

What if the State changes its mind?

Dialogue between Sharon Hecker, art historian and Giuseppe Calabi, lawyer

Prologue

Imagine you are a German collector and you have spotted at an online auction in Paris a work by a well-known seventeenth century French artist already in your collection. The description of the work in the catalogue is precise: the author, the date, the state of conservation, a list of exhibitions where the work has been exhibited and an indication of its provenance: “private Italian collection.” It is also indicated that the work is accompanied by an export license issued by the Italian authority. The minimum and maximum estimates are within your budget and, consequently, you decide to participate in the auction. During the auction, a pop-up appears on the screen (what in “physical” auctions is called a “sale room notice”) informing you that a few minutes before the start of the auction the Italian State has raised some questions about the legality of the export of the work and has cancelled the license. You do not worry too much: you are very interested in the work and if it has an export licence, excluding the hypothesis that it is a forged document, there should be no problem. So, after a lively series of bids (you are not the only one interested in that work), you are awarded the painting. Before paying, you ask the auction house for more details about the letter you received shortly before the start of the bidding process and you learn with astonishment that the Italian State has cancelled in “*autotutela*” its license issued 15 months earlier, because (a) the owner/seller at the time of the license request did not inform the Export Office that the work had belonged over a century ago to the collection of his great-grandfather (in the maternal line and, therefore, with a different surname), member of a - at that time - well-known aristocratic Neapolitan family; (b) despite the fact that this information was publicly known, as it resulted from the catalogues of the exhibitions where the work had been exhibited in Italy and abroad, the owner should have, according to the principle of “loyal cooperation” with the Italian authority, provided this information directly to the public administration at the time of the license application; (c) the omission of this information resulted in a license flaw in terms of excess of power. Therefore, for the State the license is retroactively annulled and denied, the work must return to Italy where it will be subject to protection. How should the seller, the auction house and the buyer behave in this case?

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The first question to be asked is whether or not there is a principle of “loyal collaboration” between the citizen and the public administration, the violation of which entails the possible annulment of the export license. Leaving aside the cases in which the private individual has provided the Exportation Office with false information, or has presented the request through a front man so as not to reveal his true identity (in these cases one can easily imagine the hypothesis of a crime (ideological falsity: art. 483 c.p.), to what extent must the citizen collaborate with the State by supplying any information in his possession or that he may come into possession of regarding the provenance of his work?

The concept of “provenance” in the legal field does not coincide with that of provenance in the historical-artistic field, for which I refer you to the art historian. The Code of Cultural Assets uses the term “provenance” three times: (i) art. 65 states that the State can prohibit, for defined periods of time, the removal of homogeneous groups of goods (even if not notified) if the removal could be harmful to the cultural heritage, in relation to their objective

characteristics, provenance or belonging (a rule never used by the Ministry); (ii) in case of sale through a professional (dealer/gallery), the latter has the obligation to provide the buyer with any information regarding the “provenance” (art. (iii) at the moment of entry of an item of artistic interest into Italy, if the buyer intends to have his/her foreign provenance certified by the State (art. 72). The Code speaks of provenance without defining it but distinguishes it from the ownership of the item. The provenance could be identified as “previous ownership,” i.e. the subject I bought it from, but in no way can the concept be extended to that of chain of title going back to the artist, with an indication of all those who owned the work. In fact, not only can all transfers of ownership often not be known, but there is not even a public register that can certify them, neither in Italy nor abroad.

Moreover, there is a problem of confidentiality of personal data that the law strictly protects. Our legal system provides that at the time of submission of the request for a certificate of free movement, the interested party must indicate “the nature and description” of the thing to be exported: this provision dates back to the Royal Decree of 30 January 1913 n.363 and is still in force. In the norms that regulate exportation, there is no mention of provenance or changes of ownership, and only a very extensive interpretation of the norm can include in the “description” of the item its provenance, or previous changes of ownership. But what about the dating, eventual restorations, the representation of a well-known person in a painting? To what extent must the private individual provide or even seek out this information in order to be able to obtain an export title that is safe from measures of annulment in “self-protection” of the license? In reality, it is the export control bodies that should conduct a proper investigation of the works submitted to them before granting the license. It should be noted that, on the basis of article 21-nonies of Law 241/1990, annulment in self-defense can be ordered up to 18 months from the date of adoption of the licensing measure. And if, in the meantime, the work has been sold (perhaps more than once) and the last owner is unaware of the annulment measure, can the latter be opposed? And finally, we can also agree that the relationship between private and public administration must be set up according to a principle of loyal collaboration, but can the cancellation of a license a few minutes before the auction be considered as conforming to the same principle, when the State (like everyone else) had the possibility of knowing the lots offered at auction months before, through the online publication of the catalogues? In the delicate balance between public and private interest, it would be necessary to find a balanced answer to all these questions before making accusations of unfairness.

SH

The possibility of the public administration issuing an export license and then changing its mind after issuing it seems capricious and arbitrary. For a collector, the question becomes how to minimize this risk and behave in a more self-protective manner. It is wise for collectors to conduct independent due diligence on the provenance of the artwork they intend to purchase.

In this context, it is important to understand the art historical definition of “provenance”: it means the origin of the artwork all the way back to the artist and the chain of ownership all the way up to the present. It does not mean the last owner of the work, nor does it mean the exhibition history of the work, although an old exhibition catalogue or official record may lead to the name of a past owner. Nor does provenance mean the bibliography or literature on the work, although information about provenance can be found in serious and well-

documented publications. Provenance can sometimes be gathered through personal diaries where ownership of a work may be noted in gallery or auction records, newspaper clippings, photographs, wills, and lists of studio contents compiled after an artist's death. It can also be found in an artist's correspondence or through sales receipts. Researching provenance is a complex task and is best left to professional art historians who specialize in the period or artist in question and know where to look for information. It is not always possible to construct a complete provenance. Information may be missing, hidden, misplaced, destroyed, or even invented, and new information keeps appearing as the research develops and previously unknown or unlikely sources come to light.

I have a few self-protection tips for collectors that may be helpful. First, when collectors see the words "private collection" in a sale, they should make every effort to find out the name of the collection. For art historians this is often not impossible to unravel, although privacy laws can complicate the search. Increasingly, there are records of historical art dealers searchable online, such as, for example, the Getty's database containing the records of Goupil & Cie / Boussod, Valadon & Co. and there are scholars who specialize in the history of the art market of various eras.

Second, when an owner's name is provided in a sale, collectors should try, with the help of art historians, to understand who the person was and what his or her life history was. Many buying mistakes that can cause significant financial damage could have been avoided by identifying potentially problematic works in advance. Examples where this research was not done adequately include works of art sold that later turned out to be the property of important collectors and therefore of interest to cultural heritage protection, stolen works, or works looted by the Nazis, such as Pissarro's *La cueillette des pois*.

All of this leads me to a final suggestion. Would it be useful to establish an official "cooling off period" like the escrow period used in California before a property transfers to new ownership? This neutral space allows all parties to ensure that the terms of the transaction are met and that no problems arise. It seems that the Italian government's 18-month limit on changing one's mind is already a step in the right direction.

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