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Cultural Property

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I. Introduction

Concern for protection of cultural property intensified in 1997 as thefts, military conflicts, and deterioration continued to threaten the survival of cultural heritage. Legal proceedings brought in 1997 by original owners of stolen art and by countries seeking a return of stolen or illegally exported cultural property, as well as the considerable publicity directed toward possession of stolen cultural treasures, have presented serious questions about the risks involved in acquiring cultural property and generated a new focus on legal issues relating to purchase and possession of stolen and illegally exported cultural property. A knowledge of provisions of laws and international conventions relating to cultural property will become increasingly important to lawyers, collectors, art dealers, museums, and auction houses.

II. Unidroit Convention on Stolen or Illegally Exported Cultural Objects

The most recent international convention on the protection of cultural property, the Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Unidroit Convention) has been signed by twenty-two countries, has been ratified by two states: Lithuania and Paraguay, and acceded to by one state, China. The Unidroit Convention will enter into force six months after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession. As of January 1, 1998, other countries had begun drafting bills for ratification.

The Unidroit Convention adopts the common law rule regarding stolen property, which protects the original owner. It requires a purchaser to return a stolen cultural object and provides that an unlawfully excavated, or lawfully excavated but unlawfully retained, cultural object is considered stolen. The Unidroit Convention provides for return of all stolen or illegally exported cultural property from its effective date in the country where a claim is brought. If adopted by a sufficient number of countries, the Unidroit Convention will provide the impetus for the international repatriation of cultural objects.

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III. The 1954 Hague Convention

Although the United States did not ratify the 1954 Hague Convention, it has taken more steps to comply with the Convention and its Protocol than most state parties.¹ Since promulgation of the 1954 Hague Convention, the United States has issued strict instructions for protection of cultural property and continues to provide protection in cases where a cultural property site is being utilized for military purposes.² There is much interest currently within the Executive Branch and the Congress for U. S. ratification of the 1954 Hague Convention and its Protocol.³

IV. The International Law Association's Buenos Aires Draft Convention on Protection of Underwater Cultural Property

The International Law Association, a non-governmental organization, adopted the Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage (Buenos Aires Convention). The Buenos Aires Convention seeks to provide for protective regimes of states to protect the underwater cultural heritage.⁴ It offers basic protection beyond the territorial seas of coastal states for shipwrecks and seeks to avoid and resolve jurisdictional issues related to conservation and management of underwater heritage.⁵ UNESCO has accepted the Buenos Aires Convention for review.

V. U.S. Cultural Implementation Act

The Cultural Property Implementation Act⁶ permits States that ratified the 1970 UNESCO Convention to request the United States to establish import controls on cultural property. Pursuant to the Act, Greece pursued the return of valuable objects from the late Bronze Age Aegean, of Minoan-Mycenaean style, the so-called "Aidonia Treasure," that was placed for auction at the Michael Ward Gallery in New York in 1993. The auction was canceled by court order and the treasure was returned to Greece in 1996. Greece's success in negotiating and achieving the return of the Mycenaean antiquities has encouraged the Greek nation to take additional legal actions to recover other looted antiquities that appear on the international art market.⁷ Greece's pursuit of return of the treasure through U.S. courts may establish a precedent

1. Hays Parks, *Protection of Cultural Property from the Effects of War*, in *UNIVERSAL PROTECTION OF THE WORLD CULTURAL HERITAGE—LAWS AND PROCEDURES*, ch. 3 (Marilyn Phelan et al. eds., forthcoming 1998 [hereinafter *UNIVERSAL PROTECTION*]).

2. *Id.* As Parks points out, military commanders consider whether particular objects are cultural property or otherwise entitled to protection from direct attack in weighing possible action against them. *Id.*

3. *Id.* According to Parks, the greatest deficiency in protection of cultural property has been effective implementation of existing law and, in particular, the 1954 Hague Convention and its Protocol. Parks comments that implementation creates an awareness among military commanders of the importance of protection for cultural property and the avoidance of unintended damage incidental to attack of legitimate targets. He stated that it also makes the general public, the political leadership of each community, and those dedicated to safeguarding of cultural property aware of the need to ensure that cultural property is not used for military purposes and is marked and separated from wartime targets. *Id.*

4. James Nafziger, *International Legal Protection of the Underwater Cultural Heritage*, in *UNIVERSAL PROTECTION*, *supra* note 1, at ch. 2.

5. *Id.*

6. 19 U.S.C. §§ 2601-13 (1994) [hereinafter the Act].

7. Marie Mouliou, *The Protection of Archaeological Heritage in Greece*, in *UNIVERSAL PROTECTION*, *supra* note 1, at ch. 14.

for future repatriation of a nation's patrimony and should make art dealers more cautious in marketing cultural properties without a thorough examination of their provenance.⁸

VI. Legal Issues Relating to Stolen and Illegally Exported Cultural Property

A. DUE DILIGENCE REQUIREMENT FOR PURCHASERS OF CULTURAL PROPERTY

The Unidroit Convention does not impose a due diligence requirement upon a claimant of cultural property but does impose a due diligence requirement upon a good faith purchaser who seeks compensation after having been required to return a cultural object. One of the factors in determining due diligence of a possessor is whether the possessor consulted a reasonably accessible register of stolen cultural objects to determine an artifact's provenance. Because of new concerns about rights of claimants of stolen cultural property, courts now may also require purchasers of cultural property to establish their good faith by proving they conducted a formal search of the provenance of such artifacts.⁹

B. OWNERSHIP BY A FOREIGN COUNTRY

Legislation in some countries limits private ownership of cultural property. Some states acquire ownership of cultural and historical property exported without a permit. Such laws can cause a possessor of stolen or illegally exported cultural property to violate the National Stolen Property Act.¹⁰

C. RECENT CASES INVOLVING STOLEN OR ILLEGALLY EXPORTED CULTURAL PROPERTY

1. *United States v. An Antique Platter of Gold*¹¹

The defendant-in-rem, a fourth century b.c. antique gold platter of Sicilian origin, was purchased in Lugano, Switzerland, by an American art dealer, Haber, on behalf of a client, Steinhardt, for a total of 1.3 billion lire (over \$1 million). A professor of Greek history and numismatics had concluded that the Phiale was authentic and of Sicilian origin based upon an inscription along its edge, written in a Greek Doric dialect that had been spoken in the ancient Greek-Sicilian colonies. The art dealer paid a first installment of \$250,000 when he acquired the Phiale in Switzerland. In bringing the Phiale to the United States, Haber listed the Phiale's country of origin on customs forms as Switzerland and listed its value at \$250,000. The Customs form entry made no mention of the Phiale's Sicilian origin or of its Italian history. Haber and Steinhardt consigned the Phiale to the New York Metropolitan Museum of Art to determine its authenticity. After the Metropolitan declared it to be authentic, Steinhardt paid the additional purchase price and took possession of the Phiale. As a result of the Italian Government submitting questions to the United States seeking assistance in investigating circumstances surrounding the Phiale's exportation and subsequent importation into the United States, the United States brought a civil forfeiture action against Steinhardt. The United States District Court in New

8. Marie Mouliou describes the "Aidonia Treasure" case as "a precedent for the resolution of similar cases" and "a major triumph, not only for Greece, but for all countries seeking the return of cultural property." *Id.*

9. In *Autocephalous Greek-Orthodox Church v. Goldberg*, 917 F.2d 278, 283 (7th Cir. 1990), the court suggested that to prove good faith a purchaser of cultural property must have conducted a formal search of the property's provenance by consulting records of the International Foundation for Art Research (IFAR).

10. 18 U.S.C. §§ 2314-15 (1994). The National Stolen Property Act makes it a felony knowingly to sell or to receive stolen goods in interstate foreign commerce. *Id.*

11. *United States v. An Antique Platter of Gold*, No. 95 Civ. 10537 (S.D.N.Y. Nov. 14, 1997).

York granted a summary judgment for the United States. The court noted that, in declaring the country of origin of the Phiale on customs forms, Haber should have listed Italy rather than Switzerland. Because certain countries, such as Italy (but not Switzerland), have stringent laws to protect their cultural and artistic heritage, identification of such a country raises a red flag to customs officials who are reviewing customs forms. Thus, the court determined that there was a material misstatement on the customs forms. It ruled that goods such as the Phiale that are imported in violation of customs laws are contraband.

2. *Kassel v. Chatalbash*

The German state of Kassel has filed suit in a United States District Court in Boston against an antique rug dealer, Chatalbash, for the return of seven reproductions of 16th century Flemish miniature paintings that disappeared from a Kassel library collection at the end of the war.¹² The seven paintings disappeared from a mine shaft where they had been stored for safekeeping against Allied bombing. The theft apparently occurred shortly after U.S. troops were assigned to guard the site and evacuate the works.

3. *Metropolitan Museum of Art's Monet and 15th-century Netherlandish Painting*

A claim for return of a Monet allegedly taken from a bank vault in the Russian zone of Berlin in 1945 has been brought against the New York Metropolitan Museum of Art.¹³ The Monet was donated by a Met trustee who purchased it in 1954 from a German-born New York dealer identified as a wartime collaborator who helped Nazi art dealers in France identify and locate art collections that were subsequently looted.¹⁴ The Art Loss Register confirmed the Monet had been reported as stolen.

The Belgian Ministry of Economic Affairs also intends to demand that the Met return a Netherlandish painting of Christ, "Man of Sorrows," which Belgium contends was part of the Renders Collection and a Belgian wartime loss as a forced sale to the Nazis. The Belgian government has cited a binding 1943 Allied declaration providing that any sales made to the Nazis in occupied countries were nullified.¹⁵

4. *Goodman and Gutmann v. Searle and Art Institute of Chicago*

Searle has been charged with purchasing a stolen artwork, a landscape by Edgar Degas that the Nazis took during World War II from a Dutch Jew and his wife who perished in the Holocaust.¹⁶ Searle bought the monotype for \$850,000 and donated it to the Art Institute of Chicago. Heirs of the Jewish owner are seeking its return.

5. *Gutmann v. Sotheby's*

Recently the Gutmanns received a settlement from Sotheby's after it sold a portrait by Sandro Botticelli for \$650,000 that had been stolen from the family during World War II. The Gutmanns also filed suit in New York against Sotheby's for its sale of Renoir's "Appletree

12. Walter V. Robinson, *Artworks Taken as Reparations Pose US Dilemma*, BOSTON GLOBE, Aug. 1, 1997, at A1.

13. Walter V. Robinson & Maureen Goggin, *Stolen-Art Claims Shake N.Y. Museum*, BOSTON GLOBE, July 24, 1997, at A1.

14. *Id.*

15. *Id.*

16. Walter V. Robinson, *Art Buyer Fights Holocaust Heirs*, BOSTON GLOBE, May 18, 1997, at A1.

in Bloom," which they also claim was a wartime loss. The New York court has ordered Sotheby's to provide records that would identify the present owner.¹⁷

Recently Sotheby's removed a 17th-century Dutch master from a London art auction after it acknowledged that the Nazis might have swindled it in 1941 for Hitler's proposed museum in Linz, Austria.¹⁸

6. *Mayan Exhibit and Boston's Museum of Fine Art*

An exhibit of Mayan jade, pottery and burial urns at the Boston Museum of Fine Arts is the subject of a demand by Guatemala for return of the pre-Columbian objects.¹⁹ Under Guatemalan law, archaeological items exported without a permit automatically become Guatemalan government property.²⁰

17. *Id.*

18. Walter V. Robinson, *Sotheby's Takes Work Tied to Nazis off Block*, BOSTON GLOBE, Nov. 25, 1997, at A1.

19. John Yemma & Walter V. Robinson, *Questionable Collection*, BOSTON GLOBE, Dec. 4, 1997, at A1.

20. *Id.*

