

UNIDROIT 1991
Study LXX - Doc. 21
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

OBSERVATIONS OF INTERNATIONAL ORGANISATIONS
ON THE PRELIMINARY DRAFT UNIDROIT CONVENTION
ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(Asian-African Legal Consultative Committee,
ICPO - Interpol)

Rome, April 1991

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

"The practicalities of the "fair and reasonable compensation" to be paid to the possessor of a stolen or illegally exported cultural object referred to Articles 4 and 8 of the draft constitute an obstacle, particularly for developing countries, in retrieving such objects due to their limited financial capabilities and induced flourishing business in those items.

When it comes to compensation of a possessor of a stolen object that constitutes public property of a contracting State, it is our view that the possessor should bear the burden of proving that it consulted a register of stolen cultural objects at the time of acquisition in order to qualify for compensation.

In the case of objects coming from clandestine excavations, the compensation should be assessed in the light of the actual cost of excavation and shipping but not the commercial value of the object.

As for the illegally exported items, judges should be rather restrictive in establishing and estimating compensation to possessors in order to discourage sophisticated methods of smuggling cultural objects out of developing countries which do not have adequate facilities of detection."

INTERNATIONAL CRIMINAL POLICE ORGANIZATION (INTERPOL)

GENERAL SECRETARIAT

"The study group has obviously made a laudable effort to achieve concision by limiting its objectives to two crucial subjects: the restitution of stolen cultural objects and the return of illegally exported cultural objects.

The large number of international agreements that exists on the subject of offences connected with cultural property tends to make it difficult to enforce laws covering such offences. An international convention would undoubtedly provide an effective means of ensuring that rules on this subject are harmonized.

We were particularly pleased to see the length of time allowed for submitting claims (Article 3(2) of Chapter II). The more difficult problems will, of course, arise in connection with demonstrating the good faith of the possessor of a stolen cultural object with the means he was able to use to exercise diligence when acquiring the object. We welcome the suggestion contained in Article 4(2) of the same chapter that potential purchasers should consult a register of stolen cultural objects, since we are certain that a register of this type will be established in the near future.

The General Secretariat wholeheartedly supports the undertaking and intends to make a practical contribution by proposing that Interpol's member countries adopt a recommendation, expressing their interest in the subject, at a forthcoming General Assembly session."

LEGAL DIVISION

"One of the most important legal problems faced by the international community in preventing and suppressing the illicit traffic in cultural property is the trend that has prevailed of late in most legal systems to promote trade by protecting a *bona fide* purchaser of goods for value as against a dispossessed owner. Any attempts to draft conventions that do not take into consideration such stark realities of international trade relations as the above are likely to meet with failure as evidenced by the total lack of ratifications of the European Convention on Offences relating to Works of Art adopted by the Council of Europe in 1985.

On this vexed question of reconciling the interests of a *bona fide* purchaser with those of a dispossessed owner, the two main legal systems in operation in various parts of the world, the Common Law and the Roman law-based Civil Law, have not been so divergent in practice as one is led to believe in the explanatory report of Unidroit on pages 13 and 19 of that report.

It is true that the old Common Law of England adopted a conservative stance protective of private property by sanctifying the principle of law embodied in the Latin maxim: *Nemo dat quod non habet* (i.e., "No one can give what he does not have"). In terms of trade, this meant: "If the seller's title is defective, so is the buyer's". But, as the centuries passed, this ancient legal rule, originally intended to protect owners of property, was pruned down with exceptions in order to remove legal obstacles to the free flow of trade. The result was that the Sale of Goods Act adopted by the British Parliament in the nineteenth century and extended to Commonwealth countries by separate legislation laid down that where goods are sold in market overt (this has a wide meaning: all shops in the city of London are market overt), the buyer acquires title to goods,

provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. The erosion of the old Common Law rule signified that the demands of trade and commercial convenience began to outweigh the need to protect legitimate owners of goods. The Unidroit commentary on the draft Articles 3 and 4 do not sufficiently highlight this aspect of the problem.

In Civil Law countries whose legal systems are based on the Roman Law, the principle is that possession amounts to title. But, an owner of a moveable who has been deprived of possession by a thief has a right to recover his property from the thief. This right is extinguished only after a lapse of 30 years. However, if the thief has sold the property to a *bona fide* purchaser, the owner's right of recovery is prescribed after three years. In addition, if the thief sold the property in market overt or at a public auction, the owner must reimburse to the *bona fide* purchaser the price he paid for it. It is this Civil Law position that is reflected mostly in Articles 3 and 4 of the Unidroit draft Convention.

So at the present moment, in the two principal legal systems that have influenced business transactions in many parts of the world, the *bona fide* purchaser of stolen goods sold in market overt acquires better title than the legal owner.

The Unidroit draft Convention has the merit to propose to the international community that, in regard to the purchase of stolen cultural property, the doctrine *Caveat Emptor* will be universally followed and good faith will be relevant only to obtain fair compensation for returning the property.

Besides the above comments, it may be relevant to point out that the expression "cultural objects" used in the present draft Convention might be more restrictive than the term "cultural property" used in the Unesco Convention of 1970. Furthermore, the definition of "cultural object" as given in Article 2 is too abstract to provide any practical assessment of the extent of the "objects" covered by the draft Convention.

Finally, it may be suggested that, in the choice of language and in defining key terms like "cultural property", the Unidroit draft should not follow an approach which is different from that which has already been adopted in other Conventions like the Unesco Convention of 1970 to which some 68 States are already Parties."