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FACULTÉ DE DROIT
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Alessandro Chechi, Raphael Contel, Marc-André Renold

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Case Victorious Youth – Italy v. J. Paul Getty Museum

*Ongoing dispute/litige en cours – Italy/Italie – J. Paul Getty Museum –
Archaeological object/objet archéologique – Pre 1970 restitution
claims/demandes de restitution pre 1970 – Diplomatic channel/voie diplomatique
– Judicial claim/action en justice – Judicial decision/décision judiciaire –
Negotiation/négociation – Ownership/propriété – Procedural issues/limites
procédurales – Choice of law/droit applicable – Due diligence – Illicit
importation/importation illicite – Illicit exportation/exportation illicite –
Enforcement of foreign law/applicabilité du droit public étranger*

*The “Victorious Youth” – a life-size bronze statue created sometime between the
4th and 2nd century BC – is at the centre of an ongoing dispute between Italy and
the J. Paul Getty Museum. This statue was discovered in 1964, caught up in the
nets of a fishing boat working out of the port of Fano on the Adriatic coast of
Italy. It changed hands a number of times until 1977, when it was acquired by the
Getty Museum. The major contentious issue of this dispute is whether the statue
lawfully belongs to the Museum’s collection.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted
Solution; V. Comment; VI. Sources.*

ART-LAW CENTER – UNIVERSITY OF GENEVA

PLATFORM ARTHEMIS

art-adr@unige.ch – <https://unige.ch/art-adr>

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I. Chronology

Pre 1970 restitution claims – Ongoing dispute

- **1964-1965:** A **life-size bronze statue** of a victorious athlete was **fortuitously recovered** by **Italian fishermen** working out of the port of Fano on the northern Adriatic coast of Italy. Upon their return to Fano, the fishermen sold the “**Victorious Youth**” (as the bronze came to be called) to art dealer Giacomo Barbetti. For a time, Barbetti and his two brothers concealed the statue at the home of Father Giovanni Nagni. In May 1965, it was transferred to Gubbio, where it was seen by a number of potential buyers. Eventually Barbetti **sold** the bronze to an unidentified buyer from Milan. After the sale, the statue changed hands a number of times and was later seen in a Brazilian monastery and in London.
- **1966-1970:** The fishermen, Mr. Barbetti and his accomplices were **charged with handling stolen property** in violation of Article 67 of Law No. 1089 of 1 June 1939. The prosecution reached the **Court of Appeals of Rome**, which **overturned the convictions** with a judgment of **8 November 1970** on the grounds that: (i) the prosecutors did not establish that the statue was found in Italian waters, and (ii) there was insufficient evidence demonstrating that the statue was of “artistic and archaeological interest”.
- **1972:** The **Victorious Youth resurfaced in Munich**, in the shop of Herzer Heinz, an antique dealer, where it was seen by Thomas Hoving, the former Director of the New York Metropolitan Museum of Art. Hoving asserted that the statue was being restored.
- **1974:** Herzer Heinz **sold** the bronze to **Artemis**, a Luxembourg-based corporation.
- **1977:** **INTERPOL** (which cooperated with the Italian **Carabinieri** on this case since 1970) informed Italian authorities that the Victorious Youth had been **sold by Artemis** to the **Getty Trust** for US\$3.95 million.
- **1978:** The Victorious Youth was **displayed** for the first time at the **J. Paul Getty Museum**.
- **1989:** The **Italian Minister of Cultural Heritage** invited the Getty Museum to **return** the Victorious Youth to Italy, but it was to no avail.¹
- **2007:** The **Italian Ministry** and the **J. Paul Getty Trust** reached an **agreement** which provided for the restitution of **40 objects** to Italy and the establishment of a **programme of cultural collaboration** between Italy and the Getty Museum.² The deal was signed after both sides agreed to set aside the question of the return of the Victorious Youth pending a legal process before the **Tribunal of Pesaro** concerning the **illicit exportation** of the statue. These proceedings were **dismissed** upon request of the public prosecutor on the grounds that the **statute of limitations had expired**.
- **2009:** The **prosecutor demanded the forfeiture** (confiscation) of the statue because it had been exported in contravention of Italian laws.³

¹ Tribunal of Pesaro, Order of 10 February 2010, No. 2042/07 RGNR, pp. 1, 4-5, 6-8. It appears that Artemis was created *ad hoc* in order to craft a false provenance and sell the statue.

² See J. Paul Getty Trust, Press Release, “Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement”.

³ Tribunal of Pesaro, Order of 12 June 2009, No. 2042/07 RGNR, pp. 2-3. The confiscation of objects illicitly exported is provided by Article 174 of the Code of Cultural Heritage and Landscape.

- **2010:** With an order of **10 February 2010**, the Pre-Trial Judge (Giudice per le Indagini Preliminari) at the Tribunal of Pesaro, ruled that the Victorious Youth was exported in violation of Italian legislation and, accordingly, issued an **order for its immediate forfeiture and restitution**.⁴ The **Getty appealed** the order to the **Court of Cassation**.⁵
- **18 January 2011:** The **Court of Cassation** decided that the case should be remitted to the Tribunale of Pesaro for a new examination on the merits due to the erroneous qualification of the action launched against the 2010 order.⁶
- **March 2011:** Gian Mario Spacca, President of Marche, the region where Fano is located, met representatives of the Getty Museum in Los Angeles and proposed to adopt an **agreement** whereby the parties would share the Victorious Youth. Museum representatives said that it was not possible to discuss an agreement since legal issues were ongoing in Italian courts.⁷
- **3 May 2012:** The Pre-Trial Judge at the Tribunal of Pesaro **upheld** the 2010 **forfeiture** order.⁸ The **Getty** brought an **appeal** to the **Court of Cassation** against this order asserting that the application of the criminal law rules on confiscation (Articles 666, 667(4) and 676 of the Code of Criminal Procedure) was erroneous in that the procedure violated its right to a public hearing.
- **2014-2015:** With the Order No. 24356 of 10 June 2014, the **Court of Cassation** requested the Constitutional Court to **review the constitutionality** of Articles 666, 667(4) and 676 of the Code of Criminal Procedure insofar as they prevented the Getty from obtaining a public hearing before the execution judge. With decision No. 109 of 15 June 2015, the **Constitutional Court** declared that the impugned articles were **unconstitutional** and **remanded** the case to the Tribunal of Pesaro, requesting to allow the public hearing for the proceedings against the implementation of the order of confiscation.
- **2018:** The Tribunal of Pesaro rejected the appeal of the Getty Museum and confirmed the **forfeiture** with an order of **8 June 2018**. The **Getty** brought an **appeal** to the **Court of Cassation**. Italy's top court rejected the appeal and confirmed that the statue must be forfeited to Italy with a decision of **30 November 2018**.⁹

II. Dispute Resolution Process

Diplomatic channel – Judicial claim – Judicial decision – Negotiation

- In spite of the agreement concluded in 2007, the positions of the parties seemed irreconcilable as to the Victorious Youth's ownership status, especially in the aftermath of the 2018 decision of Court of Cassation.

⁴ Tribunal of Pesaro, Order of 10 February 2010, p. 31.

⁵ J. Paul Getty Trust, Press Release, "Statement about the Ruling in Pesaro on the Getty Bronze, February 11, 2010".

⁶ Court of Cassation, 18 January 2011, No. 6558.

⁷ Allen, "Italy Offers to Share Disputed Statue with Getty Museum".

⁸ Felch, "Italian Court Upholds Claim on Getty Bronze".

⁹ Court of Cassation, Judgment No. 22 of 2 January 2019.

- The Italian Ministry of Cultural Heritage demands the restitution of the Victorious Youth on the grounds that the bronze is part of the Italian patrimony, that it was removed from Italian territory in violation of the applicable legislation, and that the curators of the Getty Museum were wilfully negligent in the acquisition of the statue.
- The Getty Museum insists that the 1977 acquisition was legitimate and recalled that in 2007 the Tribunal of Pesaro dismissed a criminal case regarding the bronze for the expiry of the statute of limitations and established that the Getty “was to be considered a good-faith owner”.¹⁰ Additionally, the Museum argues that Italian legislation is not the applicable law in this case as there is no real link between the Victorious Youth and Italy’s patrimony for the following reasons: (i) the statue was made in ancient Greece; (ii) it was netted in international waters; and (iii) only briefly passed through Italy before being spirited abroad.¹¹ For these reasons the Museum called the Tribunal’s order of 2010 “flawed both procedurally and substantively” in a statement.¹²
- Unless the museum voluntarily relinquishes the statue, the case may be taken up with the judicial authorities in the US. On the one hand, as suggested by William Pearlstein, a partner at the New York art law firm Pearlstein McCullough & Lederman, the Getty could file a suit in the United States, asserting its right to the statue and challenging the Italian authorities to assert their superior title claim to the satisfaction of a US court.¹³ On the other hand, the Italian government could demand US courts to enforce within US territory its cultural patrimony legislation under the National Stolen Property Act (NSPA),¹⁴ or could submit a letter rogatory to the US asking the government to confiscate the statue.¹⁵ Therefore, it remains to be seen whether the orders of forfeiture will be executed by US authorities.
- However, the fact that the Getty declined to discuss the deal proposed in March 2011 by the President of Marche suggests that the Museum is not disposed to negotiate an extra-judicial solution of the dispute for the time being.¹⁶ This unwillingness also emerged from the statement released in response to the 2018 decision of the Italian Court of Cassation, whereby Lisa Lapin, the J. Paul Getty Trust’s vice president of communications, said that the Getty would “continue to defend our legal right to the statue” and that that “the law and facts in this case do not warrant restitution to the Italian government” because there is “no

¹⁰ Tribunal of Pesaro, Order of 12 June 2009, p. 3.

¹¹ See also Duron, “We Will Continue to Defend Our Legal Right to the Statue”.

¹² J. Paul Getty Trust, Press Release, “Statement about the Ruling in Pesaro on the Getty Bronze, February 11, 2010”.

¹³ Pianigiani, “Italian Court Rules Getty Museum Must Return a Prized Bronze”.

¹⁴ The NSPA provides that “[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods [...] [or] merchandise [...] of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud, [...]” (18 U.S.C. § 2314); and that “[w]hoever receives, possesses [...] sells, or disposes of any goods [...] [or] merchandise of the value of \$5,000 or more [...] which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted or taken [...] [s]hall be fined under this title or imprisoned not more than ten years, or both” (18 U.S.C. § 2315). Therefore, under the NSPA the Italian government must demonstrate that the statue is considered stolen under US law, that it was discovered within the Italian territories, and that Italy’s law unequivocally vests ownership of such object to the State.

¹⁵ Albertson, “Italy’s Court of Cassation Rejects the J. Paul Getty Museum’s Appeal”.

¹⁶ J. Paul Getty Trust, Press Release, “Statement from Ron Hartwig, Vice President of Communications for the Getty”.

evidence of Italian ownership”.¹⁷ The most obvious reason for this is that the Getty believes that the Italian case is not strong in light of Italian and US law and jurisprudence.

- However, it cannot be excluded that the Italian Government will bring the Getty to the negotiating table given its power to threaten to bar access to its art as a source of loans. This is a strategy that has been used several times in the recent past. For instance, in 2006 the then Italian Minister of Culture, Francesco Rutelli, threatened a cultural embargo on the Getty if the Victorious Youth was not returned by July 2007. This pressure led to the agreement of 2007. Although this may not be decisive to confirm the hypothesis that Italy’s ownership title to the Victorious Youth was not extinguished as a result of the sales occurred after the find, it may lead the Museum to enter into negotiations.

III. Legal Issues

Choice of law – Due diligence – Enforcement of foreign law – Illicit exportation – Illicit importation – Ownership – Procedural issue

- This case entails three major interconnected legal issues: (1) whether Italian law is the applicable law; (2) whether the order of confiscation is lawful; and (3) whether the Getty Museum exercised the required due diligence in acquiring the Victorious Youth.
- (1) As far as the applicable law is concerned, the relevant Italian legislation established that all antiquities found in Italy were the property of the State.¹⁸ It was therefore illegal to export any archaeological artefact from the country.¹⁹
- The Pre-Trial Judge of the Tribunal of Pesaro conceded that the statue was very likely found in an area beyond territorial waters.²⁰ Nonetheless, the Judge confirmed that the applicable law is the Italian law because, first, the fishermen who found the statue failed to report the

¹⁷ Duron, “We Will Continue to Defend Our Legal Right to the Statue”.

¹⁸ An issue related to the determination of the applicable law is that of the recognition and enforcement of foreign cultural heritage laws. National statutes tend to take two forms. First, there are the patrimony laws that provide that ownership of certain categories of cultural objects is vested *ipso iure* in the State. Second, there are norms prohibiting or restricting the export of cultural materials. This distinction is critical because only patrimony laws enjoy extraterritorial effect. On the contrary, in the absence of inter-State agreements, export regulations are not enforced by foreign States.

¹⁹ The relevant provisions were set forth in the Italian Civil Code and in Legislative Decree No. 42 of 2004, which promulgated the Code of Cultural Heritage and Landscape (and which replaced Law No. 1089 of 1939). On the one hand, according to the Civil Code, antiquities and works of art qualify as State property. More precisely, they can be either considered part of the “public demesne” (“demanio pubblico” – Article 822) or of the “inalienable assets of the State” (“patrimonio indisponibile dello Stato” – Article 826). Whilst the objects belonging to the “demanio pubblico” are subject to a blanket prohibition on sale, those belonging to the “patrimonio indisponibile dello Stato” can be transferred with a specific authorization. On the other hand, Article 91 of the Code of Cultural Heritage and Landscape confirms that the cultural objects found underground or on the sea bed belong to the State pursuant to Articles 822 and 826 of the Civil Code. The general principle of State property of cultural objects has also been confirmed by Italian courts: see Court of Cassation, Judgment No. 2995 of 11 February 2006, and Court of Cassation, Judgment No. 42458 of 22 October 2015.

²⁰ Tribunal of Pesaro, Order of 12 June 2009, pp. 6-7.

- find and to obtain authorization for its importation and, second, the conduct constituting the crime of illicit export had taken place on Italian territory.²¹
- In order to justify the latter assertion, the Pre-Trial Judge referred to a previous decision issued by the Tribunal of Sciacca.²² The Judge held that, in accordance with international law, a ship flying the Italian flag is to be considered as a prolongation of the Italian territory. The Judge then ruled that the nets of a fishing vessel flying the Italian flag are a prolongation of the Italian territory. Consequently, the Judge asserted that the Victorious Youth became the property of the State in 1964, when it was caught in the nets of an Italian fishing boat.²³
 - In response to one of the *grounds* for the *appeal* (*the motivation of the confiscation order was not sound as the Judge failed to demonstrate that the Victorious Youth belonged to the Italian patrimony given its brief and clandestine stay in Italy*), the *Court of Cassation reiterated the argument provided by the Judge of the Tribunal of Pesaro indicating that the statue's link with the national patrimony is neither tenuous nor artificial*. In particular, the *Court of Cassation emphasised the links and "cultural continuity" between the Romans and Greeks, as these civilisations influenced each other in the period when the statue was created* (between the 4th and 2nd century BC). *In addition, the Court affirmed that Lisippo di Sicione, the alleged sculptor of the Victorious Youth, like other Greek artists and philosophers, lived in Magna Graecia* (the coastal areas of Southern Italy in the present-day regions of Campania, Apulia, Basilicata, Calabria and Sicily). It then suggested that it could not be excluded that the statue was made in Italy (and not in ancient Greece) nor that it was lost at sea during a journey from Italy (and not from Greece).²⁴
 - The Pre-Trial Judge dealt with the question whether Italian law vesting ownership rights in the State as well as the norms banning the export of valuable archaeological objects were capable of affecting the validity of the sale of the Victorious Youth. The Judge relied on Article 51 of Law No. 218 of 1995 on the Reform of the system of private international law (the Italian conflict-of-law rule in matters of property and possession): the *lex rei sitae*. According to this rule, a domestic court must apply the substantive law of the place where the property was located at the time of the last transaction. The Judge affirmed that the relevant place for the determination of the applicable legal regime was the Italian territory, i.e. the place where the object was located at the moment of its illicit exportation. As a result, Italian law was the applicable law.²⁵
 - The Court of Cassation held that the law of California could not apply to this case as the *lex rei sitae* as argued by the Getty because (i) the case is not about the legitimacy of the acquisition of the statue (it is about the validity of its confiscation) and (ii) Article 16 of Law

²¹ See also Court of Cassation, Judgment No. 22 of 2 January 2019, p. 32.

²² Tribunal of Sciacca, 9 January 1963, *Foro Italiano*, 1963, I, p. 1317. This case concerned another masterpiece that fortuitously became entangled in fishing nets in south of Sicily beyond Italian territorial waters. For a comment see Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo".

²³ Tribunal of Pesaro, Order of 12 June 2009, pp. 9-10.

²⁴ Court of Cassation, Judgment No. 22 of 2 January 2019, pp. 39-41.

²⁵ It has been held that this finding is flawed. The Judge did not consider that the connecting factor for movable property is very "unstable". This means that if a transaction is concluded abroad following exportation then the foreign substantive law in force should apply. Lanciotti, 311-316.

- No. 218 of 1995 excludes the application of foreign laws where these lead to results incompatible with the national public order. In the case at hand, the law of California cannot be applied given that it would preclude the forfeiture of an object exported in violation of the Italian law and acquired by a museum that cannot be regarded as extraneous to the crime.²⁶ In other words, the Pre-Trial Judge excluded the application of any law other than Italian law because the illicit exportation of the Victorious Youth was committed in Italy.²⁷
- (2) As far as the issue of the legality of the order of forfeiture is concerned, the Getty raised three objections. First, the forfeiture is unlawful because it stems from a criminal action (concerning the illegal exportation of the statue) which was dismissed in 2007 on the grounds that the statute of limitations had run out and that there was no one to prosecute. Second, the forfeiture order is illogical because it regards an object which already belongs to the State's patrimony and which is located abroad. Third, the order is flawed because it concerns an object that had been acquired by a person which was not involved in its illicit exportation. The Pre-Trial Judge dismissed these objections as follows.
 - As for the first argument, the Judge provided precedents demonstrating that the confiscation is compulsory and does not necessarily depend on the conviction of those who have been accused of a crime. The reason is that the act of confiscation requested by the Judge under Article 174 of the Code of Cultural Heritage should not be seen as a penalty but as the only available means to recover a cultural object that has been illicitly exported.²⁸
 - With regard to the second objection, the Judge reasoned that the adoption of a formal act of forfeiture, to be transmitted to foreign authorities for recognition, was necessary precisely because the bronze was located abroad. In the view of the Judge, this was the only manner through which the Italian State could exercise the right of ownership.²⁹
 - With respect to the third objection, the Judge affirmed that, if not fully aware of its illicit provenance, the Getty had been grossly negligent in buying the statue. As such, it was not extraneous to the illicit exportation.³⁰
 - (3) The latter issue brings us to the question whether the Getty Museum exercised the required due diligence in acquiring the Victorious Youth. The Judge held that Getty officials decided to buy the statue even if they were aware that it came from Italy (a country famous for having strict rules on the exportation of cultural objects) and that it had been at the centre of a criminal proceeding. In spite of this, Getty officials did not contact the Italian authorities to verify the legality of the exportation, but only relied on the legal advice of the seller's lawyers, who had an obvious interest in concluding the sale.³¹

²⁶ Court of Cassation, Judgment No. 22 of 2 January 2019, pp. 38-39.

²⁷ Lanciotti, 317.

²⁸ Tribunal of Pesaro, Order of 10 February 2010, p. 21 ff. See also Court of Cassation, Judgment No. 22 of 2 January 2019, p. 20-22, 31-33, 34.

²⁹ Tribunal of Pesaro, Order of 12 June 2009, pp. 9-10.

³⁰ Article 174 of the Code of Cultural Heritage and Landscape provides for the confiscation of objects illicitly exported, except when these belong to a person extraneous to the crime.

³¹ *Ibid.*, 7, 25. See also Court of Cassation, Judgment No. 22 of 2 January 2019, pp. 28-31. It is noticeable that Mr. J. Paul Getty died in 1976, but left instructions to acquire the Victorious Youth on the condition that permission would be obtained by Italian authorities. As no permission was issued, it becomes evident that the trustees of the Museum did not comply with such instructions when they bought the bronze. Lanciotti, 302-303.

IV. Adopted Solution

- The dispute is still ongoing.

V. Comment

- It is widely held that the Victorious Youth, which is attributed to the greatest Greek sculptor Lisippo *di Sicione*, is one of the finest original Greek bronzes to have survived from the classical era. It is for this reason that, since its acquisition, it has become the signature piece of the J. Paul Getty Museum as the “Getty Bronze”. Therefore, it should not come as a surprise that this unique piece is at the heart of this complex legal dispute.
- There are various reasons why the Italian claim may not succeed. First, there is no evidence that the discovery was made in Italian waters. Italian prosecutors failed to establish this in 1968 and it seems impossible to prove it nearly 40 years later. Even the Pre-Trial Judge of the Tribunal of Pesaro has conceded that the statue was very likely found in international waters.³² Second, the precedent on which Italy relies (the theory that the nets of a fishing vessel are the prolongation of the territory of the flag’s State) to affirm that the statue belongs to the Italian State and that Italian law applies cannot be fully subscribed as it entails a dangerous side-effect. If an artwork is enmeshed in the nets of a vessel whose flag’s State apply the law of finds, the theory under consideration may hamper the right of the country of origin of such artefact to make a claim. The law of finds becomes applicable when the owner of cultural materials is not known and allows the person who discovers and reduces them to actual possession to become the owner.³³ In sum, this precedent, combined with the law of finds, allows commercial treasure hunters to search and exploit underwater heritage for purely commercial reasons.³⁴
- It can be argued that Italy is justified in pursuing this claim on the ethical plane. In other words, the Italian claim is defensible if seen as part of the international effort to thwart the illicit trade in antiquities and to force museums to turn over works which have been acquired dishonestly or with negligence. Based on the available evidence, it seems that Getty officials were not in good faith at the moment of the acquisition of the Victorious Youth.

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