LEGAL ISSUES

good faith holders, innocent purchasers and compensation

Marina SCHNEIDER
UNIDROIT

THE ART MARKET

LEGAL

...... but also ETHICAL

@MarinaSchneider
INCREASE IN MARKET DEMAND
also means a potential increase in the sales of suspiciously acquired artifacts

- States of origin
- Transit States
- States of destination

Looting and vandalism of archaeological sites

Intentional damage → LOOTING and ILLICIT TRAFFICKING

Natural damage → LOOTING and ILLICIT TRAFFICKING
THE ART MARKET

THE BLACK MARKET

DAMAGE AND DESTRUCTION

INTENTIONAL

THEFT AND LOOTING

NATURAL

MONEY LAUNDERING

ILLICIT TRAFFIC

TERRORISM-FINANCING

November 2014

The Analytical Support and Sanctions Monitoring Team publishes the report S/2014/815 on 14 November 2014, on the threat posed by the Islamic State in Iraq and the Levant and the Al-Nusrah Front for the People of the Levant.

UN Security Council adopted Resolution 2199 that condemns the destruction of cultural heritage and asks Member States to adopt measures to counter illicit trafficking of antiquities and cultural objects from Iraq and Syria and allow for their safe return to the Iraqi and Syrian people.

February 12, 2015

CHARTER OF THE UNITED NATIONS

CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

LEGALLY BINDING FOR ALL UN MEMBER STATES

December 17, 2015

United Nations Security Council adopted Resolution 2253, which builds on Resolution 2199 by highlighting the importance of developing strong relationships with the private sector in countering the financing of terrorism, the laundering proceeds of crime, and strengthening due diligence processes.

S/2014/815

TERRORISM-FINANCING

MONEY LAUNDERING

ILLICIT TRAFFIC

THEFT AND LOOTING

INTENTIONAL

DAMAGE AND DESTRUCTION

THE BLACK MARKET

THE ART MARKET
March 24, 2017, United Nations Security Council adopted Resolution 2347

Resolution 2347

Condemns the unlawful destruction of cultural heritage, including the destruction of religious sites and artefacts, and the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, notably by terrorist groups

7. Encourages all Member States that have not yet done so to consider ratifying the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and its Protocols, as well as other relevant international conventions;

11. Urges Member States to develop, including, upon request, with the assistance of UNODC, in cooperation with UNESCO and INTERPOL as appropriate, broad law enforcement and judicial cooperation in preventing and countering all forms and aspects of trafficking in cultural property and related offences that benefit or may benefit organized criminal groups, terrorists or terrorist groups

20. Calls upon UNESCO, UNODC, INTERPOL, WCO and other relevant international organizations, as appropriate and within their existing mandates, to assist Member States in their efforts to prevent and counter destruction and looting of and trafficking in cultural property in all forms;

PROTECTION OF CULTURAL PROPERTY
A shared vision and a joint responsibility

UNESCO

UNIDROIT

INTERPOL

WCO

ASEAN

UNODC
civil society

European Union

ICOM and other NGOs

National legislations

Regional instruments

International conventions

Bilateral agreements

Code of ethics...
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**Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations and the Government of the People’s Republic of China on Cultural Cooperation 2005**

5. The Participants will endeavor to identify and address common concerns regarding ASEAN-China cultural cooperation relative to multilateral and international conventions.

**Agreement between the Government of the Kingdom of Thailand and the Government of the Kingdom of Cambodia to Combat against the Illicit Trafficking and Cross-Border Smuggling of Movable Cultural Property and To Restitute It to the Country of Origin 2000**
ECOWAS 2019/2023 action plan for the return of African cultural property to their countries of origin.
REQUESTS to relevant partners (inter-governmental and non-governmental organisations concerned with culture, the academe and research institutions, professional networks, etc.) to support and monitor the realisation of these declarations and agreements

Directive 2014/60/EU of 15 May 2014
Regulation on export of cultural goods
Regulation on import of cultural goods, 2019
“Protecting, promoting and transmitting heritage”

= Strategic Objective 7 of the UNESCO Medium-Term Strategy (2014 – 2021)
(Doc. 37 C/4)

“This will include providing assistance in the context of the heritage Conventions, enhanced through the recently created monitoring mechanisms under the 1970 Convention, which have demonstrated UNESCO’s enduring relevance in working to protect and prevent the pillage and illicit trafficking of cultural property that violates the expression of a community’s cultural identity.” (§ 69)
Need to have a transparent market and ethical players.

Seller

[ Intermediary ]

Buyer

...... DEALERS
Key role that trade has traditionally played in the dissemination of culture and in the distribution to museums and private collectors of foreign cultural property for the education and inspiration of all peoples.

Principles of professional practice intended to distinguish cultural property being illicitly traded from that in licit trade and they will seek to eliminate the former from their professional activities.

**ARTICLE 1**
Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported.

**ARTICLE 2**
A trader who is acting as agent for the seller is not deemed to guarantee title to the property, provided that he makes known to the buyer the full name and address of the seller. A trader who is himself the seller is deemed to guarantee to the buyer the title to the goods.

**ARTICLE 3**
A trader who has reasonable cause to believe that an object has been the product of a clandestine excavation, or has been acquired illegally or dishonestly from an official excavation site or monument will not assist in any further transaction with that object, except with the agreement of the country where the site or monument exists. A trader who is in possession of the object, where that country seeks its return within a reasonable period of time, will take all legally permissible steps to co-operate in the return of that object to the country of origin.

**ARTICLE 4**
A trader who has reasonable cause to believe that an item of cultural property has been illegally exported will not assist in any further transaction with that item, except with the agreement of the country of export. A trader who is in possession of the item, where the country of export seeks its return within a reasonable period of time, will take all legally permissible steps to co-operate in the return of that object to the country of export.
ARTICLE 5
Traders in cultural property will not exhibit, describe, attribute, appraise or retain any item of cultural property with the intention of promoting or failing to prevent its illicit transfer or export. Traders will not refer the seller or other person offering the item to those who may perform such services.

ARTICLE 6
Traders in cultural property will not dismember or sell separately parts of one complete item of cultural property.

ARTICLE 7
Traders in cultural property undertake to the best of their ability to keep together items of cultural heritage that were originally meant to be kept together.

ARTICLE 8
Violations of this Code of Ethics will be rigorously investigated by (a body to be nominated by participating dealers). A person aggrieved by the failure of a trader to adhere to the principles of this Code of Ethics may lay a complaint before that body, which shall investigate that complaint. Results of the complaint and the principles applied will be made public.
CHALLENGES

PRIVATE SALES

Chinese archaic bronze vessel believed to be around 3000 years old taken off a public auction block - one of the star lots - to sell it directly to a group of businessmen from the mainland (Art Newspaper, published online 27 August 2014)

(ONLINE) AUCTIONS

MUSEUMS

Principle

Museums must conform fully to international, regional, national and local legislation and treaty obligations. In addition the governing body should comply with any legally binding laws or conditions relating to any aspect of the museum, its collections and operations.
How can I be sure that the object I want to buy has not been stolen or illegally exported?

In case of problems, how can I prove that I had honest intentions when buying it?

How can I be confident that I am an ethical buyer?

**innocent or good faith purchaser**

one who purchases property for consideration in good faith and without knowledge of facts that would lead to the suspicion that the seller does not have good title.

Private collectors participating at the Club should follow the ICOM code of ethics and rules relating to collecting, and read and follow United Nations (UN) on stolen or illicitly exported cultural objects.
innocent or good faith purchaser

one who purchases property for consideration in good faith and without knowledge of facts that would lead to the suspicion that the seller does not have good title

….. what happens if you buy an object of which the seller has no good title ????

You are exposed to a claim for restitution and may not be entitled to compensation !!!
The Case for Repatriating China’s Cultural Objects

Restitution / return = sensitive and complex issues which involve conflicting yet legitimate interests
TWO SCENARIOS

A CULTURAL OBJECT IS STOLEN

OFFENCE

FROM A PRIVATE OWNER/WORSHIP PLACE/STATE

RESTITUTION CLAIM

WHO CAN CLAIM

PROBLEM

EX. The object was acquired by a person in good faith

Ex. The object has been licitly imported in another State

A CULTURAL OBJECT IS ILLEGALLY EXPORTED

FROM STATE X

ACTION

RETURN CLAIM

CURRENT SITUATION:

ABSENCE OF HARMONISATION OF NATIONAL LEGISLATIONS
LACK OF HARMONISATION

OBSTACLES TO RESTITUTION

ACQUISITION IN GOOD FAITH

« POSSESSION VAUT TITRE »
I GROUP – ITALY

II GROUP – FRANCE

« NEMO DAT QUOD NON HABET »
III GROUP – UK, USA

Winkworth v. Christie Manson and Woods Ltd

Which law will apply to the request of restitution???
- "the law of the State where the object is located"

... BUT IN WHICH MOMENT IN TIME ?

- at the time of the claim
- at the time of acquisition
- at the time of theft
**Winkworth v. Christie Manson and Woods Ltd**

**Jurisdiction:** English Court  
**Lex rei sitae** at the time of the transfer  
**Applicable law:** Italian law  
**Art. 1153 Italian Civil Code** « POSSESSO VALE TITOLO »

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**Uniform law ....**

What characterize UNIDROIT conventions is the method of elaboration followed: in particular the importance of the participation of experts in the drafting, the minimization of the diplomatic interests, the debate being placed rather on the level of the influences of the common law rights or civil rights - these controversies are themselves mitigated in the sense that one seeks rather practical solutions than conservative rules.

Choice of subjects requiring a transnational solution and no longer simply the determination of a national law competent to regulate disputes that transcend borders.

In the 1995 UNIDROIT Convention in particular this means that a pragmatic solution has been found for "good faith" between two conflicting but legitimate interests = due diligence
It is over-optimistic to assume a willingness on the part of the sovereign States to change their laws and accede to conventions solely for the propose of harmonisation [unification]...

**ACQUISITION A NON DOMINO**

- **COMMON LAW**
  - OWNER
  - SELLER
  - OBJECT

- **CIVIL LAW**
  - BUYER

**RESTITUTION IN ANY CASE OF THE STOLEN OBJECT TO ITS RIGHTFUL OWNER**

**COMMON LAW**

- "NEMO DAT QUOD NON HABET"

**CIVIL LAW**

- "POSSESSION VAUT TITRE"

**COMPENSATION FOR THE LOSS CAUSED TO THE POSSESSOR WHO ACTED WITH DUE DILIGENCE**
"REMEDYING WEAKNESSES, BUILDING ON STRENGTHS"

Return of illegally exported cultural objects

Restitution of stolen cultural objects

- Article 3(1): The possessor of a cultural object which has been stolen shall return it.
- Article 4(1): The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.
- Article 4(4): Criteria to determine "due diligence"
  a. Removal of the object - contrary to the law of the requiring State regulating the export of cultural objects.
  b. The export significantly impairs a scientific or historic interest, or the object is of significant interest for the requesting State.
- Article 5(1): Compensation to the possessor who did not know the object was illegally exported. / Physical return

Copyright of UNIDROIT
4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including:

- the character of the parties,
- the price paid,
- whether the possessor consulted any reasonably accessible register of stolen cultural objects,
- whether the possessor consulted any other relevant information and documentation which it could reasonably have obtained,
- and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

The 1995 Convention complements the due diligence rules drafted by museums and dealers – rendering them binding - and promotes trust in the international trade. It formalises what has long been taken for granted by serious collectors, museum professionals and art dealers: the need to verify the provenance of a cultural object offered for sale.
Where stolen or illegally exported cultural objects are transmitted by way of inheritance or succession, the beneficiary has the same duties as a good faith possessor who acquired the object by transfer. This is important, in particular in museum practice, where it is quite common for private persons to make donations or bequests to museums or similar institutions of objects the origin of which may be doubtful.

**Article 4(5) and Article 6(5)** - The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

**Due Diligence**
The buyer cannot prove he/she exercised due diligence

- no compensation

- strong «sanction»
  (hard law ≠ soft law)

### COMPENSATION .....who pays?

**Article 4(1)**
The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation.

**Article 4(2)**
Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.

**Article 4(3)**
Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.
IMPACT OF THE 1995 CONVENTION

on European Union instruments ......


Time-limit for initiating return proceedings
Burden of proof (“good faith”) for the purpose of compensation on the possessor
Criteria for “due care and attention”

All “taken” from the 1995 UNIDROIT Convention

European Parliament resolution on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (2017/2023(INI)) .....
IMPACT OF THE 1995 CONVENTION

- on the law of States not Parties to the 1995 Convention ……

DUTCH LAW

Since the UNIDROIT Convention does not permit reservations, the choice of the Dutch authorities was to base the implementation of the 1970 UNESCO Convention in part on « the goods elements of the 1995 UNIDROIT Convention »

Dutch Civil Code 3.86a – 3.86b – 3.87 – 3.87ba
Dutch Code of Civil Procedure

SWISS LAW

Illicit excavation = theft (Art. 3(2)) when consistent with the law of the State where the excavation took place - automatic restitution

Not time limitation: "a claim for restitution of an object forming an integral part of an identified monument or archaeological site […] shall not be subject to time limitations" unless the possessor and location are known

PRODUCTS OF CLANDESTINE ARCHAEOLOGICAL EXCAVATION

- Illicit excavation = theft (Art. 3(2)) when consistent with the law of the State where the excavation took place - automatic restitution
- Not time limitation: "a claim for restitution of an object forming an integral part of an identified monument or archaeological site […] shall not be subject to time limitations" unless the possessor and location are known

“SPECIAL PROTECTION”

OBJECTS IN USE BY TRIBAL OR INDIGENOUS COMMUNITIES

- Importance stressed in Preamble
- No time limitation to action, unless the possessor and location are known.
- Illegal export impairs the traditional or ritual use by a tribal or indigenous community (Art. 5(3)(d))
A private owner may make a claim directly in a foreign court for the restitution of a stolen object.

A State can take similar action for the return of an illegally exported object.

**Time limitation of actions**

Relative and absolute periods

(no time limitation for action relating to cultural objects forming an integral part of an identified monument or archaeological site, or belonging to a public collection, or a cultural or religious institution, and sacred or communally important cultural objects belonging to and used by a tribal or indigenous community)
AWARENESS RAISING AND CAPACITY BUILDING

Joint UNESCO-EU projects

- Engaging the European art market in the fight against illicit traffic of cultural property and
- Training the European judiciary and law enforcement officials on the fight against the illicit trafficking in cultural property
- Workshop for collectors in Abu Dhabi (2017) and Qatar (2019)

Not only does the 1995 UNIDROIT Convention enable an effective limitation of abuses within the context of the international trade of cultural objects, but it also contributes to enhancing legal certainty in this field.

The 1995 Convention complements the due-diligence rules drafted by museums and dealers and promotes trust in the international trade. It formalises what has long been taken for granted by serious collectors, museum people, and art dealers: the need to verify the provenance of a cultural object offered for sale.

On the other hand, it clearly creates an obstacle for international art dealers of a more dubious variety: it is becoming ever more difficult to use the differences between domestic laws in order to obtain a valid title for stolen cultural objects otherwise removed without the consent of their owner.
It is important that museums, libraries, archives and art dealers continue to be able to develop their collections. Nevertheless, they should ensure that their collections are built up in accordance with universally recognised moral principles.

They must take precautions to ensure that they acquire or borrow only ethically acceptable items and reject items that might have been looted or illegally exported.

In a world of global trade, they permit a fair and transparent exchange between equal partners aiming at the preservation of our cultural heritage for our descendants and ultimately ensuring a future for our past.

Taking the right decision

Should the due diligence process result with any doubt, it is strongly recommended not to proceed with the acquisition.

Having thoroughly evaluated the situation, the decision to acquire the item is the full responsibility of the purchaser. Should there be reasonable causes to believe that a criminal offence has been committed, it is also his responsibility to report it to the police.

In case of acquisition, and if the verification of provenance proves satisfactory, it is recommended that a file on the object be created and conserved in a safe place, including the precise details on the means by which due diligence has been exercised, and all the related documents. In the absence of documentation, the reasons why the object has been purchased should be clearly explained.
Due diligence as a requirement

but

ethical practice as a responsibility

THANK YOU