

ENFORCEABILITY OF VESTING LAWS: PROCEEDINGS BEFORE THE BELGIAN COURTS

Lucie Lambrecht* and Marie-Sophie de Clippele†

The enforceability of 'vesting laws' – legislation which seeks to vest ownership of antiquities in the nation from which they originated – has once again become the subject of a court decision, this time in Belgium. Readers will be familiar with the decisions of the US courts in *Hollinshead*,¹ *McClain*² and *Schultz*³ and the English Court of Appeal in *Barakat*.⁴ These decisions, all from common law jurisdictions, recognise the enforceability of such laws where the antiquities are being traded overseas. Arguments that such items do not fit the US definition of 'stolen property' have been rejected, as have arguments that the recognition of such legislation would amount to enforcing a penal or public law, which is not justiciable in foreign court.

In the recent proceedings before the Belgian courts the Islamic Republic of Iran sought the return of 349 objects which had been brought into Belgium in 1964 by a French-Belgian collector in the case of a Belgian diplomat. The collector had, at that time, been married to an Iranian physician named Maleki, and had acquired the objects while based in Teheran, partly through local excavations and partly from local dealers.

The factual scenario in this case was extremely complicated. Suffice to say here, the Brussels Court of Appeal found against Iran on the basis that its title to the objects had expired. This decision was quashed by the Court of Cassation and referred for decision back to the Liège Court of Appeal which held that the objects should, notwithstanding the passage of 50 years, be returned to Iran. The Court found that Mrs Maleki had failed to prove that she had acquired the objects lawfully, and that Iran had, under the terms of its legislation, established ownership of the objects. This reasoning was in direct contrast to that of the Brussels Court of Appeal which had held that the Iranian law on which the claim was based was basically of a penal nature and sought to enforce Iranian confiscation measures, rather than directly conferring ownership rights on the Iranian State. The Liège Court's decision, while in stark opposition to the findings of the Brussels Court, fits the trend of common law cases such as *Schultz* and *Barakat* which have upheld such vesting statutes.

THE FACTUAL BACKGROUND

On Christmas Eve 2014, 349 archaeological objects originating from the Khurvin site in Iran left the reserves of the Belgian Royal Museum of Art and History, also known as the *Cinquantenaire Museum*,⁵ for Teheran, after the Iranian State had been claiming them for more than 30 years.

The 349 objects in question (348 ceramics and one bronze piece) had been brought into Belgium in 1964 by a French-Belgian collector in the case of a Belgian diplomat. Then married to an Iranian physician named Maleki, she had acquired the objects while based in Teheran, partly through local excavations and partly from local dealers.

1 495 F.2d 1154 (9th Cir. 1974).

2 545 F.2d 988 (5th Cir. 1977); 593 F.2d 658 (5th Cir. 1979).

3 178 F. Supp. 2d 445 (S.D.N.Y. 2002), aff'd, 333 F.3d 393 (2d Cir. 2003).

4 [2007] E.W.C.A. Civ. 1374; [2008] 1 All E.R. 1177.

5 <<http://www.kmkg-mrah.be/cinquantenaire-museum>>.

* Founder and managing partner, Lambrecht Law Office, Brussels.

† PhD candidate, aspirant F.R.S.-FNRS, Université Saint-Louis – Bruxelles, Université Paris-Saclay.

THE JUDICIAL BACKGROUND

The judicial story behind this restitution case is interesting, not to say puzzling.

It all started in 1981 when the Iranian Islamic Republic, in a first attempt, sought the return of the archaeological objects before the Brussels Court of first instance on the basis of their illegal exportation, without, however, asserting title to the objects. At that point in time the objects had ended up, after passing through the hands of several middlemen, at the University of Ghent under the control of Professor VDB, who had assisted Mrs Maleki in the excavations on the Khurvin site. At the instigation of Mrs Maleki the objects were placed under custodianship in the Cinquantenaire museum, pending the legal proceedings.

The Brussels civil court dismissed the claim of the Iranian Republic but also denied Mrs Maleki the right to claim the objects back from Professor VDB.⁶

Refusing to give in, both the Iranian Republic and Mrs Maleki challenged the decision before the Brussels Court of Appeal. In the course of the lengthy proceedings Mrs Maleki died and her daughter, Mrs Dutreix, continued them in her place.

In 2011, the Court of Appeal again dismissed Iran's claim – which was now primarily based on the Iranian Republic's original title to the objects – declaring the title claim expired⁷ while restoring Mrs Dutreix's rights.⁸ However, the Iranian Republic sought judicial review of the ruling before the Court of Cassation, mainly invoking the issue of whether ownership is a perpetual right (in which case the title claim could not expire).

In June 2013, the Court of Cassation rejected the finding of the Brussels Court of Appeal that the title claim of the Iranian Republic had expired after 30 years on the basis of article 2262 of the Civil Code and annulled the Court of Appeal's judgment to that extent.⁹

In accordance with Cassation procedure the case was then referred to the Court of Appeal of Liège, which resolved this issue on a definitive basis.¹⁰

The Court of Appeal of Liège decided to allow the objects to return to Iran and held that Mrs Dutreix should pay all costs of keeping the archaeological objects for so many years in the Cinquantenaire Museum.

THE JUDICIAL DIFFERENCES

As the decision in this last judgment is in direct opposition to the earlier decisions cited above, it should be reviewed critically. Without going into detail here,¹¹ it is particularly rewarding to highlight the difference in reasoning between the Brussels and the Liège Courts of Appeal.

Application of Private International Law

First, as regards the analysis of private international law, the Liège Court of Appeal starts by admitting the paradox between, on the one hand, the requirement that the Belgian judge should take into consideration the interpretation of foreign (*in casu* Iranian) laws while, on the other hand, stating that no interpretation, whether in case law or in legal doctrine for the Iranian rules in the present case exists.

6 Trib. Bruxelles, 26 Dec. 1988, unpublished.

7 On the basis of Art. 2262 of the Belgian Civil code, which reads: "*Toutes les actions réelles sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre, ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi.*" (free translation: "*All rights in rem expire after 30 years, with no obligation for the party invoking prescription to prove his title or to invoke any bad faith exception.*")

8 Brussel, 20 June 2011, unpublished, p. 8.

9 Cass., 4 Oct. 2012, published on the official website of Belgian case law: <<http://jure.juridat.just.fgov.be>>.

10 Liège, 14 Oct. 2014, unpublished.

11 This case merits an in-depth legal analysis as the various court decisions, particularly those of the two appeal courts, tackle a number of crucial concepts and doctrines relating to the application of foreign laws imposing export restrictions as well as dealing with title to archaeological objects.

The Liège Court then proceeds to analyse briefly the legal rules at issue, mainly article 26 of the Iranian Civil Code (dealing with state property designed for public use) and an Iranian Law of 1930 relating to the conservation of antiquities.¹²

In other words the Liège Court, not knowing how to apply the foreign legal rules, decided – rather quickly jumping to conclusions – to conduct its own analysis of the legal rules as applied to archaeological finds.

This short reading of the legal rules, as opposed to the Brussels Court of Appeal which devoted a more complete analysis to them, leads the Liège Court to a peculiar application of the Iranian laws.

On the one hand, the Brussels Court stated that the 1930 Law deals with ownership rights and recognises private ownership, including that of the finder. The Liège Court, on the other hand, found that this Law does not deal with the *a priori* ownership question at all (i.e. the question who is legally to be considered as the original owner of an archaeological find), even though the latter court eventually concluded, but then on the basis of its reading of article 26 of the Iranian Civil code, that every archaeological find is *a priori* State ownership.

For another, while the Brussels Court observed that the antiquities in dispute had never been affected to the Iranian service nor been used as such and hence article 26 of the Civil Code could not apply, the Court of Liège actually held this provision to found the Iranian Republic's title and ordered their return on that very basis!

Establishing Title to the Objects

Second, concerning the title question, the Court of Appeal of Liège found that Mrs Maleki could not prove she had acquired the objects in a lawful manner, nor did she have sound possession and she could therefore not be recognised any ownership rights. The Court held that, all archaeological finds being *a priori* State property according to Iranian law, the current owner is and remains the Iranian State and on this ground it ordered the return of the archaeological objects.

In that aspect the Court of Appeal of Liège followed the Court of Cassation and rejected the argument that the title claim of the Iranian had expired after 30 years.

This explains why the Liège Court's reasoning strikingly differs from that of the Brussels Court of Appeal. The latter had assumed that it was for the Iranian Government to prove that it had a rightful claim to recover the objects which a Belgian court could endorse. In that respect, the Brussels Court considered that the Iranian law on which the claim was based was basically of a penal nature and sought to enforce Iranian confiscation measures – which the Court correctly ruled it could not apply outside Iranian territory. Nevertheless, the Court conceded that the 1930 Law also contains clear ownership rules and therefore the Iranian State was not *prima facie* precluded from claiming the return of the objects as a civil measure to sanction illegal exportation. Remember that the Court had already concluded that Iran had no title to claim ownership of the archaeological objects, and that even if it had, its claim had expired (that second part was annulled by the Court of Cassation).

The Brussels Court eventually refused to accept that the exportation by Mrs Maleki was illegal or at least not in a sufficient degree to justify the return in flagrant denial of her ownership right.

The Question of Sound Possession

Third, the analysis of the possession of Mrs Dutreix itself also differs between the two Courts of Appeal. For the Court of Appeal of Liège Mrs Dutreix's possession in Belgium was not sound in view of the fact that neither she nor her mother, Mrs Maleki, almost ever had the physical control of the objects. But the Court overlooked the fact that Mrs Maleki had filed a complaint in 1975 against the Belgian diplomat for fraudulent conversion because the objects were temporarily

12 Law of 12 Aban-Mah 1309 (3 Nov. 1930) and its implementing decree of 28 Aban-Mah 1311 (19 Nov. 1932).

stored in his cellar before being handed over to another middleman and finally to Professor VDB. This may suggest that Mrs Maleki was seeking to repossess the objects and certainly wanted them back for herself, which is not the same as merely holding (*détention*) the objects for another.

By contrast, the Brussels Court of Appeal had considered that the acquisition by Mrs Maleki from both sources (through archaeological excavations she had organised as well as from local dealers) was not unlawful according to Iranian law and that the Iranian officials had knowledge of these transactions (by reference to several official letters produced by Mrs Maleki); there was also a book that had been published about the excavations, all of which invalidated any argument that she would have been in bad faith.

The Court of Appeal of Liège did not scrutinise all these elements as it considered that the Iranian State had in any case *a priori* ownership of the finds of those excavations and – by implication – that Mrs Maleki could not assert a better title.

Yet the Court of Appeal of Liège admitted that Iran had not been diligent during the proceedings and did not pay enough attention to the administration and the surveillance of the archaeological objects, even though some of the finds were published.

CONCLUSIONS AS TO GOOD FAITH POSSESSION

If there is one conclusion one can draw from this court case, which really had a strange twist in the end, it seems like it suffices for a claimant, typically a source country, to convince the court that it had *a priori* or original title to an archaeological object according to its local law, no matter how long ago and in which manner the object left its jurisdiction, and that it is for the defendant party, the current 'owner', to prove a better title, but it is also clear from the Liège decision that the burden of proof for the latter is being made very tough and that mere good faith possession will no longer suffice.

Thus it looks as if in Belgium too, the Napoleonic adage '*possession vaut titre*' (*bona fide* possession confers title) – that for many years afforded legal comfort to unsuspecting collectors of (stolen or looted) property – is to give way to a tendency for Belgian courts to favour the original owner, at least in the absence of a valid export licence.

As a final note, in the case under review none of the international or European treaties dealing with illegal exportation or trade in cultural heritage (UNESCO 1970, UNIDROIT 1995, EU Directive 2014/60 (recasting the Directive of 15th March 1993) applied as the relevant facts had occurred outside the timeframe (in the 1950s and early 1960s). That meant that the courts were required to confine the scope of their judgment to the traditional Civil code rules. That is why the outcome of the case may leave us, lawyers, who are accustomed to working in this traditional environment, perplexed. Unless, of course, evidence was overwhelming of the importer deliberately acting to violate the prevailing export regulations. In which case, end of story.