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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

GOOD FAITH REDEFINED

A Practical Solution

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To appreciate the problem of harmonisation it is not essential to go back to the Book of Genesis and the legend of the Tower of Babel, but it helps; it reminds us that disharmony is the natural state of the law as between one jurisdiction and another, and always has been. It is therefore over-optimistic to assume a willingness on the part of sovereign states to change their laws and accede to conventions solely for the purpose of harmonisation, which can only be a means to an end, not an end in itself.

These preliminary observations spring to mind when one observes the fundamental discord which has existed for centuries between the Civil and Common law systems over the law relating to title (and in particular title to stolen goods). Where one group prefers the bona fide purchaser without notice, and the other group prefers the dispossessed original owner, how is the gulf to be bridged? Is it realistic to suppose that one or other will make a volte-face just for the sake of harmonisation?

The situation is further complicated by the variations, exceptions and special factors evolving within or introduced by the separate national jurisdictions, for example the quaint but dangerously obsolete law of "market overt" in England.

Looked at internationally in the context of Cultural Property, where the need for harmony is uniquely urgent, the general impression can only be one of hopeless and apparently insoluble muddle.

A solution must however be found, preferably one which:

- (i) leaves national legal conceptual principles intact
- (ii) is easy to implement, and
- (iii) is easy to understand.

In view of the deep divisions referred to above, a solution which leaves national concepts intact may at first sight appear to be unattainable, but if we examine where the differences lie a way of bridging the gulf may emerge.

Taking the Civil law jurisdictions first, the common fact which they all share is the objective of conferring good title on the bona fide purchaser. Differing reservations are provided from State to State for the benefit, usually within a very restricted period, of the original owner who is the victim of the theft and who may have a right of repossession during that period. The period ranges from zero in Italy to ten years from the

date of the bona fide purchase in West Germany. Repossession which causes loss to a bona fide purchaser usually carries with it the right to compensation.

Good faith itself is variously defined. The extent to which a purchaser is obliged to make enquiries, and the extent to which his good faith may be jeopardised if he deliberately fails to make enquiries are primarily matters for subjective determination or judicial precedent. Objectively, it is easier to define bad faith than good.

In Common law countries, despite intense efforts by the "museum lobby" in New York State (which have so far been limited to a 3-year limitation period from "discovery" of theft) the original owner who has done nothing to bring his title into question will retain title (in some jurisdictions indefinitely) against all subsequent holders whose claim to title is fatally flawed because it is founded on theft. There are of course exceptions, notably the English law of market overt and the New York limitation period referred to above. Nevertheless the principle is firmly adhered to in Common law jurisdictions.

As a general rule it can therefore be stated that in Civil law countries the right of the original owner to repossess is the exception. For Common law countries the right of the bona fide purchaser to retain is the exception.

It is easy to see therefore that the only scope for manoeuvre is to be found in the definition of good faith. If it is possible to identify something which if done or not done denies a purchaser the right to claim that he acted bona fide, and if the thing to be done or not done relates exclusively to Cultural Property, the effect will be to preserve the general principles relating to title of both systems, while giving greater protection to those who are rightfully in possession of works or art and antiques.

This is where we look for a mechanism which is easy to understand and easy to implement.

The principle of searching a Register is well established in many jurisdictions, in association with the related principle that failure to make a search puts the person who ought to have made the search at risk. Technically, using a computer system, such a Register can be established on an international basis for recording the theft of works of art and antiques. If this Register becomes operative (and there is good reason to believe that it soon will be, as it is currently the subject of technical study under the auspices of Lloyds of London), and is made accessible

internationally, the opportunity will have arrived to introduce the concept of obligatory search into the field of Cultural Property. More precisely, this would mean that where a stolen object is recorded on the Register of stolen works of art and antiques, and provided the Register is accessible in the country where the object has been purchased, good faith cannot be claimed by the purchaser, whether he searched the Register or not.

The implementation of such a limited change, restricted to a specific qualification of good faith, coincidental with a technological advance of great importance to all who are involved in dealings and the protection of Cultural Property, would be a truly significant step forward in harmonisation and in providing much needed security for owners, whether public or private, of art objects. While there is nothing new in the concept of legal protection by registration and registration being the equivalent of express notice of prior interest which a purchaser ignores at his peril, the novelty of this solution lies in the need to synchronise a change in the law with the commencement of a technical service (the computerised Register) which does not presently exist, and which may differ from existing registers in other fields to the extent that it may be established as a private sector initiative.

Fortunately law reform and development of computer programmes and systems both require a long gestation period which has to be reckoned in months and years rather than weeks. The objective should therefore be to put both the legal and the technological process into motion simultaneously so that the one is ready for the other. They are absolutely interdependent. The Register can only operate to the extent that it provides proper legal protection for the original owner; the law will be ineffective unless the Register functions effectively.

This is not the place to describe in detail the systems or procedures applicable to the Register, but two points should perhaps be mentioned. The first is that it will be desirable, if not necessary, to provide not only a facility to search by description, but also by an image display at least as good as a normal TV image, and this should be transmissible at speed by the appropriate telecommunication link. Secondly, it will of course be essential for all relevant data to be prepared and stored in a secure state (not necessarily on the central database) *before* a theft occurs. It may indeed become a standard condition of insurance of all art objects and antiques over a certain value that such recording is undertaken.

When a theft occurs the relevant extracts from the pre-recorded data would be supplied to the central database of the Register and would then be available for search.

Here then is a solution to the problem of title which meets the three criteria described above. It does not interfere with the basic national legal concepts because it is directed to the definition of good faith, not the rights of the bona fide purchaser; and it requires a specific mechanism i.e. the computerised Register, to make it effective. If the current study by Lloyds of London confirms that the Register is technically feasible, it is easy to implement; and no-one could deny that it is easy to understand.

If therefore the proposals described in this paper are favourably received by the distinguished company of experts attending the Colloquy, a significant step forward could be taken by incorporating into the additional protocol a provision on the following lines:

"Computerised information relating to the ownership of cultural property shall be taken into account in determining the good faith of a subsequent purchaser of such property where such information is accessible in the State in which the purchaser acquired the property".