

UNIDROIT 1989
Study LXX - Doc. 12
(Original: French)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Summary of the statement of Mr Pieter VAN NUFFEL
(observer representative of the Commission of the European Communities)
at the first session of the Unidroit study group
on the international protection of cultural property

Rome, March 1989

A. Present situation within the European Communities

Articles 30 and 34 of the EEC Treaty establish the principle of the free movement of goods within the Community. The Court of Justice has given a very broad interpretation of these articles; thus any regime of licensing of imports or exports is in principle prohibited (even the system of automatic licences). However, Article 36 of the EEC Treaty provides that Articles 30 to 34 shall not debar prohibitions or restrictions in respect of imports or exports when these are justified on the ground of "the protection of national possessions of artistic, historical or archeological value". All member States, with the exception of Denmark, have special procedures for exports while three member States (France, Italy and the United Kingdom) also recognize a right of pre-emption.

The question of whether those laws respect the limits on the freedom of the member States laid down by Articles 30 to 36 of the EEC Treaty is not easy to answer since there is no case law of the Court of Justice on the matter. The Commission is at present preparing a communication which should clarify its own interpretation of Article 36 of the Treaty in this regard.

B. The establishment of the internal market

The Single European Act has introduced a new Article 8A into the EEC Treaty. That article provides that "The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 ... The internal market shall comprise an area without internal frontiers in which the free movement of goods, services and capital is ensured in accordance with the provisions of this Treaty".

By 31 December 1992 at the latest all frontiers, or in any event all intracommunity frontier controls, will disappear. It should however be noted that when adopting the Single European Act, the member States were clearly aware that a problem could arise in connection with cultural property as they added to the Single Act a General Declaration to the effect that "Nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to control terrorism, crime, the traffic in drugs and illegal trading in works of art and antiques".

The problem is which "accompanying" measures will be necessary to permit the lifting of controls over persons and goods at intracommunity frontiers.

It should first be recalled that the member States can in principle continue to apply their existing legislation containing prohibitions and restrictions to the export of cultural property (within the limits of Article 36 of the EEC Treaty); they can no longer however proceed to physical controls at the frontier. Furthermore, regard must be had to the fact that the transfer of objects from one member State to another will no longer be considered as "exports"; customs administrations will no longer deal with such consignments. In other words, to the extent that the present regime is, in whole or in part, based on customs controls, it will become inoperative in practice and "something else" will have to be found.

The Commission is giving consideration to what that might be and to which should be the "accompanying" measures intended to produce the same effects as the existing laws relating to the protection of cultural property.

C. Initial reflections on the accompanying measures

(The following comments are of a provisional character and in no way bind the Commission of the European Communities).

(a) As regards *stolen property*, harmonisation of (civil) law could in theory be contemplated. It would however run up against problems in connection with the competence of the European Communities (Article 222 of the EEC Treaty provides that "The present Treaty shall be entirely without prejudice to the system of ownership in member States") and it should furthermore be noted that the European Communities are, in practice, largely inactive in the field of the harmonisation of civil law.

In any event, "1992" will not fundamentally alter the nature of the problem. It is true that it will be still easier than it is today secretly to move a cultural object from one member State to another, but the change will be one of degree rather than of principle. Accompanying measures will perhaps therefore not be called for.

(b) As regards *illicit export*, "1992" will certainly entail a change in the legal regime since there will in principle no longer be any "exports" within the Community, although the member States will retain the right to maintain prohibitions and restrictions. What then could be the necessary measures in this connection?

The difficulties facing the movement of the goods which arise out of the differences between the laws of the member States intended to protect, for example, the environment, human and animal health etc. are as a rule overcome either by *recognition of the rules* of other member States or by

a *harmonisation of substantive law*. The first would seem to be excluded as there are wide divergences among the laws; the second seems very difficult as the decision to consider a given object as important for a State's cultural heritage cannot easily be taken in another country even if the legal texts are uniform. Moreover, regard should be had to the political difficulties in the way of achieving harmonisation in this field.

The only practical step would therefore seem to be that of the *harmonisation of procedures*. Even if the member States were to be left free to establish their internal procedures, a decision could be taken to the effect that they should draw up the same type of document (e.g. a green or red slip, according to whether the export is permitted or not).

A clear distinction should be drawn between export to a non-Community country and transfer within the Community. In the first instance an export (from whatever member State it might be) would only be possible on presentation of a green slip. In the second it could be necessary to provide for the mutual recognition of the procedures (return of the object with a red slip or without a slip). It is evident that the principal problem would be the organisation of a system ensuring that every cultural object (or every cultural object subject to a commercial transaction or to export) would be accompanied by such a slip.