimt, Gustav Ucicky. For almost 70 years the portrait hang in the Austrian Gallery in the Belvedere Palace in Vienna near The Kiss, another Klimt masterpiece. Ferdinand Bloch-Bauer died in Zürich in November 1945. His will does not mention any of the paintings, but shortly before his death Ferdinand Bloch-Bauer had mandated Dr. Rinesch, his solicitor in Vienna, to reclaim his art collection. Halfway 1946 the Austrian Government passed the Annulment Act,[23] which in § 1 nullifies any confiscation during the German occupation of Austria. Consequently January 1948 negotiations between Dr. Rinesch and the director of the Austrian Gallery, Dr. Garzarolli started. The latter felt he had a strong position: he was the *beatus possessor* and Dr. Rinesch was the requesting party. Under the Annulment Act the Jews who wanted to leave Austria were obliged to donate valuable artworks in exchange for export permits for other valuable items "deemed to be important to [the country's] cultural heritage". Furthermore D. Garzarolli took the presumed validity of the will made by Adele as a transfer of title. Notwithstanding the text of the will (which contained no more and no less than a request to her husband) he took for granted that ownership had passed from Adele to the State of Austria. He did not doubt that Adele could have given the paintings, although she did not owe them: they belonged to both husband and wife. The result of the negotiations was that in exchange for export licenses for the other objects of art Dr. Rinesch left *Häuser im Unterach am Attersee*, *Adele Bloch-Bauer I* and *II*, *Apfelbaum I* in the State's possession and that he donated *Buchenwald* and *Schloss Kammer am Attersee III.* It is the merit of the Austrian journalist Hubertus Czernin that he gained access to the archives at the Austrian Gallery, to examine the paper trail and discovered the true nature of these so-called donations, which he found to be concluded under duress, fraud and extortion. In his opinion the post-war coercion on emigrating families to make donations to the State that persecuted them was of such appalling moral standing that he expected a change of attitude from the Austrian authorities and their willingness to reach a redress. He wrote a series of articles about stolen works of art under the title *Das veruntreute Erbe*, published in Vienna's Der Standard newspaper in 1998, when Czernin first wrote about the case of Bloch-Bauer and her paintings and proved that several Austrian museums knew that they possessed looted art. In response to these revelations Austria passed a Restitution Act,[24] and it constituted a Restitution Committee. This new development enabled the heirs Bloch-Bauer to request restitution of the Klimt paintings. As such came forward Maria V. Altmann, born in Austria in 1916; after the annexation by Nazi Germany in 1938 she fled the country and settled in California in 1942. She became an American citizen in 1945. She was a niece, and the sole surviving named heir, of Ferdinand Bloch-Bauer. The Restitution Committee, composed of Austrian government officials and art historians,

[22] "Bei klaren Bewusstsein und unbeeiflusst ferfüge ich für den Fall meines Todes wie folgt: … Meine 2 Portrtäts und die 4 Landschaften von Gustav Klimt, bitte ich meinen Ehegatten nach seinem Tode der österr. Staats-Gallerie om Wien, die mir gehörende Wiener und Jungfer. Brezaner Bibliothek, der Wiener Volks u. Arbeiter Bibliothek zu hinterlassen … (quoted after Klimt/Welser, p. 11).

[23] Bundesgesetz vom 15. Mai 1946 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind, BGBl Nr. 106/1946.

[24] *Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen*, BGBl I Nr 181/1998.

however, agreed to return certain Klimt drawings and porcelain settings that the family had donated in 1948, but the committee declined to return the six paintings, concluding, based on the reading of Adele's will, that her precatory request to her husband had created a binding legal obligation that required her husband to donate the paintings to the Gallery on his death. Altmann then announced that she would file a lawsuit in Austria to recover the paintings. Because Austrian court costs are proportional to the value of the recovery sought (and in this case would total several million dollars, an amount far beyond Altmann's means), she dismissed her suit and filed an action in the United States District Court for the Central District of California under the Foreign Sovereign Immunities Act (1976 FSIA), claiming the restitution of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II, Apfelbaum I*, *Buchenwald*, *Häuser in Unterach am Attersee* and *Amalie Zuckerkandl*. Austria raised the defense of sovereign jurisdictional immunity (*forum non conveniens*), but the district court, the court of appeal and the Supreme court dismissed Austria's motion for dismissal, thus acknowledging the retroactive effect of the FSIA and applying the statute to preenactment conduct of foreign states.[25] All courts found that FSIA grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases, including "cases … in which rights in property taken in violation of international law are in issue," such as Altmann´s claim. The case was referred for trial in the Los Angeles district court. There both parties agreed in May 2005 to arbitration in Austria in order to establish, "whether, and in what matter, in the period between 1923 and 1949, or thereafter, Austria acquired ownership of the Arbitrated paintings *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II, Appletree I*, *Beech Forest (Birch Forrest)* and *Houses in Unterach am Attersee"* (*Amalie Zuckerkandl* was subject of a similar arbitration procedure) "and whether, pursuant to section 1 of Austria's Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections dated 4th September 1998 (including the subparts thereof) the requirements are met for restitution of any of the Arbitrated Paintings without remuneration to the heirs of Ferdinand Bloch-Bauer." In a very thorough and well-motivated judgement of not less than 48 pages dated January 15, 2006 arbiters ruled that the Republic of Austria in 1948 had acquired ownership of these paintings, not as a consequence of the will of Adele (the *presumptio Muciana* made it highly probable that her husband owned them), but on the basis of the agreement with Dr. Gustav Rinesch, acting as the representative of the heirs of Ferdinand Bloch-Bauer. More important, however, is their ruling that the requirements for restitution as mentioned in the Restitution Act were fulfilled.[26] This relates to all five paintings subject to this arbitration: arbiters ruled that Austria was obliged to return the paintings *Birkenwald*, *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apfelbaum I* and *Häuser in Unterach am Attersee* to Maria Altmann, but not *Amalie Zuckerkandl*. Only two months later the Austrian government returned Altmann's family's heirlooms to her. She consigned the Klimts to Christie's, to be sold on her behalf.

6. Conclusion

In the first case the claim for restitution or replevin was dismissed: according to Italian law Cesati, the bona fide possessor of the triptych acquired full title of the art work by the delivery of this work by someone he could reasonably think he was the owner. In the second case the claim was dismissed as well: according to Californian law the defense of laches raised by Liz Taylor, the defendant, attained its goal. Her adverse possession had ripened into title. However, in both cases the decision could only be reached after long and costly litigation including the major expense of a full discovery of the facts, in the case of Cesati the full provenance of the work since the auction, in the case of the Van Gogh the full history after the acquisition at the London auction at which Taylor acquired the painting. In the third case the claim for restitution was successful. In the conflict of interests between the original

[25] *Maria V. Altmann v. Republic of Austria, et al.*, 142 F. Supp. 2d 1187 (CD Cal. 2001); *Maria V. Altmann v. Republic of Austria, et al.*, 317 F. 3d 954 (9th Circuit, 2002), as amended, 327 F. 3d 1246 (2003). *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S.677 (U.S. 2004).↩

[26] http://www.bslaw.com/altmann/Klimt/award.pdf retrieved March, 1 2018.

owner of a work of art (Renaissance Art Investors, Mauthner, Bloch-Bauer) and the purchaser (Cesati, Taylor or the Republic of Austria) we find regulations concerning statutes of limitation, adverse possession and prescription and the general trend is that Common law jurisdictions, New York law in the first place, are more likely to favor the original owner, whereas Civil law jurisdictions seem to be more inclined to consider commercial interests as the deciding factor. This difference is the true basis of a number of international treaties concerning the fate of looted art, such as the Washington Conference Principles on Nazi-Confiscated Art, December 1998, the Vilnius Forum Declaration, October 2000 and the Terezin Declaration, June 2009. In both legal families, however, the cost of litigation is considerable. Hartmann could not afford the court costs in Austria and filed suit in California. Up to the Supreme Court the judges denied Austria´s motion for dismissal, lifted Austria's immunity and decided that Altmann could rely upon the expropriation exception of the Foreign Sovereign Immunities Act. The trial on the substance of the case had thereupon still to begin. Confronted with the prospect of a long and expensive litigation, the parties accepted to resort to binding arbitration in Austria. Compared to the other cases this is an interesting development. The cost of litigation constrains the parties to consider the possibilities of mediation, negotiation, alternative dispute regulation of arbitration. Arbitration has some serious advantages over litigation, as we have seen from the case of *Austria* v. *Altmann.* In that case the parties had agreed that the arbitration tribunal was to apply Austrian substantive and procedural law. In short, the decision of the arbitration tribunal should be based solely on the facts presented to it by the parties, which by this arrangement avoided the long and costly factual investigations and deliveries of proof by hearing witnesses. The parties furthermore had agreed that all costs were to be covered by the Republic of Austria. This is an important aspect of arbitration: parties are free to delineate the subject-matter; they can arrange about the selection of the judges and their specific qualifications; they are free to exclude the possibility of appeal and - last but not least - the Convention of New York of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards enables even trans-border execution of judgments by arbiters in over 155 States.[27]

[27] R. Keim, Filling the Gap Between Morality and Jurisprudence. The use of binding arbitration to resolve claims of restitution regarding Nazi-stolen art, [2003] Pepperdine Dispute Resolution Law Journal 3/2, p. 295-315.