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DETERMINING COMPETENT JURISDICTION IN CROSS-BORDER ART DISPUTES[1]

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Kryvolapov B. Determining competent jurisdiction in cross-border art disputes.
Throughout history, armed conflicts have often been accompanied by the unlawful export and looting of cultural property. The ongoing war in Ukraine is, regrettably, no exception. According to data from the Ministry of Culture and Strategic Communications of Ukraine and UNESCO, numerous cultural objects have been relocated to the territory of the aggressor state. As a result, the risks associated with the illicit circulation of cultural assets have significantly increased, highlighting the urgent need for effective legal mechanisms for their restitution. This article examines international and national rules governing jurisdiction in cases involving the return of cultural property, identifies existing legal conflicts, and evaluates optimal forums for adjudication. Special attention is given to EU judicial practice, particularly an analysis of the Brussels I bis Regulation, along with relevant laws in Switzerland, France, the United States, and other jurisdictions. The article concludes that the application of the *forum rei sitae* rule establishes a strong link between the cultural object and the court handling the dispute, which in turn facilitates more efficient legal proceedings, including the appointment of necessary expert assessments. The impact of classifying cultural objects as movable or immovable on jurisdictional outcomes is also explored. Using the example of the frescoes from the Casenoves Chapel, the article demonstrates how transnational movement can alter legal classification and jurisdiction. Furthermore, the article assesses the potential of alternative dispute resolution (ADR), particularly arbitration, in such cases. Examples from judicial and arbitration practice, including the landmark *Altmann v. Austria* case, illustrate that arbitration may offer a more expedient, specialized, and confidential means of resolving cultural property disputes. The article advocates for the further development of ADR in the field of cultural heritage protection and proposes amending Ukrainian legislation to clarify jurisdiction over disputes involving cultural assets.
Key words: jurisdiction, cultural objects, art disputes, arbitration proceedings.

Криволапов Б. Визначення підсудності у транскордонних спорах щодо об'єктів мистецтв.
Збройні конфлікти протягом усієї історії людства супроводжувалися незаконним вивезенням та розграбуванням культурних цінностей. Сучасна війна в Україні, на жаль, не стала винятком: за інформацією Міністерства культури та стратегічних комунікацій України і ЮНЕСКО, зафіксовано численні випадки переміщення культурних об'єктів на територію держави-агресора. У зв'язку з цим зростає загроза незаконного обігу культурних цінностей, що вимагає створення ефективних правових механізмів для їх повернення. Метою статті є аналіз міжнародного та національного законодавства щодо визначення підсудності у справах про реституцію культурних об'єктів, виявлення правових суперечностей та визначення оптимальних юрисдикцій, які можуть забезпечити найефективніший захист прав. Окрему увагу приділено судовій практиці Європейського Союзу, зокрема Регламенту Брюссель I bis, а також правовим нормам Швейцарії, Франції, США та інших держав. Зроблено висновок, що застосування правила підсудності

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forum rei sita створює необхідний зв'язок між об'єктом і юрисдикцією суду, що сприяє оперативному й ефективному розгляду справ, включаючи призначення відповідних експертиз. Розглядається вплив класифікації культурних цінностей як рухомих або нерухомих на визначення належної підсудності. На прикладі справи щодо фресок з каплиці Казеновес продемонстровано, як фізичне переміщення культурного об'єкта впливає на його правову природу. Окремий розділ присвячено аналізу альтернативних способів вирішення спорів, зокрема арбітражу. Наводяться приклади з міжнародної судової та арбітражної практики, зокрема відома справа Altmann v. Austria. Аргументується, що арбітраж здатен забезпечити більш швидкий, компетентний і конфіденційний розгляд справ про повернення культурних цінностей. Зроблено висновок про доцільність подальшого розвитку альтернативного вирішення спорів у сфері охорони культурної спадщини. Пропонується внесення змін до законодавства України щодо визначення підсудності у справах, предметом яких є культурні цінності.

Ключові слова: підсудність, культурні цінності, спори щодо об'єктів мистецтва, арбітражне провадження.

Problem Statement. Armed conflicts have historically been accompanied by the looting of cultural property – from antiquity to the present day. Unfortunately, the war in Ukraine is no exception. According to Ukraine's Ministry of Culture and Strategic Communications and UNESCO, numerous instances of the illegal export of cultural property to the territory of the aggressor state have been documented. It is likely that some of these items will end up in museums in the Russian Federation. However, a significant number of cultural assets looted from Ukrainian museums and private collections may also find their way into the hands of private individuals abroad. As a result, legal claims for the return of unlawfully exported cultural property from Ukraine are inevitable. One of the key legal issues in such cases will be determining the competent court with jurisdiction over these matters.

Analysis of basic research and publications. The theoretical and methodological foundations of this article are grounded in the works of leading scholars, including Evelien Campfens [2], Theodore Cheng [4], Maria Beatrice Deli [6], Lorna Gillies [7], Gerte Reichelt [15], Marc-André Renold [16], Ibrahim Takavut [18], Matthias Weller [20], and others.

The purpose of this article is to analyze the existing jurisdictional rules in disputes involving cultural property and to identify the most appropriate forum for adjudicating such cases. Additionally, one of the objectives of this study is to assess the advantages and disadvantages of arbitration in the context of cultural property disputes.

Presentation of the basic material of the article. The first question faced by individuals filing a claim for the recovery of illegally exported cultural property is: which country's court has jurisdiction? There are various perspectives on this matter.

As a general rule, jurisdiction lies with the court of the defendant's place of residence (*actor sequitur forum rei*). This is the most widely recognized principle of international jurisdiction, under which the claimant initiates proceedings before the court in the defendant's domicile. This principle is codified in EU law and reflected in several international conventions. However, case law demonstrates that this rule is not always appropriate. A notable example is the *Heylshof* case, which involved the Dorotheum auction house in Vienna. A Swiss consignor offered a painting for sale at Dorotheum that had been stolen from the Heylshof Museum collection in Worms, Germany. Both the Swiss consignor and the German foundation claimed ownership and submitted restitution requests to Dorotheum. In response, Dorotheum deposited the painting with the local court in Vienna, allowing the parties to resolve the dispute independently of the auction house. Under Austrian law, one of the alleged owners had to initiate proceedings against the other in order to release the object from court custody. However, under the then-applicable Brussels I Regulation, the Viennese courts lacked jurisdiction over the matter. Consequently, the parties had to initiate proceedings in the defendant's country of residence, even though the painting was physically held by the Austrian court [20, pp. 38-39].

Such cases likely contributed to the amendments introduced in the Brussels I Regulation, culminating in the adoption of its current version – Brussels I bis. This version introduced a specific jurisdictional rule for disputes over cultural property held unlawfully by another person. Article 7(4) of the Regulation allows a person domiciled in one Member State to be sued in another Member State in civil proceedings concerning the return of a cultural object. A claimant may bring an action in the courts where the object is located at the time of proceedings (*forum rei sitae*) [10].

Dr. Lorna Gillies, who has conducted an in-depth analysis of Article 7(4), describes this development as a "welcome" step toward the mutual protection of unlawfully removed cultural property within the EU [7]. She emphasizes that this jurisdictional basis helps claimants who may not know the defendant's identity or domicile. In conjunction with Article 35 of the Regulation – which permits interim measures –Article 7(4) can:

- ensure that the cultural object remains within a specific jurisdiction during the proceedings;
- prevent its transfer to a third party in another jurisdiction;

facilitate the investigation into the object's provenance and help determine how the defendant acquired it [7].

Several states have also adopted national legislation with special jurisdictional provisions for cultural property disputes. For instance, Article 98a of the Swiss Federal Act on Private International Law allows claims for the repatriation of cultural property to be brought either at the defendant's residence or at the location of the object [8]. Similarly, Article L112-14 of the French Cultural Heritage Code authorizes the French state to file a return claim in the court of the country where the cultural object is currently located [4].

It is worth noting that beyond the above-mentioned advantages, the *forum rei sitae* rule also promotes a closer connection between the cultural object and the adjudicating court. This proximity often leads to faster and more efficient proceedings, including the timely appointment of necessary experts and evaluations.

In common law jurisdictions, the approach to determining jurisdiction is relatively flexible. For example, U.S. courts apply not only the traditional rule of jurisdiction based on the defendant's domicile but also allow for jurisdiction in a state where the defendant has minimum contacts or where the object is located (*forum rei sitae*). In certain cases, courts have accepted jurisdiction based on the plaintiff's residence. Moreover, Professor Marc-André Renold observes that courts in the U.S., U.K., Australia, and Canada, even when having jurisdiction under private international law, may decline to exercise it under the doctrine of *forum non conveniens.* According to this doctrine, a court may refer the case to a more appropriate forum if that forum has a stronger connection with the subject matter or the parties. While this approach provides considerable flexibility, it also increases the likelihood of jurisdictional conflicts and forum shopping [16].

The rules on the jurisdiction of claims for the restitution of cultural property are also codified in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Property. Article 8(1) states that such claims may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, as well as before authorities designated by that State [19].

When considering various jurisdictional options in disputes involving cultural property, it is important to recognize that the classification of such objects as movable or immovable significantly influences jurisdiction. In this context, Austrian scholar Professor Gertraut Reichelt cites a notable decision by the Montpellier court, which addressed the issue of jurisdiction. The case involved two co-owners seeking the return of frescoes that had been removed from the walls of the Casenoves Chapel. The buyer had dismantled the frescoes and sold them to the City of Geneva and the Abegg Foundation in Switzerland. Given that jurisdiction was a central issue, the court first examined the legal nature of the disputed property. It concluded that jurisdiction should be determined by the location of the immovable property to which the frescoes originally belonged, despite their subsequent removal [15, p. 97]. Professor Reichelt notes that if the frescoes had been classified as movable property, the dispute would likely have fallen under the jurisdiction of a Swiss court, in accordance with the actor sequitur forum rei rule [15, p. 99].

It is also worth noting that the legal classification of cultural property is initially determined according to the laws of the country where the property is located. The relocation of such objects to another country may result in a change in their legal status based on the laws of the destination country [15, p.99]. Therefore, it can be asserted with confidence that the classification of property as movable or immovable directly affects jurisdiction in disputes involving cultural property. Any cross-border movement of such objects may alter jurisdiction after the applicable legal classification has been established.

Ukrainian legislation currently lacks specific provisions regarding the jurisdiction of disputes involving cultural property. In the absence of an agreement between the parties on the choice of jurisdiction under Part One of Article 76 of the Law of Ukraine "On Private International Law," the jurisdiction of such cases will presumably be determined in accordance with Part Two of the same

article [14]. Given the ongoing recodification of Ukrainian private law, it would be appropriate to amend Section XII of the Law of Ukraine «On Private International Law» by including a provision granting jurisdiction to Ukrainian courts over cultural property disputes, provided the objects are located within Ukraine's territory. The adoption of such a legal provision would enhance legal certainty and strengthen Ukraine's standing as a state capable of offering effective judicial protection in matters of cultural heritage.

An analysis of extensive case law concerning disputes over art objects leads to the conclusion that such proceedings are often excessively protracted. For instance, the *Plough* case—involving the forgery and sale of paintings—lasted an entire century (from 1918 to 2018) and was marked by significant conflicts arising from the limited expertise of both judges and experts in this field [1]. Moreover, confidentiality was repeatedly breached during court proceedings in such cases, which is entirely unacceptable in the context of the art market [1]. These issues have contributed to the growing recognition, in recent decades, of the need to develop alternative dispute resolution (ADR) mechanisms for resolving disputes involving cultural property.

The idea of using ADR in cases involving cultural objects is not new. The UNIDROIT Convention explicitly provides for this possibility in Article 8(2), which states that the parties may agree to submit the dispute to any court, other competent authority, or arbitration [19]. Furthermore, Article 5(6) of Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, amending Regulation (EU) No. 1024/2012, provides that the competent authorities of the requested Member State may, in accordance with national legislation, facilitate the implementation of an arbitration procedure, provided that both the requesting Member State and the possessor or holder give their formal approval [11]. However, for various reasons, ADR mechanisms have not been widely used in such cases.

A notable example is the case of *Maria Altmann v. Republic of Austria*. Maria Altmann, a U.S. citizen and the niece of Adele Bloch-Bauer, sought the return of six paintings by Gustav Klimt—including the renowned *Portrait of Adele Bloch-Bauer I* ("Golden Adele")—which had been confiscated by the Nazis in 1938. After the war, the paintings came into the possession of the Austrian Belvedere Gallery, which claimed to have acquired them legally based on a will. Altmann, however, argued that the will had been executed under duress and, in 2000, filed suit in the U.S. District Court for the Central District of California, despite the fact that the artworks were located in Austria and the events in question occurred prior to 1945.

A key legal issue in the case was whether a U.S. citizen could sue a foreign state (in this instance, Austria) in a U.S. court, and whether the Foreign Sovereign Immunities Act (FSIA) applied retroactively to acts committed before its enactment. This issue was extensively litigated and ultimately reached the U.S. Supreme Court, which held that the FSIA did apply retroactively and that Austria was not immune from suit in U.S. courts [17]. Following the Supreme Court's decision and the remand of the case to the District Court in Los Angeles, the parties continued to contest procedural matters until May 2005, when they agreed to submit the case to binding arbitration in Austria. In 2006, the arbitration panel ruled in favor of Altmann, and all six paintings were returned to her [9]. This case illustrates how arbitration can, in certain circumstances, provide a faster and more effective resolution than prolonged litigation.

One of the foremost scholars in this field, Evelien Campfens, has analyzed numerous cases—including *Cassirer v. Thyssen-Bornemisza Collection Foundation*, *Malewicz v. City of Amsterdam*, and *Simon v. Republic of Hungary*—and unequivocally concludes that parties must make a serious and good-faith effort to resolve disputes through ADR before resorting to litigation in the United States [2, p. 197].

According to some experts, the main advantage of arbitration in such cases is that the parties can select an arbitrator with specific knowledge and relevant experience in the field [4, p. 31]. Moreover, arbitration ensures the level of confidentiality often required in these disputes. It also allows for the use of preliminary injunctions and other forms of interim relief, which can be critical in resolving the case [4, p. 32]. Many scholars also highlight additional advantages of arbitration, including its flexibility, speed compared to court litigation in many jurisdictions, and cost-effectiveness. In cases involving the restitution of cultural property to the country of origin, arbitration is often perceived as more neutral than national courts [6]. Finally, one of the most significant benefits of arbitration is the international enforceability of arbitral awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Until recently, certain national and international institutions have been involved in resolving disputes concerning cultural property. In 1994, the WIPO Center for Alternative Dispute Resolution for Art and Cultural Heritage was established [21]. However, according to several researchers, this Center has not been widely utilized in practice [1]. Additionally, the Permanent Court of Arbitration in The Hague has been actively engaged in matters concerning the protection of cultural heritage during armed conflicts. A notable example includes the proceedings between Eritrea and Ethiopia, initiated by the Eritrea-Ethiopia Claims Commission. The Commission addressed mutual claims, including those involving the destruction of cultural and religious sites, violations of humanitarian law, and infringements of property rights during the conflict [13]. The Permanent Court of Arbitration provided institutional support to the Commission, including organizing hearings and assisting in drafting decisions.

In 2018, a significant development occurred in the field of alternative dispute resolution for cultural property: the establishment of the Court of Arbitration for Art (CAfA). This institution serves as a specialized arbitration and mediation body designed to provide an effective, confidential, and professional alternative to traditional litigation in matters concerning art and cultural heritage.

CAfA maintains a roster of arbitrators and mediators with specialized expertise in both art and law, contributing to well-reasoned and competent decisions [5]. To address issues concerning authenticity and provenance, CAfA tribunals may appoint independent experts [5]. This practice enhances the objectivity of proceedings and helps to minimize conflicts of interest. One of the key advantages of CAfA procedures is the high degree of confidentiality, which is especially important to art market participants seeking to avoid public scrutiny. On average, arbitration proceedings before CAfA last approximately nine months, with expedited procedures available for cases requiring prompt resolution.

The emergence of this specialized arbitration authority has been welcomed by both scholars and legal practitioners. Some academics believe that the establishment of such a court will boost the popularity of arbitration in disputes concerning works of art [18, p.698]. According to other experts, CAfA offers several significant advantages, particularly in light of the unique characteristics of art and cultural heritage disputes [12]. Furthermore, it is argued that CAfA's narrow specialization fosters increased trust among participants in the art market [12].

It can therefore be concluded that the establishment of this arbitration tribunal marks a positive development and opens new prospects for the effective and professional resolution of art-related disputes.

Conclusions.

- Many scholars now agree that the most appropriate basis for determining jurisdiction in art-related disputes is the location of the object at the time of proceedings (*forum rei sitae*). According to the author, this approach is the most effective for resolving disputes involving works of art.
- The legal classification of a cultural object as either movable or immovable property is a key factor in determining jurisdiction over related disputes. Its transfer to another country may result in reclassification under the host state's legal system, potentially altering the competent jurisdiction.
- Arbitration of art disputes has proven to be more effective by several criteria compared to litigation in courts of general jurisdiction. The establishment of the Court of Arbitration for Art (CAfA) represents an important step toward the development of effective and professional methods for resolving art-related disputes.
- Given the ongoing recodification of private law in Ukraine, it would be reasonable to incorporate the *forum rei sitae* principle into national legislation concerning cultural property disputes. It is advisable to amend Section XII of the Law of Ukraine «On Private International Law» to include a provision granting Ukrainian courts jurisdiction over such cases, provided that the cultural objects are located within Ukrainian territory. This would enhance legal certainty and strengthen Ukraine's role in ensuring the effective protection of its cultural heritage.

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