

THE INTERNATIONAL PROTECTION
OF ARCHAEOLOGICAL HERITAGE:
QUESTIONS OF PRIVATE INTERNATIONAL LAW
AND OF LEGAL HARMONIZATION*

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Summary: *Introduction: State Ownership and Inalienability of Archaeological Objects. I. The Ineffectiveness of the Inalienability of a Cultural Object at International Level: The Principle of Territoriality (lex rei sitae). II. The Exceptional Effectiveness of the Inalienability of a Cultural Object at International Level. III. The Need to Clarify and Harmonize National Legislations – the UNESCO/UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects. Conclusion.*

INTRODUCTION: STATE OWNERSHIP AND INALIENABILITY
OF ARCHAEOLOGICAL OBJECTS

Domestic laws generally protect archaeological finds. Many national legislations establish that cultural objects found in the subsoil are the property of the State.

This is why a majority of the Mediterranean countries has a clear and precise legislation granting a right of ownership of the State over all objects found in its subsoil.¹ Similarly the Swiss law provides, since its modification

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¹ Italy: Articles 10 and 91 of the *Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137* et art. 822 et 826 *du Codice civile*, Greece: Article 7 of the *Law No. 3028/2002 on the Protection of Antiquities and the Cultural Heritage in general*; Egypt: Article 6 of the *Law No. 117 de 1983 on the Protection of Antiquities*; Spain: Articles 40 to 45 of the *Ley 16/1985 del Patrimonio Histórico español* of 25 June 1985; Turkey: Article 5 of the *Law no. 2863 on the Protection of Natural and Cultural Properties* (with the reference of Article 773 of the *Turkish Civil Code*).

in 2003, that antiquities of scientific value are the property of the canton on whose territory they are found (Article 724(1) of the Swiss Civil Code). These objects are inalienable and imprescriptible and they cannot be acquired in good faith (Article 724(1bis) of the Swiss Civil Code).²

French law is less clear on this subject.³ The legislation of certain African States is also ambiguous with regard to the State ownership on objects originating in their territory.⁴

The question of the inalienability and its effect at the international level are addressed by the UNESCO 1970 Convention, which in its Article 13(d) provides that States undertake to “classify and declare certain cultural property as inalienable”.⁵

The main issue is that of the effectiveness of such national legislations at international level: as a matter of fact a cultural object removed from its territory may lose, through the territoriality of the laws, its inalienability (I). There are nevertheless cases where the inalienability of such an object will be taken into account through specific mechanisms of private international law (II). Moreover, a movement towards the harmonization of laws in this field seems to be taking place, which would prevent to a certain point the negative effects of the territoriality of law in this field. In this context, the recent work of UNESCO and UNIDROIT proposing model provisions in this field shall be examined (III).

I. THE *INEFFECTIVENESS* OF THE INALIENABILITY OF A CULTURAL OBJECT AT THE INTERNATIONAL LEVEL: THE PRINCIPLE OF TERRITORIALITY (*LEX REI SITAE*)

Territoriality, which leads to the application of the principle of the *lex rei sitae*, currently very widespread in comparative private international law,

² Modifications made to the Civil Code following the entry into force of the Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA), RS 444.1.

³ Article 716 of the French Civil Code and L. 531-14 ss. of Heritage Code; see Marie Cornu and Vincent Negri, *Code du patrimoine commenté*, Litec 2010, pp. 273 ss.

⁴ See for instance the Nigerian Law (Articles 41 and 51 ss of the Law no. 97-002 of 30 June 1997 regarding the protection, the conservation and relative à la protection, la conservation and the promotion of national cultural heritage) and the one of Mali (Articles 11 and 12 of the Decree no. 275/PG-RM on the regulation of archaeological excavations of 5 November 1985) according to which the ownership of the objects may be divided between private persons and the State depending on the circumstances.

⁵ Convention of 14 November 1970 concerning the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural objects (hereinafter 1970 UNESCO Convention).

often renders ineffective the inalienability of a cultural object, when such an object is acquired by a purchaser in good faith according to the law of the place where the object is brought to. Examples found in French (A), English (B) and Swiss (C) case law allow illustrate this issue.

1. *The classical example: Duc de Frias v. Baron Pichon (1885)*

This old decision of the Civil Court of the Seine of 17 April 1885⁶ dealt with the claim by the Duc de Frias for the return of a silver vase acquired by the Baron Pichon. According to Spanish law, this object, which had belonged to the Burgos cathedral, was considered inalienable.

The French Court ruled that, despite the inalienability conferred to the object by Spanish law, the Baron Pichon should be protected in his acquisition on the basis of French domestic law (Article 2279 of the French Civil Code), applicable as the law of the place where the object was located at the time of its acquisition. When he had acquired the object in France, the purchaser had taken the necessary steps to be considered a purchaser in good faith according to French law. The French Court therefore considered that Spanish law was ineffective in France and, as a result, the inalienability under Spanish law was not recognized.

2. *English case law: Winkworth vs. Christie's (1970)*

A collection of Japanese cultural objects was stolen in England and brought to Italy where it was sold to a collector who acquired it in good faith. This collector decided thereafter to put the collection up for auction at Christie's in London. The dispossessed English owner filed a claim for the restitution of these objects asserting his prior ownership.⁷

The English court decision deals with the law applicable to the restitution claim. The issue of the applicable law was in fact critical: while Italian law protects in such a case the purchaser in good faith, English law on the contrary does not allow the acquisition in good faith of stolen objects.

The English judge decided, by virtue of the principle of the *lex rei sitae*, that Italian law is applicable despite the links the case had with England. The main relevant fact was that the objects were situated in Italy when the acquisition was made by the Italian collector, which justifies the application of Italian

⁶ Tribunal civil de la Seine, 17 April 1885, J. Clunet, 1886, p. 593.

⁷ Chancery Division, 1979, 1 All ER 1121.

law to this acquisition. The rights of the Italian collector are protected, even in England, to the detriment of those of the dispossessed English owner.

3. *Swiss case law: The Indian gold coins (2005)*

A more recent decision of the Swiss Federal Court related the claim for the restitution made by India to the *Crédit Agricole Indosuez* in Geneva of two ancient gold coins minted in Hyderabad in 1613 et 1614.⁸ These coins were pledged to the bank in 1988 to secure a loan granted to two financial companies controlled by the descendant of the last Nizam of the principality of Hyderabad. India considered itself the owner of these coins since the unification of the country in 1950 and claimed their restitution from the bank. India further claimed that the coins were exported in violation of Indian legislation.⁹

The Swiss Supreme Court examined in the light of Swiss law, the question of whether India could claim title over the coins and whether the bank was in good faith when accepting the pledge over the coins.

According to the Supreme Court, the bank took the necessary steps to ensure that the creator of the pledge had the right of ownership on the gold coins. The Court considered that the bank could not be criticized for not having sought information on the conformity of the export of the coins with Indian legislation for two reasons.

First, Indian legislation prohibiting the export of antiquities is public law and, as such, it is not applicable outside the Indian territory. Second, the fact that the coins might have been illicitly exported from India has no effect on the owner's power to dispose of the objects. The Court rules therefore that even if one considered India as the owner of the objects – which was in fact disputed in the present case – Swiss law would not allow taking into account of the Indian legislation on the protection of its heritage. As a consequence, the pledge created in favor of the bank was valid.

These examples show that States often refuse to take into consideration the particular status of a cultural object when it is acquired abroad. And as far as archaeological objects are concerned, the situation is even more precarious: the law of the place of origin of an archaeological object (in particular in the case of illicit excavations) will play no role as it is simply not known to anyone.

⁸ Decision of the Federal Tribunal of 8 April 2005, ATF 131 III 418, JdT 2006 I 63.

⁹ See Marc-André Renold, *Une importante décision suisse en matière de transfert international de biens culturels: l'arrêt du Tribunal fédéral sur les pièces d'or anciennes du 8 avril 2005*; *Revue de droit unifié* XI, 2006, pp 399-404.

II. THE EXCEPTIONAL *EFFECTIVENESS* OF THE INALIENABILITY OF A CULTURAL OBJECT AT INTERNATIONAL LEVEL

There are a number of instances in which the territoriality of laws does not prevent the protection of a cultural object and its inalienability. The topical example is that of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1), however there are also bilateral agreements that allow the inalienability of a cultural object to be upheld on the basis of the law of the State of origin of the object (2). National case law also occasionally goes in this direction (3). Finally, exceptional mechanisms based on the general rules of private international law can also play a role (4).

1. *International multilateral conventions*

The 1970 UNESCO Convention does indeed encourage States “to facilitate recovery of such [inalienable] property by the State concerned in cases where it has been exported” (Article 13(d), final clause). This provision has had little effect and is rarely invoked in practice.

For its part, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects¹⁰ has had a double effect on the inalienability of archaeological objects for States that have ratified it.

First, the Convention assimilates an illegally excavated object to a stolen object “when consistent with the law of the State where the excavation took place” (Article 3(2) of the UNIDROIT Convention). The result is that for the States having ratified the Convention, an illegally excavated object is assimilated to a stolen object and can therefore not be acquired, even in good faith. This stems from the application of the other rules of the Convention, in particular Article 3(1) under which “the possessor of a cultural object which has been stolen shall return it”, whether he was in good faith or not.

Second, even where the State does not consider itself to be the owner of the illegally excavated object —an option specifically envisaged by the final words of Article 3(2) of the Convention— it may still request its return on the basis of the Convention’s specific provisions on illegally exported cultural objects (Articles 5 to 7 of the Convention). In such a case, the return will not be automatic and the State of origin is required to prove that the object’s physical conservation, its context or information relating to it

¹⁰ <http://www.unidroit.org/french/conventions/1995culturalproperty/1995culturalproperty-f.htm>. To this date, 34 States ratified the Convention; for the current state of the ratifications, see <http://www.unidroit.org/english/implement/i-95.pdf>.

is at risk of significant damage. The State may also establish that the object is of significant cultural importance to it (Article 5 of the UNIDROIT Convention). This provision allows a court which is hearing the case, if it accepts the request, to take account of the public law of the State of origin on the archaeological object and thus give effect to its rules on the inalienability and the prohibition of export.

2. *International bilateral conventions*

The taking into consideration of the rules of the State of origin of the archaeological object is possible not only under multilateral conventions such as the UNIDROIT Convention. In a number of cases bilateral agreements also allow it, such as the bilateral agreements Switzerland recently concluded with so far, Italy, Greece, Colombia and Egypt.¹¹

Thus, to take an example, the bilateral agreement between Switzerland and Italy concluded on 20 October 2006 (and in force as of 27 April 2008),¹² imposes import controls on a wide range of cultural objects, particularly antiquities. If such an object is illicitly imported into one of the two States, the other may demand its return and thus secure the application of its rules on the inalienability and the prohibition of export of objects originating in its soil.

To bring a claim for the return of objects, the co-contracting State must be able to show that the object in question falls within the ambit of such an agreement and that it is protected by its national cultural heritage legislation (Article 7 of the CPTA).¹³ Therefore, thanks to such bilateral agreements, foreign national legislation governing the export of cultural objects can be applied by the co-contracting State. Thus, bilateral agreements remedy the problem of non-recognition of foreign public law.

3. *National case law*

The decision of the English court *Government of the Islamic Republic of Iran vs. The Barakat Galleries Ltd* dealt with the claim for restitution by Iran of a collection of objects dating back to a period between 3000 BC and 2000 BC

¹¹ For an overview on the bilateral agreements concluded by Switzerland, see <http://www.bak.admin.ch/kulturerbe/04371/04377/index.html?lang=fr>.

¹² RS 0.444.145.21.

¹³ Federal Act on the International Transfer of Cultural Property of 20 June 2003 (Cultural Property Transfer Act, CPTA, RS 444.1).

and located in the Barakat Gallery in London.¹⁴ According to the Iranian State seeking their return, these objects originated from recent excavations that Iranian legislation considered illicit. The Barakat Gallery refused to consider that the provenance of the archeological objects was illegal and affirmed having bought them in good faith.

The questions that the English court raised in this case were first whether the Iranian State could avail itself of an ownership right on archaeological objects on the basis of its national legislation and, if so, whether this title would be recognized and taken into account by English courts, considering that it is based on public law.

According to the principle of the *lex rei sitae*, the judge answered the first question by applying Iranian law. After having examined relevant Iranian laws, the Court decided that the Iranian State had a right of ownership on such objects, although it was not clear whether such a right was one of actual ownership or rather a simple right of possession.

Regarding the second question, the English Court admitted that Iran's claim for return concerned the recognition of an ownership right of the State on archaeological objects which were part of its national patrimony, and not the application of foreign public law by England. Such an ownership right was to be recognized, even if the objects had never been in Iran's actual possession.

The Court adds interestingly that the recognition of Iran's ownership on such archaeological objects complies with England's desire to participate to the fight against the illicit traffic of cultural objects according to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, as well as the European Directive on the restitution of cultural objects¹⁵ and the European Regulation on the export of cultural objects.¹⁶

4. *Exceptional procedures in private international law*

There exist yet more ways of enabling rules on inalienability and export prohibition of excavated objects to be effective abroad, this time stemming from codified private international law. Two mechanisms based on the general private international law (i et ii) and a mechanism specific to cultural objects shall be explored below (iii).

¹⁴ *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd*, Court of Appeal, 2007, EWCA Civ 1374.

¹⁵ OJEC 27 March 1993, L 74/74 (the text is being revised).

¹⁶ OJEC 31 December 1992, L 391/1 (revised in the meantime).

A. *Exception clause (closer links)*

Several private international legislations provide for an exceptional application of the law of the State with which the case presents closer links. For instance, under Article 15 of the Swiss Code of Private International Law, entitled “exception clause”, a law other than the normally applicable law may be applied if “in the light of all the circumstances it is clear that the action has only a very tenuous link with that law and is far more closely related with another law”.¹⁷

The English judge who decided the *Winkworth* case asked himself whether the English law of the place of theft should not exceptionally be applied in place of the Italian law of the location of the objects at the time of the purchase; however in the final analysis his answer was negative: Italian law was genuinely more relevant than English law.

B. *Special effect of foreign mandatory provisions*

Judges have developed mechanisms that enable them to take account of foreign mandatory law in particular circumstances. For instance, the German Federal Court of Justice held that an insurance contract was invalid under German law because it concerned Nigerian statuettes illegally exported from Nigeria.¹⁸

National or even unified private international law also allow this. The Swiss Code of Private International Law provides the following in its Article 19(1): “When required by legitimate interests that are obviously preponderant according to the Swiss concept of law, a mandatory provision of a law other than that designated by the present law may be taken into consideration, if the situation concerned presents a close link with that law”.¹⁹ This provision has not until now led to the taking into consideration of rules conferring inalienability on foreign cultural objects. On the contrary, the decision on the ancient gold coins reviewed the applicability of Indian law in the

¹⁷ Federal Law on Private International Law of 18 December 1987 (RS 291).

¹⁸ BGHZ 59 p. 82 (1972).

¹⁹ Paragraph 2 of the 19 of the Swiss Code of Private International Law makes this consideration dependent on other conditions: “In judging whether such a provision should be taken into account, consideration will be given to its avowed purpose and the consequences that its application would have in order to reach a decision appropriate to the Swiss concept of the law”.

light of this provision, but it concluded that the strict conditions of Article 19 of the Swiss Code were not met in this particular case.²⁰

In conventional law, Article 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations²¹ provides a similar exception. It has not, to our knowledge, been applied with respect to cultural objects.

C. *The Belgian Code of Private International Law (2004)*

More recently, the Belgium legislator took a close interest in this issue. Indeed Article 90 of the Belgian Code of Private International Law contains the following rule:

“When an object that a State includes in its cultural heritage has left that State’s territory in a manner regarded as illicit under that State’s law at the time of its export, that State’s claim for its return is determined by the law of the said State in force at the time or, at the latter’s discretion, by the law of the State on whose territory the object is located at the time of the claim.

However, if the law of the State which includes the object in cultural heritage gives no protection to the owner in good faith, the latter may invoke the protection afforded by the law of the State on whose territory the object is located at the time of the claim”.

This provision seems to propose a very relevant and original compromise between the *lex originis* (applicable abroad if the State of origin so desires) and the protection of the purchaser in good faith who can invoke, if needed, the law of the place where the object is currently located. It is however still too early to evaluate the practical impact of this provision.

The influence of the work of the Institute of International law can be seen in this provision. Indeed, as early as 1991, the Institute had dwelt upon the law applicable to the international sale of art objects. Article 2 of the 1991 Basel Resolution provides that “the transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country”.²² This text stems from a notable debate held under the auspices of this prestigious Institute.²³

²⁰ ATF 131 III 418, discussed *supra* I.C

²¹ Official Journal L 266 of 09.10.1980

²² Yearbook of the Institute of International Law, Basel session, 1992, Vol. 64-II p. 402 ff.

²³ Yearbook of the Institute of International Law, Basel session, 1992, Vol. 64-I pp. 278 s and 64-II pp. 90 ff., rapporteur: A Ferrer-Correia.

It is worth mentioning once again the UNIDROIT Convention which, in all matters regarding the return of illicitly exported cultural objects, provides for the law of the State of origin to be taken into account (see Articles 1(b) and 5 of the UNIDROIT Convention).

III. THE NEED TO CLARIFY AND HARMONIZE NATIONAL LEGISLATIONS – THE UNESCO/UNIDROIT MODEL PROVISIONS ON STATE OWNERSHIP OF UNDISCOVERED CULTURAL OBJECTS

Careful analysis of some national and international texts and of current practice may suggest that we have perhaps reached a change of paradigm in this regard. This change, initiated together by UNESCO and UNIDROIT, could lead to the adoption of more precise national rules which could, if needed, be applied by a foreign jurisdiction.

In 2010-2011, a group of experts elaborated model provisions aiming to guide the States who are willing to adopt rules that allow a better protection of their cultural heritage, in particular of undiscovered archaeological objects.²⁴

The return and restitution committee of UNESCO,²⁵ in its recommendation of June 2010 establishing this group of experts, recalled “the importance for States which claim ownership of certain cultural objects to have a clear and precise legislation to provide a basis for an action to recover the object if it is found in another country”.²⁶ The expert group drafted model provisions which were approved the following year by the same Committee during its 17th session that took place on June 30th and July 1st, 2011.²⁷ The Unidroit Council also adopted them in 2011.

These provisions are six in total.²⁸ They propose respectively a general obligation to protect and preserve (Provision 1), a definition of undiscovered cultural object (Provision 2), a rule affirming the principle of State ownership on these objects (Provision 3) and a rule assimilating an illegally excavated object to a stolen object (Provision 4).

²⁴ Manlio Frigo, *Dispositions modèles définissant la propriété de l’Etat sur les biens culturels non découverts – Introduction*, Rev. Dr. unif. 2011, p. 1025 ff.

²⁵ Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.

²⁶ Recommendation No. 3, 16th session of the Intergovernmental Committee, Paris 2010, CLT-2010/CONF:203/COM.16/5.

²⁷ Recommendation No. 4, 17th session of the Intergovernmental Committee, Paris 2011.

²⁸ See the full text of the explanatory report with model provisions and explanatory guidelines of 29 June 2011 in: Rev. dr. unif. 2011, p. 1037 ff.

The most interesting provisions for the present purposes are Provision 5 and 6. Provision 5 supports the inalienability of archaeological objects:

The transfer of ownership of a cultural object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.

This provision is followed by Provision 6 on the international enforcement of national rules in this respect:

For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to law or licitly excavated but illicitly retained, such objects shall be deemed stolen objects.

Provision 5 can be easily understood as it stipulates the principle of inalienability. Provision 6 should be considered together with rule asserted by the 1995 UNIDROIT Convention according to which “the possessor of a cultural object which has been stolen shall return it” (Article 3(1)). It therefore implies that a State party to the Convention should automatically return an illegally excavated cultural object, whether the present possessor is in good faith or not. In this way, the status of an inalienable cultural object is clarified on the international level.

IV. CONCLUSION

We can see that a very important development is taking place. Whilst the principle of the application of the *lex rei sitae* still appears to be firmly established, hypotheses of the primacy of the inalienability of cultural objects in line with the *lex originis* are increasingly frequent. To this, one may add a clear tendency towards the harmonization of substantive rules on State ownership of undiscovered cultural objects, facilitating their consideration by a foreign judge.

The time may have come to realize that the principle contained in Article 13(d) of the 1970 UNESCO Convention (recognition abroad of regulations on the inalienability of certain cultural objects of the State of origin) is a valid and internationally enforceable one, in particular for archaeological objects.