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THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

SECOND STUDY REQUESTED FROM UNIDROIT BY UNESCO ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY WITH PARTICULAR REFERENCE TO THE RULES OF PRIVATE LAW AFFECTING THE TRANSFER OF TITLE TO CULTURAL PROPERTY AND IN THE LIGHT OF THE COMMENTS RECEIVED ON THE FIRST STUDY

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relevance to the subject.

If notwithstanding the complexity of the international protection of cultural property different aspects are to be treated in isolation, only one specific critique of the subject can be useful and more likely to succeed. The different disciplines concerned should be considered only once a study has been carried out and its findings made available.

Questions relating to the acquisition in good faith of cultural property and its effects merit special attention and in consequence the different aspects of the problem will be treated in further detail in this second study. With a view to the protection of cultural property, the conclusion has been reached that a recommendation be made to restrict as far as possible the protection of a good faith purchaser, while leaving open the possibility of granting him compensation in a modified form of what is known in some continental legal systems as the right to payment ("droit au paiement").

Following current tendencies in private international law, this study will also deal with the subject of mandatory rules ("loi de police") which constitute an effective method of achieving the restitution of cultural property.

In the first study, recognition of rules of foreign public policy ("ordre public") was recommended and a request has been made that this concept be further developed with a view to the international protection of cultural property through the medium of private international law.

Since the modern tendency is towards laws of mandatory application, an attempt must be made to study in greater depth and to further the recognition of foreign *ordre public* in this direction. The application of mandatory rules provides a legal ground for the restitution of cultural property to the country of origin on the basis of private international law and could, independently of the 1970 UNESCO Convention, supplement the mechanisms provided by it.

In sum, it may be stated that this second study opens up certain additional perspectives for an effective international protection of cultural property by means of the right to payment and the connecting factor offered by mandatory rules as an instrument of cultural policy.

CHAPTER I

The transfer of ownership of cultural property
Comparative law survey

Introduction

Whereas the first study concentrated on acquisition in good faith *a non domino*, the second will above all provide a comparative law survey of certain aspects of real rights arising under the law of obligations. The transfer of immovable property cannot be dealt with in this analysis.

The transfer of ownership of cultural property - as indeed any transfer of ownership - is governed by the law of obligations. The legal instrument for such a transfer will therefore be the same as that for other property. This legal situation constitutes only a point of departure with a view to the international protection of cultural property since, by reason of its special nature, such property cannot always be looked at in the same way as other property and it will therefore be necessary to lay down special legal conditions. Hence the wish of some experts to treat the protection of cultural property as a *sui generis* subject with its own rules.(1)

This is a difficult field because the different points of view have been subject to historical development and it has in consequence been influenced by rigid dogmas.

A comparison of the rules governing the transfer of ownership in the various legal systems reveals two principal characteristics which distinguish them:

- the principle of *traditio* and the consensual principle on the one hand, and
- the concept of *cause* ("causal principle") and the principle of abstraction on the other.

These two dual principles have not been so clearly defined in the various legal systems(2) where they have been combined in different ways although from the standpoint of comparative law a classification into these groups nevertheless does seem possible, depending on the different legal systems which have recourse to one or another of the principles.

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(1) Cf. R. CREWDSON, Cultural Property - A Fourth Estate?, the Law Society's Gazette, 18.1.1984, pp. 126-129; cf. S. RODOTA, The civil law aspects of the international protection of cultural property, Proceedings of the Thirteenth Colloquy on European Law, Delphi 20-22 September 1983, Council of Europe, Strasbourg, 1984, p. 99; to the contrary, CHATELAIN in his observations on the first study.

(2) Cf. E. von CAEMMERER, Rechtsvergleichung und Reform der FahrnisÜbereignung, RabelsZ 12

I. *The principle of traditio and the principle of abstraction*

As a model for this group one may take the German legal system which, unlike practically all other legal systems, requires for the transfer of ownership not only a contract of sale but also an abstract real contract (*Einigung*) as well as the handing over of the property (*traditio*).

According to §929, paragraph 1 of the German Civil Code (BGB), *traditio* (handing over) of the goods to the purchaser is a necessary condition for the transfer of ownership. Pursuant to §930 of the BGB, *traditio* may be replaced by *constitutum possessorium* and, in accordance with § 931 of the BGB, by the owner's assigning to the purchaser the claim to recover the property.

If, for example, a person buys at an art exhibition a painting which belongs to the gallery, even if he leaves it there until the end of the exhibition then, pursuant to §930 of the BGB, ownership of the painting immediately passes to the purchaser.

Assignment in favour of a purchaser of a claim to recover property which the owner has against a third party is an example of the replacement of *traditio* under §931 of the BGB. If, for instance, the owner wishes to dispose of a painting which he has lent to a gallery for an exhibition, then instead of proceeding directly to the transfer of the property which would be necessary, he may assign his right to restitution of the property by the gallery to the new owner. In such cases the transfer of ownership is also instantaneous.

However the means by which *traditio* is replaced should not be confused with transfer of ownership by an auctioneer who acts in his own name and, although not himself the owner, under authority conferred on him by the owner of the property. In this way the purchaser obtains ownership as if he had acquired it from the owner in person.(3) According to §929, paragraph 1 of the German Civil Code (BGB) *traditio brevi manu* is also sufficient if the purchaser is already in possession of the property.

These many departures from the rigorous principle of *traditio* have led experts to criticize the German Civil Code which in their opinion is also dominated by the consensual principle.(4)

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(3) Cf. H. HANISCH - Aspects juridiques du commerce international de l'art, Genève 1985, not yet published.

(4) Cf. G. SAILER, GefahrenÜbergang, EigentumsÜbergang, Verfolgungs- und ZurÜckbehaltungsrecht beim Kauf beweglicher Sachen im IPR, 1966, p. 32.

As opposed to the rules to be found in the English, French and Italian legal systems, the handing over of the property to the purchaser is an essential element for the transfer of ownership in the German legal system (as also in Austria and Switzerland).

However a contract of sale and the handing over of the property are not sufficient for the transfer of ownership. Pursuant to §929 of the BGB it is necessary that there be a "meeting of wills" - an "abstract real contract" between the owner and the purchaser. In principle this meeting of wills is independent of the basic contract and is usually present at the time of the conclusion of the sale contract by the parties.

Since however the real transfer of ownership is independent of the *cause* of the contract, it follows that a defect in the basic contract has no effect on the validity of the real transfer of ownership.

According to the law of the Federal Republic of Germany, the purchaser acquires ownership of the goods even if the contract of sale is subsequently held to have been void, provided that the property has been handed over (*traditio*).

No rules corresponding to the principle of abstraction of the German Civil Code are to be found in the Austrian, French, Italian or Swiss legal systems, nor in those of the Common Law countries. In spite of the criticism of this approach, both the *doctrine* and the caselaw have remained attached to it - up to a point: thus the nullity of the contract does have some effect on the meeting of wills (*Einigung*), or rather this meeting of wills is linked to the basic contract.

The legal consequences which flow from the principle of abstraction are important. A party cannot bring an action for recovery of the property in the event of the contract being void, the only remedy which may be open being a claim based on unjust enrichment.

The purchaser may acquire property even in the absence of a valid contract of sale but he cannot keep it permanently. He must, in the absence of any legal foundation, return it if an action for unjust enrichment is brought against him.

If however the purchaser has disposed of the property to a third party who has acquired it in good faith, he may rely on his good faith even if the basic contract is void. This is a specific case of acquisition in good faith under the German Civil Code.

The German *Bundesgerichtshof* (BGH) considered the question of the nullity of the contract (§134 of the BGB) in the *Nigerian* case.(5)

At the conclusion of carriage operations from Nigeria to Hamburg involving bronze statues of considerable value, three packages were found to be missing. In consequence the purchaser sought compensation on the basis of his insurance contract but the plaintiff's claim was rejected by the Bundesgerichtshof on the ground that the contract was void on account of the infringement of a foreign law prohibiting the export of the statues, in conformity with §134 of the BGB.

The BGH did not invoke §138 of the BGB (legal act contrary to public policy) because the statues had already disappeared during carriage and it was not known whether there had been the necessary meeting of wills.

Since we are here in the presence of an infringement of the Nigerian law prohibiting the export of national cultural property and as the Bundesgerichtshof considered this infringement to be an offence against the rules of international commerce and an action contrary to the interests of nations to conserve their cultural heritage, there is no doubt that the transfer of ownership, had it been effected in Germany, would have been held to be void as contrary to *ordre public*.(6)

The only countries which have followed the example of the Federal Republic of Germany by combining the principles of *traditio* and of abstraction are Greece(7) and Japan.(8)

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(5) Cf. G. REICHELT, International protection of cultural property, Uniform Law Review 1985-I, p. 91.

(6) Cf. H. HANISCH, op. cit., p. 37.

(7) Cf. G. SAILER, op. cit., p. 33. Article 1034 of the Greek Civil Code provides that "to transfer the ownership of movable property it is necessary for the owner to hand over possession to the purchaser and that the parties agree to the transfer of ownership".

(8) Cf. H. HANISCH, op. cit., p. 35, n. 83.

II. *The principle of traditio and the concept of cause*

The legal systems of the other German speaking countries, which are likewise based on the principle of *traditio*, have not adopted the abstract notion of transfer of ownership known to the Federal Republic of Germany. The legal situation in Switzerland for example is quite distinct. The Swiss Civil Code contains no rules as to whether the principle of abstraction should be applied or recourse had to the concept of *cause*. Article 714 of the Swiss Civil Code does no more than provide that, for the transfer of ownership of movable property, it is necessary for the purchaser to be put in possession of the property, but it does not answer the question of whether the contract under the law of obligations is sufficient to transfer the ownership or whether a meeting of wills is necessary and, if the latter, whether this depends on the *cause* of the contract or not. The Swiss Civil Code has laid down rules only for the transfer of immovables and has opted for the concept of *cause*. Article 974 of the Swiss Civil Code[9] refers to third parties in bad faith who cannot rely on an irregular entry in a land registry.

The legal situation in Switzerland has led to interminable discussions as to whether this rule permits the conclusion by analogy that the concept of *cause* is likewise applicable to the transfer of movable property or whether, on the contrary, the Civil Code has, for the transfer of such property, established the application of the principle of abstraction, thus following the *doctrine*. In 1903 the Federal Court decided in favour of the principle of abstraction in respect of the transfer of movables and this view likewise represented the predominant *doctrine*. The situation changed in 1929 with an important decision of the Federal Court according to which the transfer of movables under the Swiss legal system requires a valid *cause*. In its decision upholding the concept of *cause* the Federal Court had regard above all to the arguments which are still in the forefront of discussion today, considering the existence of a *cause* to be necessary so as to protect a person disposing of the property without any valid legal *cause* against the successors in bad faith of the other party to the contract and against the creditors in the event of his bankruptcy.[10]

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(9) Article 974 provides that: "When a real right has been irregularly registered, such registration cannot be relied on by third parties who knew or ought to have known of any defects.

Registration is irregular when it has been effected without a legal basis or by virtue of a non-binding legal act.

Those whose real rights have been infringed may directly invoke the irregularity of the registration against third parties in bad faith".

(10) Cf. E. von CAEMMERER, op. cit., p. 677.

The Swiss Civil Code also permits the replacement of *traditio*, by either *constitutum possessorium* or by the assignment of a claim for recovery as is the case under the German Civil Code, provided that the person disposing of the property or the third party remains in possession of the property, on the basis of a special legal relationship. Although no rule exists concerning *traditio brevi manu*, this may nevertheless also be considered as being permitted.

Another example is furnished by the Austrian Civil Code (ABGB). According to §380 of the ABGB, no property can be acquired without a title or without a legal manner of acquisition (*titulus* and *modus*). Here the Austrian Civil Code is based on *traditio* and on the concept of *cause*; that is to say that if there is no legal *cause* then ownership cannot pass.

In Austria the person disposing of the property remains the owner of it and may call for its restitution by the purchaser in accordance with §366 of the ABGB by bringing a claim for recovery. He enjoys a real right to restitution vis-à-vis the purchaser which is a consequence of the need for an objectively valid basic contract.

By virtue of the *traditio* and of the notion of *cause* ownership is considered as never having been transferred in the event of a subsequent invalidation of the title.

In conformity with §426 of the ABGB, movable property may as a general rule be transferred to another person only by a physical handing over from the one person to the other. However the ABGB does lay down crtain exceptions: "Property may be conveyed by means of a declaration through which the owner expresses in a manner which can be proved that he holds the property in the future in the name of the acceptor" (§428, first limb - *constitutum possessorium*) "or in the case of an acceptor who is holding the property without a real right, that such acceptor may possess it in the future on the ground of a real right" (§428, second limb - *traditio brevi manu*).

One particularity among the systems of *traditio* is provided by §427 of the ABGB, namely symbolic delivery (*traditio symbolica*).

Valid title and transfer in a legal manner (§423 of the ABGB) - *titulus* and *modus* - are a necessary condition for the legal acquisition of ownership of movable property.

The contract whereby property is acquired consists, according to the new *doctrine* relating to §§426 *et seq.* of the ABGB, in the combination of contractual agreement between owner and purchaser as to the transfer of

ownership, and the transfer of the property.

Title is not sufficient to acquire ownership of property; it can only give rise to a right *in personam* - a claim for the handing over of the property.

What is to be understood by *traditio* is the transfer of property with the intention on the one hand to dispose of it and on the other to acquire it, in other words the handing over of the property, which may be effected with the consent of the preceding owner.

Traditio implies a legal transfer. The transfer of ownership is valid only if the person disposing of the property is the owner of it or if he has received authority from the owner. The Austrian Court of Cassation (OGH) dealt with this question in the *drawings case* (OGH 3.3.1966, 7 Ob 43/66) in which it was faced with a claim for recovery concerning 49 drawings by the painter Rudolf Wacker.

The plaintiff had given to S. drawings owned by him with a list which he had himself drawn up entitled "list of drawings entrusted to Mr S." with a view to their sale by S. at a minimum price of 140,000 Austrian schillings. S. however sold the drawings for 40.000 schillings to the defendant and kept that sum for himself. The defendant had no doubts as to S.'s authority to dispose of the drawings but in the plaintiff's opinion he had not acquired ownership because S. had not been authorised to dispose of them at such a low price.

The court of first instance found that the defendant had acquired ownership by virtue of §367 of the ABGB as the plaintiff had entrusted the drawings to S. The Court of Appeal however upheld the claim for recovery whereas the Court of Cassation confirmed the judgment at first instance: the OGH put forward the argument that it was necessary to protect "confidence in the authority to dispose of the property" of the person in possession of the drawings. A purchaser who concludes a contract with a person authorised to sell on specific conditions but who fails to respect them should be protected. In this case we can only speak of an abuse of the authority conferred by the authorisation but not of bad faith on the part of the defendant.

The judgment of the OGH in the *drawings case* should not be seen as a precedent because good faith, even with a view to the protection of a legitimate belief in authority to dispose of the property, can only be taken into consideration in a legal system which recognizes the principle of the abstract validity (independent then of a valid *title*) of contracts to dispose of property, as is the situation under the German caselaw.

This case concerned a person who was neither their owner, nor authorised to dispose of the drawings to the defendant at the price paid. The invalidity of the underlying contract does have effects according to the Austrian law governing *traditio*.

As to acquisition in good faith *a non domino*, good faith cannot be relevant at the same time to both *titulus* and *modus*. Under Austrian law the defendant did not become the legitimate owner of the drawings and the decision is all the more curious as there can be no doubt as to the solution of the real central problem in the present *doctrine*.(11)

Generally speaking Dutch and Spanish law follow the French system. They depart from it however in that they require *traditio* and for this reason they are dealt with here.

Both *constitutum possessorium* and the assignment of claims for recovery of property exist in Dutch law (Article 639 B.W.) as in that of the Federal Republic of Germany. Such an assignment is however valid only if third party rights are not involved and, according to the caselaw of the *Hogen Raads*, ownership is transferred only if the real rights of third parties are not prejudiced.

As in other legal systems (for example in Austria and Switzerland), the *doctrine* and the caselaw wavered between the principle of abstraction and the concept of *cause* before deciding in favour of the latter.

Spanish law has opted for the principle of *traditio* in Article 609, paragraph 2 and in Article 1095, paragraph 2 of the Civil Code.

As is the case under the Austrian Civil Code, a symbolic handing over of property - *traditio symbolica* - such as for example, the handing over of keys, is to be found in Spanish law (Article 1463 of the Civil Code). *Constitutum possessorium* may replace *traditio* subject to the sole condition that the property sold cannot be transferred at the time it is disposed of. The requirement of *cause* is not expressly mentioned in Spanish law and in consequence the same is true of most of the legal systems of the South American countries(12) which follow the Spanish system.

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(11) Cf. G. FROTZ, Gutgläubiger Mobiliarerwerb und Rechtsscheinprinzip. Festschrift für Walther Kastner, 1972, p. 134.

(12) The only mention expressis verbis of cause is to be found in Brazilian law, the single paragraph of Article 622 of the Civil Code providing that: "Também nao transfere o dominio a tradiçao, quando tiver por titulo um ato nullo" (cf. G. SAILER, op. cit., p. 35 et seq.).

III. *The consensual principle and the concept of cause*

The legal systems of the German-speaking countries which require abstraction or *cause* as well as *traditio* for the transfer of ownership are in opposition to the Roman law system adopted by the French Civil Code. The latter followed the practice which had already done away with the requirement of *traditio* by admitting the so-called *traditio fictiva*. Article 711 of the French Civil Code, which describes all the methods of acquiring ownership, establishes that transfer of ownership is already permitted "par l'effet des obligations". This principle is expressed in a very general manner in Article 1138 concerning the duty of handing over ("obligation de donner") and is repeated in respect of contracts of sale in Article 1583 which provides that with the conclusion of the sale contract ownership is acquired by the purchaser, whether or not the goods have already been handed over and the price paid.(13)

As the French Civil Code does not require *traditio*, questions relating to possession as far as it concerns the transfer of ownership are important in French law above all in relation to the acquisition of ownership *a non domino*. This notion of ownership is moreover of relevance vis-à-vis third parties, that is to say that even though a French purchaser is not yet in possession of the property, he is already the owner of it.

In application of the consensual principle, in the case of a pledge in favour of the seller's creditors, the purchaser of the property may bring a claim based on Article 608 of the Code of Civil Procedure. In the event of the bankruptcy of the purchaser, cultural property which is still in the hands of the seller belongs to the general body of creditors, which clearly illustrates the difference with the principle of *traditio*.

Most of the Latin American legal systems have followed Spanish law and especially those of the more important States such as Argentina (Civil Code, Articles 577 and 2524), Brazil (Civil Code, Articles 620/622) and Chile (Civil Code, Article 684), as well as Uruguay (Civil Code, Articles 758 and 760), Colombia (Civil Code, Article 754), Ecuador (Civil Code, Article 717), Honduras (Civil Code, Article 711) and others. The fact that in countries influenced by Roman law the contract of sale generally has effects on the transfer of ownership has led to a distinction being drawn between on the one hand the French Civil Code and the laws which have followed it being based on the consensual principle and on the other the Dutch and Hispanic Latin American legal systems which follow the principle of traditio (cf. E. von CAEMMERER, op. cit., p. 680).

(13) The majority of the continental legal systems which have followed the French Civil Code have opted for such rules, namely Belgium, Italy, Portugal (Civil Code, Articles 408 and 1317) and a number of South American legal systems such as Bolivia (Civil Code, Articles 1023 and 1025), Peru (Civil Code, Articles 947 and 948) and Venezuela (Civil Code, Articles 798, paragraph 2 and 1474). (Cf. E. von CAEMMERER, op. cit., p. 679).

The consensual principle of the French Civil Code has many practical advantages. However one drawback is constituted by the fact that Article 1585 provides as follows:

"Whenever goods are not sold en bloc but by weight, number or measure, the sale is not complete, in the sense that the goods sold are at the seller's risk until such time as they have been weighed, counted or measured; ...",

that is to say that in respect of a contract for the sale of goods described generically ownership passes only after weighing, counting or measuring, i.e. after the conclusion of the contract.

According to the prevailing view, Article 1585 refers not only to the transfer of risks but to the transfer of ownership in general.

Specification of the goods is necessary because if the goods sold are identified in a very precise manner, the person disposing of them cannot change them to the detriment of the purchaser or of a third party without this being noted.

The French Civil Code is silent as to the requirement of *cause*. From Articles 711, 1138 and 1583 which link the transfer of ownership to the conclusion of a contract it follows that a valid *cause* is the essential requirement for a transfer of ownership.

The French system has one peculiarity in that there may be a reversal of the burden of proof in an action for recovery of property in favour of the purchaser-owner; the seller must adduce proof of his former ownership and must in addition prove that he is still the owner because of the invalidity of the contract of sale.

It is important to note that the invalidity of the sale contract, and in consequence that of the transfer of ownership, may also be relied on against third parties.

There is a rather special application in Italian law of the French consensual principle. Article 1376 of the Italian Civil Code provides as follows:

"In contracts having as their object the transfer of ownership of a specified thing, the constitution or transfer of a real right, or the transfer of another right, such ownership or right is transferred and acquired by virtue of the lawfully expressed approval of the parties."

Italian civil law is based on the French Civil Code, both of which belong to the family of Roman Law and for this reason the Italian Civil Code of 1862 has witnessed a parallel historical development to that of the French Civil Code. Analogies are similarly to be found in connection with the transfer of ownership and it was only towards the second half of the nineteenth century that the Italian Civil Code became subject to other influences and in particular that of the German pandects.

Whereas the Italian Civil Code of 1862 was derived from the French Civil Code, that of 1942 is an expression of developments which took place in the interim. The more recent code also contains rules which take account of Italian legal practice, for example Article 1153, which permits acquisition in good faith *a non domino* even of stolen property.

Italian law is difficult to classify because some solutions are exclusively orientated towards legal practice and it is for this reason that Italian law more faithfully reflects modern developments than does the rigid dogmatism of other legal systems.

Italian law has opted in Article 1376 of the Civil Code for the consensual principle, following French law but with many nuances, to the extent that the Italian Court of Cassation finally held that the parties may in general exclude real effects (cf. Cass. 4.3.1969, No. 692, Giur. It. 1969 I, 2162).

While questions concerning possession in the transfer of property have no importance in French law, the Italian Civil Code of 1942 speaks of handing over (*consegna*) (see Article 1153 of the Italian Civil Code).

In sum, whereas the principle of *traditio* is applied in the Federal Republic of Germany, Austria and Switzerland, France has chosen the consensual principle and Italy a variant of this principle. Here again Italian law shows its flexibility and its capacity to reflect legal practice.

The Italian Civil Code of 1942 has adapted the consensual principle in a special way with a view to finding an intermediate solution. According to Italian law forced sale (*vendita obbligatoria*) and sale with real effects (*vendita con effetto reale*) are possible.(14)

Ownership may be transferred by means of a binding contract and in any event acquisition *a non domino* may be recognized as an autonomous ground of transfer (cf. Article 1153 of the Italian Civil Code).

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(14) Cf. E. JAYME, Konsensualprinzip und Obligatorischer Kaufvertrag im Italienischen Zivilrecht, Festschrift für Otto Mühl (1981) 339 at p. 344.

The Common Law systems occupy a special position, even though they are in fact closer to those which apply the consensual principle than those which follow the principle of abstraction. Thus, according to the English Sale of Goods Act of 1979, in principle the mere contract of sale does not transfer ownership from the seller to the buyer: in fact there is a first, further requirement that the goods must be specified if at the time of the conclusion of the contract they were still unascertained (see Sec. 16 S.G.A.); moreover in all cases the parties must intend the property to pass (see Sec. 17 S.G.A.). However, if in this respect the difference with the consensual principle appears to be clear (in accordance with the latter the property passes automatically unless the parties did not express a different intention) and the system is very similar to that adopted by German Law (the requirement of *Einigung*), a more precise analysis will show that in practice and thanks to a set of rules for ascertaining the parties' intention provided for by the law (Sec. 18 S.G.A.), the difference is much less important: see, e.g. rule number 1 of the above-mentioned section, according to which "unless a different intention appears", "where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made ..." (see Benjamin's Sale of Goods, 3rd edition, 1987, pp. 265 *et seq.*).

As far as the system followed by the United States Uniform Commercial Code (UCC) is concerned the foregoing considerations are even more true: although as a rule the transfer of property is subordinated to the identification of the goods to the contract once again in practice and given a number of presumptions, the various solutions appear very similar to that adopted by those systems which in principle follow the consensual principle (cf. §2-401 (1) (2) (3); §2-501 (1) lett. (a) of the UCC).

IV. *Other principles*

There is no fourth group which combines the consensual principle and the principle of abstraction although the laws of the Scandinavian countries recognize a transfer of property which is subject to no particular principle, such transfer being effected by successive stages, namely the conclusion of the contract, *traditio* and the payment of the price. The purchaser is accorded a "real" protection by the conclusion of the contract; in effect use of the property by the creditors of either the seller or the purchaser is not possible between the conclusion of the contract and *traditio*. In the relations between the parties the notion of transfer of ownership has little importance, being of relevance only to relations with third parties.(15)

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(15) Cf. G. SAILER, op. cit., p. 45.

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This chapter has, in conformity with UNESCO's request, been devoted to the transfer of ownership under the civil law in a number of legal systems.

As in the first study, in which a comparative law survey was made of acquisition in good faith *a non domino*, an attempt has here been made to provide a similar survey in respect of the transfer of ownership. For the purpose of illustrating the wide differences which exist in this context, a classification has been made of the general principles (*traditio*, abstraction, consensus and *cause*).

To end this chapter, the following conclusions may be drawn:

(1) The civil law rules concerning the transfer of ownership of movables take on a different appearance depending on whether they are viewed in isolation or classified in accordance with general principles.

(2) Notwithstanding the many rules relating to such transfer there is none in existence designed especially for the protection of cultural property. As regards the rules relating to acquisition in good faith *a non domino*, their effects on the protection of cultural property vary considerably (Chapter III).

(3) The same rules apply to the transfer of ownership of cultural property as to that of other property.

(4) Among the civil law rules relating to the transfer of ownership, it is possible to identify certain aspects of particular relevance to the protection of cultural property to the extent that cultural property might be seen as a *sui generis* kind of property. These would constitute a unified basis for the ways of transferring ownership (*titulus* and *modus*).
A special rule relating to acquisitive prescription could likewise be devised for the protection of cultural property.

(5) A detailed examination of the transfer of ownership in the light of private international law was not requested in connection with this study although a harmonisation of the rules governing transfer of ownership from that angle could offer an effective protection of cultural property.

CHAPTER II

The definition of cultural property

Up to now it has not proved possible to find any uniform definition of cultural property and although experts are of the view that such a definition would be highly desirable, they are conscious of the difficulties its framing would involve.

Each country has its own national definition of cultural property[16] and even in the international conventions the definitions are different in each case. The explanation is to be found in the fact that the concept of cultural property depends not only on national, artistic and socio-cultural factors or on cultural policy, but very often also on material factors and the artistic tendencies which reflect the spirit of the age.

Whereas each national definition is directed towards the aim of the national protection of cultural property, each international definition is framed with the purpose and scope of the convention in question in mind. Thus the definition in the 1970 UNESCO Convention refers to its subject-matter, namely the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property.[17] This definition (see Article 1 of the 1970 UNESCO Convention) has in effect established categories of cultural property although it has found no unified criteria permitting a definition.

One thing is however certain: since the adoption of the 1954 Hague Convention for the protection of cultural property in case of war the term "cultural property" has acquired a uniform connotation at both national and international level and indeed it has also subsequently been used in all disciplines, even with retroactive effect.[18]

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(16) UNESCO has already published two volumes which contain a collection of extracts from the legislation in force in 45 member States. These volumes were published in English in 1984 under the title "The protection of movable cultural property: Compendium of legislative texts. Cf. also BURNHAM, The Protection of Cultural Property: Handbook of National Legislation (1974).

(17) R. FRAOUA, Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (Paris, 1970). Commentaire et aperçu de quelques mesures nationales d'exécution.

(18) Cf. G. REICHELT, op. cit., p. 65.

In Austria, for example, a statutory definition of cultural property is to be found in §1 of the law on the protection of cultural property: according to that provision, cultural property is "movable or immovable property created by human hands which is of historical, artistic or cultural importance and whose preservation is in the public interest" (cf. §1 DSchg 1923 in the 1978 version).

Since the new Austrian law of 1986 prohibiting the export of cultural property (AusfVG), there is an identity between cultural property as defined in §1 DSchg and in §1 of the AusfVG which for its part refers back to Article 1 of the 1954 Hague Convention. In other words the terms are employed as though they were synonyms even although they are not exactly synonymous, this being due to the fact that in the Austrian understanding of cultural property the public interest is a necessary condition whereas this requirement is lacking from Article 1 of the Hague Convention.

The term "cultural property" is itself already a significant example of the interdependence which exists between the national and international domains since notwithstanding the different values which they represent they have a common purpose, namely the protection of cultural property. This interaction between the national and international domains should be followed in the future.

Summing up the *status quo*, it may be affirmed that until now the only attempts at a systematic approach have been on a maximalist or on a minimalist basis.

The maximalists aspire towards a comprehensive registration of cultural property which would be achieved by the method of enumeration. Even if this method is most certainly difficult to apply because the lists must be constantly up-dated, it is however that most frequently followed in the United States.(19)

The minimalist method on the other hand merely lays down general principles and here two approaches are possible: categorisation and classification:

(a) categorisation provides only general descriptions of cultural property.

(b) classification for its part establishes certain values, as for instance in France and in countries influenced by the French model.

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(19) Cf. G. REICHELT, op. cit., p. 69.

As each system has both advantages and disadvantages, there are also mixed systems, for example that of Canada which proceeds on the basis of categorisation combined with the method of enumeration.

If the aim is a unified law for the international protection of cultural property then it is necessary to find, in addition to national criteria, a common criterion which is recognized as valid for the protection of the cultural property in question: this criterion is the qualification of cultural property either as *res commercium* or as *res extra commercium*.

Cultural property which is *res extra commercium* can neither be acquired in good faith nor constitute the *cause* of the contract. Each country must decide for itself what it understands by *res extra commercium* but the simple fact that the qualification represents a unifying factor already offers the guarantee of a certain degree of effective protection of cultural property.

There exists in each legal system movable property which, on account of its particular characteristics, is not subject to the law which usually governs trade in goods. The legislator has, in respect of such property, enacted special rules (for example *res religiosae* cannot be sold without the authorisation of the competent ecclesiastical authorities).

In **Italy** for example cultural property which is *res extra commercium* under Article 1145 of the Italian Civil Code of 1942, "Possession of things *extra commercium*: The possession of things of which ownership cannot be acquired is without effect" is listed in special laws.

Article 23 of the law of 1.6.1939, No. 1089 on the protection of property of artistic and historical interest classes cultural property in the version of 8.8.1972, No. 487.

In **Austria** the law of 1986 prohibiting the export of cultural property (AusfVG) contains a list of cultural property which may be exported. This list is regularly up-dated. By *a contrario* reasoning this list likewise indicates that cultural property which cannot be exported without an authorisation from the Federal Office for Cultural Property.

The **French** legal system excludes as a matter of principle commerce in property belonging to the "public domain" and in consequence the acquisition of such property is not possible. There is however no single reply to the question of what must be considered as falling within the public domain. It is therefore a matter of dispute among experts as to whether or not pieces of art in museums and manuscripts in libraries belong

to the public domain. If, on the other hand, the law has expressly provided that ownership of property cannot be transferred, then in no event can such property be acquired by a third party purchasing it in good faith.

The law of 31.12.1913 on historic monuments demonstrates that acquisition in good faith is not possible.(20)

The corresponding legislation in the Federal Republic of Germany is "the law according protection against the export of cultural property" of 6.8.1955 as revised in 1974. Acquisition in good faith of cultural property registered in accordance with this law is not possible.

The legal systems of the Socialist countries recognize different types of ownership. Property owned by the State is not attachable and such property is therefore to be considered as *res extra commercium*.

In Canada, the 1974 Cultural Property Export and Import Act sets out six categories which provide the guidelines for establishing a Control List and for five of those categories it sets minimum value limits. Objects with a value below the minimum values are not included in the Control List and no permit is therefore required before exporting them. It is important to note that these minimum values cannot be lowered without parliamentary amendment although they may be raised when appropriate. To determine whether or not an object is subject to control it is not the Act which should be consulted but rather the Control List itself as the former merely describes the rather open-ended limitation of the list and the lowest fair market value in Canada which can be set whereas the latter provides limits for carefully defined categories of objects.(21)

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(20) See the case of the madonna stolen from a church in Batz-sur Mer in France in 1978 and in this regard J.P. VERHEUL "Foreign export prohibitions: cultural treasure and minerals", Netherlands International Law Review, 31 (1984) pp. 419-427.

(21) See, for other countries, the UNESCO Compendium of legislative texts: The protection of movable cultural property.

CHAPTER III

The protection of cultural property and acquisition in good faith *a non domino*: the right to payment

I. *General considerations*

The questions associated with the acquisition in good faith of cultural property *a non domino* were dealt with in the first study in which the conclusion was reached that the principles governing the protection of acquisition in good faith should have regard to the need for security in the art trade.

A number of observations on the first study suggested that when contemplating the protection of cultural property, other considerations, such as those relating to security in the art trade, should not be taken into account (cf. L.V. Prott).

On the other hand, one must, with Fraoua, recall that good faith is a fundamental principle of civil law in the continental systems although it has been qualified by many exceptions.

In this context it should be reaffirmed that if attention was concentrated in the first study on questions relating to good faith, that was because of UNESCO's request to do so in the light in particular of the 1974 draft LUAB, which is not the case with the second study.

Having regard to the observations on the first study, and given the recommendation contained in that study concerning civil law, the question has been taken up again here with the aim of ensuring the effective international protection of cultural property.

Since no new general regulation of the matter at international level is conceivable in the near future, the possibility should be considered of adapting the respective national rules which make provision for the protection of acquisition in good faith with a view to the restitution of the cultural property so acquired.

However, such an adaptation should only be contemplated in cases where the protection of acquisition in good faith *a non domino* exists as a form of transfer of ownership in the particular legal system.

There must moreover be one assumption, namely that any new laws relating to acquisition in good faith should be concerned only with cultural property which would, as already noted in the first study, require the existence of a definition or qualification of such cultural property.

Given however that the existing criteria for a definition under national law are so different, it is the various national legal systems themselves which should proceed to the qualification and the determination of the criteria which are necessary and appropriate in this connection, since the great diversity of cultural property excludes any possibility of successfully establishing international criteria. (See Chapter II, *supra*).

An optimal protection of the international and national transfer of cultural property could be achieved by denying totally any legal protection to the acquisition in good faith of cultural property.

Even in those legal systems which as a general rule protect acquisition in good faith, such acquisition of certain types of cultural property is not at present protected (property within the public domain, export prohibitions etc.).

As regards cultural property, another way of reducing to a minimum the protection of its acquisition in good faith *a non domino* by recourse to public law would for example be a system of registration of cultural property although some reservations based on practical considerations have been expressed regarding registration in the observations on the first study.

The mere fact that many legal systems do not protect acquisition in good faith does not however result in an effective protection of cultural property as there is always the possibility that such property will be moved to countries whose legal systems accord such protection, thus rendering impossible the restitution or return of the cultural property.

The comparative law survey in the first study showed wide differences in the legal treatment of acquisition in good faith in the different legal systems, varying as it does from full protection to no protection at all, with other systems adopting an intermediate position.(22)

In addition to the widely differing attitudes to good faith, it should be recalled that many exceptions and limitations are to be found even in those legal systems which in general admit the principle of good faith.

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(22) Cf. G. REICHELT, op. cit., p. 103.

From this overall view of the question of good faith the conclusion may be reached that a definition of the acquisition *a non domino* of cultural property is neither possible nor useful when the desired aim is the international protection of cultural property.

It is therefore necessary to ascertain whether there already exist, in those countries whose law accords protection to acquisition in good faith, rules permitting the restitution of the property and, if not, whether such rules should be introduced, without affecting the existing institution of the protection of acquisition in good faith. Here a choice exists among the different forms of the "right to payment" which is already widely recognized in some legal systems and not only in connection with cultural property.

II. *The right to payment*

Many legal systems accord the purchaser in good faith a right to payment in the event of his acquiring movable property *a non domino*.

The rules vary considerably from one legal system to another but in general the effect of the right to payment is that the purchaser in good faith may, subject to specific conditions and against restitution of the property, require compensation for the price paid by him. Four aspects of the question will be considered:

(A) The right to payment in various legal systems
(B) The function of the right to payment
(C) The scope of the right to payment
(D) The importance of the right to payment for the international protection of cultural property.

A. The right to payment in various legal systems

The right to payment constitutes an intermediate solution between the extremes of an unlimited protection of acquisition in good faith *a non domino* and a refusal to accord any such protection and the preparation of new draft laws shows a certain tendency to increased recourse to the right to payment.

It is applied in such a different manner in the various legal systems that no method of classification is possible, various forms of the right to payment being known in the French, Swiss, Portuguese, Scandinavian, Dutch and Hungarian legal systems.

(1) *France*

Article 2280 of the Civil Code provides as follows:

"If a person in possession of stolen or lost property bought it at a fair or in a market, or at a public sale, or from a merchant selling similar goods, the original owner may only recover the property by reimbursing the price paid by the person in possession of it".

French law recognizes the right to payment of the person in possession. The former owner may require restitution of the property by a purchaser in good faith against reimbursement of the purchase price. However acquisition in good faith of movable property at a fair or market or at a public sale or from a merchant selling similar goods is a necessary condition.

The application of Article 2280 of the French Civil Code is limited to "a person in possession". If a subsequent transfer is not effected in the circumstances described in that article, the former owner may call for restitution of the stolen or lost property without having to reimburse the price paid (unlike the provisions of Article 934, paragraph 2 of the Swiss Civil Code).

The rules in force in Belgium and Luxembourg are identical to the French rules.

(2) *Switzerland*

Article 934 of the Civil Code provides that:

"1. The possessor who has had a movable object stolen from him, or who has lost it, or who is dispossessed of it in some other manner independently of his will, may reclaim it during a period of five years.

2. When the object has been acquired at a public auction, at a market or from a merchant dealing in objects of the same kind, it may no longer be reclaimed from either the first purchaser or from any other *bona fide* purchaser, unless the purchaser is reimbursed for the price he has paid.

3. Restitution is moreover subject to the rules concerning the rights of the possessor in good faith".

Unlike French law, the Swiss legal system, which also makes provision for the right to payment, requires that the third party purchase be in good faith. This right to payment exists for a period of five years. The compensation payable is equivalent to the price paid by the *bona fide* purchaser himself: that is to say the purchase price and not the personal value attached to the property by the original owner.

The last purchaser has a right of retention over the property against the owner.(23)

(3) *Portugal*

The former Portuguese Civil Code of 1867 did not deal with acquisition in good faith. In principle the new Civil Code of 1966 does not recognize the acquisition in good faith of movable property. The owner may call for restitution of his property from a *bona fide* purchaser - whether or not it has been lost; in the event of acquisition from a dealer selling objects of the same kind the owner must however compensate the *bona fide* purchaser for the price paid by him (Article 1301 of the Portuguese Civil Code).(24)

(4) *The Scandinavian countries*

In the Scandinavian draft on the protection of the acquisition in good faith of movable property, the right to payment is limited to property which is of particular personal value, that is to say of more than just pecuniary value, in excess of its economic value, and acquisition in good faith is thus given a high degree of protection. The Danish, Finnish and Swedish drafts are almost identical, only Norway having distanced itself from those proposals, its own law already being in force.(25)

In Sweden, it is possible to acquire property in good faith *a non domino*, although the purchaser must return the movable property to the former owner against reimbursement of the purchase price and related costs, on condition that restitution is sought within a period of three years from the time when the property ceased to be in his possession.(26)

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(23) Cf. E.W. STARK, Commentaires du Code civil suisse, 2ème éd. vol. IV (1984), p. 383.

(24) Cf. K. SIEHR, Der gutgläubige Erwerb beweglicher Sachen - Neue Entwicklung zu einem alten Problem, Zeitschrift für vergleichende Rechtswissenschaft, 80 (1981), p. 281.

(25) Cf. K. SIEHR, op. cit., p. 279, note 50.

(26) Cf. H. HESSLER, Der gutgläubige Erwerb in der neueren schwedischen Rechtsentwicklung und dem nordischen Gesetzentwurf, RabelsZ 32 (1968) p. 284.

(5) *The Netherlands*

The law at present in force grants a right to payment to a person who acquires movable property in good faith subject to special conditions (Article 2014 II, 637 of the *Bürgerlijk Wetboek*). The new Netherlands Civil Code, which is not yet completely in force, lays down rules similar to those which are at present applied in Sweden (Art. 3.4.2.3a, paragraphs 2 and 3 of the N.B.W.).(27)

(6) *Hungary*

A right to payment based on the Swedish model has existed in certain situations in Hungary since 1960. However this right can only be exercised in relation to the acquisition for value of property purchased from a person other than a merchant (Article 118, paragraph 2 of the Hungarian Civil Code).(28)

B. The function of the right to payment

(1) The function of the right to payment is to strike a balance between those legal systems which do not recognize acquisition in good faith and those which do so to varying degrees.

(2) The right to payment is not necessarily linked to the protection of acquisition in good faith.

Some legal systems accord full protection to the acquisition in good faith *a non domino* of movable property without however admitting the right to payment (cf. Italy), while others provide, in the case of *bona fide* acquisition, for the restitution of the property to the former owner against reimbursement of the purchase price (e.g. the Netherlands, N.B.W. - not yet in force).

(3) Many legal systems protect acquisition in good faith to a limited extent only, while granting the right to payment (Belgium, France, Luxembourg, Spain, Switzerland). Moreover, the owner is entitled to claim recovery of the property from the *bona fide* purchaser.

(4) When the right to payment does exist, it is dependent on the legal protection accorded by the different legal systems to acquisition in good faith.

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(27) Cf. K. SIEHR, op. cit., pp. 275-276.

(28) Cf. K. SIEHR, op. cit., p. 276 and 285.

(5) The question of whether the right to payment applies to all property acquired in good faith or whether it is limited to property of more than just pecuniary value is likewise dealt with differently.

C. The scope of the right to payment

The scope of the right to payment varies in the different legal systems. Two aspects are important for this study:

(1) The right to payment is sometimes accorded to successive purchasers (Switzerland) and sometimes refused (France).

(a) As to the right to payment of successive purchasers, it is sufficient that an earlier purchaser acted in good faith and was entitled to payment. The question arises of whether the right to payment of the preceding purchaser may be tranferred to a successive purchaser. Moreover, should the right to payment be calculated on the basis of the price paid by the first purchaser or that paid by a subsequent purchaser?

(b) Some legal systems exclude the transfer of the right to payment, granting it only to the person who was directly entitled to it.

(2) The right to payment under private international law in the event of a change in the applicable law (*Statutenwechsel*).

If property acquired in good faith is moved to another country with different rules governing the granting of the right to payment, the problem of the connecting factor to determine the right to payment arises. If such a right was acquired under the law formerly applicable, it will as a rule continue to exist notwithstanding any change in the applicable law arising from the transfer of the property to another country,[29] unless mandatory rules of the new law do not admit recognition of the right to payment.[30]

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(29) For a contrary opinion, see the decision of the BGH of 8.4.1987, VIII ZR 266/86. Note on this decision by STOLL, IPRax 1987, pp. 357-360.

(30) Cf. K. SIEHR, Das Lösungsrecht des gutgläubigen Käufers im Internationalen Privatrecht, Zeitschrift für vergleichende Rechtswissenschaft, 83 (1984), p. 110.

D. The importance of the right to payment for the international protection of cultural property

If one takes as a point of departure the assumption that the protection accorded under private law to acquisition in good faith of cultural property *a non domino* runs counter to the aim of the international protection of cultural property, then it is necessary to consider whether the effects of such acquisition which militate against the protection of such property, may be avoided or mitigated by the right to payment.

Existing laws or drafts may be taken as a basis for a possible solution.

(1) *The importance of the right to payment as already applied*

From the standpoint of private law rules concerning the transfer of ownership, the right to payment entails:

(a) the facilitation of the restitution of stolen, lost or missing cultural property to the former owner;

(b) an increased risk for purchasers in good faith and, in most cases, also for successive purchasers that they will not be able to retain the cultural property acquired by them;

(c) the facilitation of the restitution of cultural property which has been acquired by means of the reimbursement of the purchase price which has already been paid;

(d) an extension of the legal remedies available to the former owner in the sense that not only may he bring a claim for recovery of the cultural property, he may also obtain its restitution;

(e) the restitution of cultural property acquired in good faith even in cases where it has been moved to another country or of a change in the applicable law (*Statutenwechsel*);

(f) a reduction of the insurance risk (observations of Crewdson on the first study).

(2) *The right to payment as it might be in the future*

It is necessary to contemplate a right to payment in all those legal systems which currently acknowledge acquisition in good faith *a non domino* without at the same time admitting the right to payment, those who refuse

to recognize such a right basing their argument on the need to ensure the security and the interests of the art trade.

The legal possibilities of institutionalising the right to payment must be considered:

(a) Reform of national legal systems by the introduction of the right to payment in respect of the acquisition in good faith of movables in general.

There have been some moves towards law reform in connection with the acquisition in good faith of movables, for instance:

(i) Before 1967 *Portugal* had no tradition in regard to acquisition in good faith. The new Code has however, subject to special conditions, introduced this concept and has recognized the right to payment (cf. Chapter III, *supra*).

(ii) The *Dutch Nieuwe Bürgerlijk Wetboek* provides for the right to payment against reimbursement of the purchase price.

(iii) The *Scandinavian* draft is of particular interest. It accords a right to payment only in the event of acquisition in good faith of property which, apart from its economic value, has a purely personal value; that is to say in respect of property which is of more than pecuniary importance to the former owner or for whom the restitution or the repurchase of the property has a special significance (cf. Chapter III, *supra*).

These examples of legal innovations are intended to show that it is in principle possible to reform national legal systems in connection with the right to payment and that the question is a topical one.

A general introduction of the right to payment of the *bona fide* purchaser of all property, and not just cultural property, would have the great advantage of avoiding the need for a definition of cultural property.

(b) The establishment of a right to payment in respect only of the acquisition in good faith of cultural property.

The worldwide importance generally attached to cultural property today justifies the importance accorded to it by private law. The protection of cultural property has up to now been ensured internationally by conventions such as the 1970 UNESCO Convention and nationally by rules of public law (export prohibition laws), but with a view to a global protection it is

necessary to consider whether additional means of protection might not be devised from the angles of both private and private international law.

Moves should be made in the systems of private law towards the establishment, alongside the traditional existing categories of tangible and of intellectual property, of a new notion of "cultural property" as a *sui generis* category with legal implications.[31]

The Scandinavian draft, which has introduced the new notion of "property of more than just pecuniary value" and which acknowledges the right to payment only in cases of the acquisition of such property, affords an example which should be followed in the elaboration of a future law regarding the protection of cultural property. In this regard it is the definition of cultural property that constitutes the main difficulty in introducing a right to payment in the event of the acquisition in good faith of such property.

It has already been proposed that the criteria for such a definition be determined in accordance with a method of qualification by the various national legal systems (cf. Chapter II, *supra*). If regard were to be had to this suggestion then the relevant *lex fori* would have to be applied for the purpose of characterising property as cultural property and it would then be for the *lex fori* to decide whether or not a right to payment exists.

(3) *Limitations on the right to payment*

The right to payment is in principle related to the former owner's limited right to repurchase the property. The owner may assert his right to restitution within a fixed period and it is only during that period that the former owner's right to make payment may be exercised. On the other hand there exists during that period a right to retain the property until such time as the purchase price has been reimbursed.

The periods within which the right to restitution must be invoked differ from one legal system to another. For example in Switzerland it is five years, in the Netherlands and Sweden three, the period beginning to run from the time when the former owner no longer has the property in his possession. A lengthier period would be conducive to a more effective protection of cultural property although on grounds of legal certainty it should not exceed five years.

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(31) Cf. R. CREWDSON, Cultural Property - A Fourth Estate?, in The Law Society's Gazette, 1984, p. 126.

Finally, reference may be made to some observations on the first study in relation to the right to payment.

As to Mr Chatelain's comment, it may be recalled that the French Civil Code contains a rule on the matter and that in consequence a special rule for cultural property would not give rise to insurmountable problems.

Mr Rolland and Mr Fraoua are both sympathetic to the proposal to introduce a right to payment in connection with the international protection of cultural property, the latter however alluding to the financial difficulties which might be experienced by the poorer countries although this problem could be raised in a broader context which would also include the political aspects of such protection.

Ms Prott's reference to Article 7 (b)(ii) of the 1970 UNESCO Convention (... "paying just compensation ...") would not be of assistance in relation to the private law notion of the right to payment since, under the Convention, compensation would be paid by the State (public law).

Mr Crewdson's suggestion that regard should be had to the conditions of insurance guarantees in connection with the right to payment is certainly of great importance for cultural property.

It should once again be recalled that the right to payment, which is a familiar concept in private law and private international law, may usefully contribute to the restitution of cultural property to the former owner only in those cases where restitution is excluded by the protection accorded to *bona fide* purchasers.

CHAPTER IV

The role of mandatory rules (*loi de police*) in the international protection of cultural property

I. *General considerations*

Until now attention has been focused on the possibilities of providing international protection to cultural property on the basis of civil law, the essential point being the right to payment by the original owner of the *bona fide* purchaser.

Another possible way of bringing about the restitution of cultural property is however offered by private international law through the application of mandatory rules and in this connection it may be recalled that the first study recommended the recognition of foreign *ordre public* so as to make international *ordre public* an effective instrument of protection.(32) In accordance with present trends in private international law, this idea of international *ordre public* has been developed through mandatory rules for the protection of cultural property.

Mandatory rules, although belonging to the domain of public law, have a certain influence on private law. They are, above all, instruments of economic policy, for example rules relating to exchange controls, cartels etc.

The recognition of mandatory rules for the protection of cultural property would offer a legal solution drawn from private international law which might permit the restitution of cultural property to the original owner. The special connecting factor of private international law provided by mandatory rules for the protection of cultural property could exercise some influence on illegal traffic in the art trade, independently of cultural policy.

II. *Different aspects of mandatory rules*

Mandatory rules are in general rules of public law and are not applied under private international law, although today many exceptions are being made to the principle of the non-application of public law, the most important indeed being in connection with mandatory rules.

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(32) Cf. G. REICHELT, op. cit., p. 131.

The question of the influence of mandatory rules of public law on civil law, and in particular their effect on international contracts, stands at the crossroads of private international law and public law and presents three aspects:

- mandatory rules of the law chosen by the parties or of that which would normally be applicable to the contract;

- mandatory rules of the *lex fori* which are set up against rules of foreign law which govern the contract;

- mandatory rules of another law (that is to say neither the *lex fori*, nor the law chosen by the parties, nor yet again that which would normally govern the contract).(33)

The prevailing *doctrine* is generally speaking disposed to accept the first two types of rules, unanimity existing only in respect of the third category. It is precisely those rules which need to be considered in relation to the international protection of cultural property.

III. *Two possibilities for applying mandatory rules*

Two connecting factors are available:

- the law governing the contract, namely the *Einheitsanknüpfung*

- a special connecting factor (*Sonderanknüpfung*).

In the context of this study, the author would state her preference for the special connecting factor. According to Wengler(34) who created the concept of *Sonderanknüpfung*, it may be applied on condition that:

- the State indicates its willingness to apply the mandatory rules;

- there is a close link between the mandatory rules and the matter in hand;

- the mandatory rule is not contrary to national *ordre public*.

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(33) MARTINY, MUnchener Kommentar, on art. 12 EGBGB, paragraph 329, vol. 7.

(34) S. WENGLER, Die AnknDpfung des zwingenden Schuldrechts im IPR, Zeitschrift fDr Vergleichende Rechtswissenschaft, (1941), p. 54.

IV. *The socio-political component of mandatory rules as "Sonderanknüpfung"*

The special connecting factor was, in Wengler's opinion, originally viewed in general terms before being applied to more specific matters, although always in the context of economic policy and it is only recently that mandatory rules have been envisaged as a protective measure, for example in the field of consumer protection.

In so far as socio-political considerations have been introduced into private law, the scope of mandatory rules has been extended. It is in this way that a new kind of mandatory rule has been created and developed and, in conformity with prevailing trends, mandatory rules have also been developed with a view to the international protection of cultural property, a field which calls for the application of such mandatory rules.

For the application of such mandatory rules, it is certainly necessary for the *ordre public* to be clearly evidenced by the State which has laid down those mandatory rules.

Since the general criteria for the application of mandatory rules are insufficiently precise and developed, it is necessary, both for the international protection of cultural property and for the security of the legitimate commerce in works of art, to establish special mandatory rules. Such rules would be applied independently of the law normally applicable.

V. *The practical importance of mandatory rules for the international protection of cultural property*

(a) Hitherto, the question of the restitution of cultural property has been dealt with in a political context and in that of public law for those States which have adopted the 1970 UNESCO Convention.

The application of mandatory rules provides a new legal basis for the restitution of property to the country of origin, independently of the possible application of the UNESCO Convention which complements it, in which connection it must be stressed that the 1970 Convention is of indirect rather than immediate application.(35)

It follows from the foregoing that what is being contemplated is the application of mandatory rules with a view to the international protection of cultural property which should be directed only towards cultural property of more than just pecuniary value.

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(35) R. FRAOUA, op. cit., p. 103.

One result of this new kind of mandatory rules is a certain politicisation of private international law which reflects current trends.

(b) The application of mandatory rules would require judges to identify the various interests involved and the consequences of such application, which was not done in the case of *New Zealand v. Ortiz*[38] and, in the *Nigerian* case,[37] only in a roundabout way.

Since what is under consideration is a new type of mandatory rule, it is necessary, out of regard for private international law, to turn first to the criteria normally followed, that is to say that the State must indicate its intention to apply the mandatory rules, that they must be of relevance to the matter in hand and that they must not be contrary to national *ordre public*, with one modification however of the last requirement, namely respect for the more rigorous notion of international and not merely national, *ordre public*. Moreover, in connection with the protection of cultural property, regard must be had to "the purpose of the [mandatory rules] and the consequences of their application in reaching an appropriate solution".[38]

As an illustration of the practical importance of mandatory rules for the protection of cultural property, reference may be made to the *Danusso* case:[39] Ecuador requested the restitution of a collection of pre-Colombian artifacts which had been illegally exported from the country between 1972 and 1975 and imported to Italy by Danusso who mounted a highly successful exhibition in Milan. The Turin court acceded to Ecuador's request in recognition of that country's export prohibition law as the property in question was of great national importance, even though the 1970 UNESCO Convention had not yet entered into force. The fact that the court ought not to have accorded such extensive protection to the pre-Colombian collection in the absence of sufficient legal grounds for so doing, underlines a genuine need for establishing mandatory rules for the international protection of cultural property.

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(36) Cf. Attorney-General of New Zealand v. Ortiz and others, (1983) 2 All England Law Reports 93.

(37) Cf. G. REICHELT, op. cit., p. 91, note 21.

(38) Article 19 of the Swiss federal law on private international law of 18 December 1987 which has yet to enter into force.

(39) Tribunale di Torino, 25.3.1982, Rivista di Diritto Internazionale Privato e Processuale 1982, p. 625; see, in this regard, K. KREUZER, Ausländisches Wirtschaftsrecht vor deutschen Gerichten, Zum Einfluss fremdstaatlicher Eingriffsnormen auf private Rechtsgeschäfte, 1986, 24 FN 55.

(c) The importance of the recognition of foreign *ordre public* which was already underlined in the first study,(40) has been supported by some experts in their observations (although contested by, for example, Mr Merryman).

Mr McLachlan of the Commonwealth Secretariat has addressed this question and suggested that particular importance be attached to mandatory rules for the international protection of cultural property. The proposals submitted on this second study go in the same direction as Mr McLachlan's comments on the first study which also laid stress on the role of private international law in the protection of cultural property although this approach was rejected by other experts in their observations.

Mr Rolland and Mr Moura Ramos made reference to mandatory rules for the international protection of cultural property in the light of Article 7 of the Rome Convention on the law applicable to contractual obligations of 19 June 1980 (hereinafter referred to as "the Rome Convention").

(d) The strongest argument in favour of a legal solution is directed towards the introduction of a special connecting factor of a mandatory character for the international protection of cultural property and is based on Article 7 of the Rome Convention which provides that:

"1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

Furthermore, trends towards the application of mandatory rules in private international law are confirmed by recent codifications of private international law, for example Article 34 of the law of the Federal Republic of Germany on private international law of 27 July 1986.(41)

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(40) Cf. G. REICHELT, op. cit., p. 131.

(41) Article 34 provides that: "This sub-paragraph cannot affect the application of mandatory provisions of German law which govern the matter, whatever the law applicable to the contract".

Although the content of this article found no place in Article 7, paragraph 2 of the Rome Convention, it provides, by way of interpretation, a basis for the application of mandatory rules.

Article 19 of the very recent Swiss federal law on international private law acknowledges the application of mandatory rules on condition that it is required by "legitimate and manifestly overriding interests" (Article 19, paragraph 1). Furthermore, regard is to be had to the purpose and effects of such rules. Article 19 provides as follows:

"1. When legitimate and manifestly overriding interests in accordance with the Swiss conception of law so require, regard may be had to a mandatory provision of a law other than that designated by this law if there is a close connection between the situation under consideration and that law.

2. In determining whether regard should be had to such a provision, attention should be paid to its purpose and the consequences of its application in arriving at a proper decision in accordance with the Swiss conception of law."

If the introduction of mandatory rules for the international protection of cultural property in an international instrument is to be contemplated, then inspiration should probably be sought in Article 7 of the Rome Convention,(42) but above all in Article 19 of the Swiss federal law on international private law which refers to "legitimate and overriding interests" (paragraph 1) which constitute a new and essential feature on which stress must be laid in connection with the international protection of cultural property.

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(42) Cf. H. HANISCH, Internationalprivatrechtliche Fragen im Kunsthandel, Festschrift für Wolfram Müller-Freienfels, pp. 207-208.

CONCLUSIONS

UNESCO has requested a second study on the international protection of cultural property with reference to the rules of civil law affecting the transfer of ownership of cultural property.

It appeared from the observations of the experts consulted that the first study should be completed and the recommendations contained in Chapter V, II (A) 1 and 2 further developed. It is for this reason that only matters falling within the domain of private law and private international law have been treated, and not questions of public law such as inventories and registration.

Results

In the light of the study which has been undertaken, some main points may be made and conclusions drawn:

1. Private law regimes govern the transfer of ownership both of cultural property and other goods. In the interest of its international protection, a new *(sui generis)* category of cultural property should be contemplated, alongside the traditional distinction between tangible and intellectual property.

In this connection, one could employ the new term found in the Scandinavian draft which speaks of "property of more than just pecuniary value" since it is evident that works of art do fall within such a category.

Rules relating to the transfer of ownership of cultural property should be adapted in function of this new category of property (recovery, right to payment, acquisitive prescription, acquisition in good faith, etc.).

2. In the event of the preparation of a uniform law concerning the protection of cultural property, a universal criterion, which would stand alongside national criteria, should be developed which would be the classification of cultural property into the categories of *res commercium* and *res extra commercium*.

3. The first study was limited to consideration of the principle of good faith (Art. 7 of the draft LUAB) but that approach can no longer be maintained with the same rigidity, on the one hand because the point of departure of the work has changed and on the other so as to take account of

a number of important observations.

A uniform definition of good faith in connection with the acquisition of cultural property is scarcely possible, nor is it desirable, at this stage and should await the establishment of a new category of cultural property.

4. At present many civil law systems permit acquisition in good faith *a non domino*. The right to payment would offer a legal solution permitting the restitution of cultural property to the original owner, and in consequence such a solution would be conducive to the international protection of cultural property.

5. Furthermore, and this on the basis of private international law, consideration could be given to the introduction of a special connecting factor (*Sonderanknüpfung*) recognizing mandatory rules for the international protection of cultural property with a view to the possible restitution of the property to the country of origin.

6. The study has demonstrated the possibility of contemplating the protection of cultural property through rules of private law and of private international law, the introduction of new rules in these areas being justified in the opinion of a number of the experts consulted.

The foregoing observations, as well as the reactions of experts to the first study, would seem to warrant the continuation of work with a view to the elaboration of a new international instrument which would be desirable in a field which, at international level, calls out for improved legal protection.

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