

GENERAL ARTICLES

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Squaring the Triangle of Cultural Property Law. Seventy Years of UNIDROIT's Work

Abstract: A lot has been written about the “Eternal Triangle of Cultural Property Law”, the sale of a cultural object by a non-owner, and the innovative provisions of Article 4 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. This article aims to demonstrate how almost 70 years of UNIDROIT's work in the field have shaped the principles regulating *a non domino* sales of stolen cultural objects. The article focuses on the work conducted by UNIDROIT; from the drafting of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables to the adoption of the 1995 UNIDROIT Convention; and examines its impact on domestic legislation and case law.

Keywords: UNIDROIT, UNESCO, cultural object, due diligence, good faith

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Introduction

Stolen art cases present what might be called the “Eternal Triangle of Cultural Property Law”,¹ in which the players are the Owner, the Thief, and the *Bona Fide* Purchaser.² At the corners of the Triangle, the owner and the good faith purchaser, although not themselves in contractual privity, assert simultaneous claims to rights over the same cultural object, the concurrent discharge of which is legally impossible.³ The law is therefore called upon to resolve this conflict.

This article offers an innovative approach by analysing the extent to which – after almost 70 years of work of the International Institute for the Unification of Private Law (UNIDROIT) – it has contributed to squaring the “Triangle of Cultural Property Law” or shaping the law regarding *a non domino* sales of cultural objects across different legal systems. The article begins by taking into consideration the work conducted by UNIDROIT before the adoption of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“the UNIDROIT Convention”).⁴

In the 1950s, during the preparatory work on The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“the 1954 Hague Convention”) and its First Protocol,⁵ UNIDROIT was confronted, for the first time, with the issue of the competing rights of the owner and the good faith purchaser of an object sold *a non domino*. At the time of the preparatory work on the Convention, an early draft tentatively suggested a common-law-friendly shift of the burden of proof from the dispossessed owner to the possessor who claims her or his good faith. The proof of good faith was considered essential to receive compensation for the loss. However, at that time the international community was not ready to abandon the core principles of their legal systems in search of a compromise. After conducting a comparative legal survey, UNIDROIT reached the same conclusion in the *Remarks* they sent to the UNESCO Secretariat.

The above-mentioned discussion surrounding *a non domino* sales anticipated the debates on Article 11 of the 1974 UNIDROIT Draft Convention providing

¹ The original concept of the “Eternal Triangle of Cultural Property Law” was first introduced in the seminal paper: M. Mautner, “*The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties*,” *Michigan Law Review*” 1991, Vol. 90(1).

² M.E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, “Seattle University Law Review” 2000, Vol. 23, p. 653; John Henry Merryman in *Reversal in Two California Cases Prompt Debate on Time Limits*, “IFAR Report” 1996, Vol. 17(5), p. 4. Scholars have even talked about the “eternal rhombus of law”, where the new player is “the future generation” as the holder of interests for protecting cultural objects. A. Jagielska-Burduk, *Nabycie własności dobra kultury od nieuprawnionego: wybrane zagadnienia* [Purchase of a Cultural Object from a Non-Owner: Selected Problems], “Santander Art and Culture Law Review” 2015, Vol. 1(1), p. 129.

³ M. Mautner, *op. cit.*, p. 95.

⁴ 24 June 1995, 2421 UNTS 457.

⁵ 14 May 1954, 249 UNTS 240.

a Uniform Law on the Acquisition in Good Faith of Corporeal Movable (LUAB).⁶ In working on the LUAB, UNIDROIT defined the concept of a “legitimate sale” and found that the sole scope for manoeuvre to harmonize the laws on good faith acquisitions was to be found in the definition of *bona fide*: to identify the criteria according to which the purchaser could claim that he or she acted in good faith. Almost simultaneously, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 UNESCO Convention”),⁷ which, however, constituted a largely irrelevant contribution to the harmonization of good faith acquisition of cultural property. Despite the fact that Article 7(b)(ii) of the 1970 UNESCO Convention touches upon issues concerning the return of illegally imported objects and the compensation of the innocent purchaser, it avoided addressing private law issues. Indeed UNESCO, due to its statutory mandate, was more concerned about setting general obligations to fight the illicit trafficking of cultural objects than unifying national laws.

Finally in 1983, when UNESCO realized that the private law issues stemming from Article 7(b)(ii) could no longer be ignored, it entrusted UNIDROIT with a study concerning the main aspects of the problem. Eventually, UNIDROIT's contribution became an International Treaty – the UNIDROIT Convention. Articles 3 and 4 (on the sale of stolen cultural objects) and Articles 5 and 6 (on the sale of illegally exported cultural objects) of the UNIDROIT Convention owed much to the research already conducted by UNIDROIT in the field. In particular, Article 3 compels the restitution of any stolen cultural object, but the dispossessed purchaser who can prove her due diligence – carefully defined under Articles 4(1) and 4(4) – can invoke her right to a fair and reasonable compensation. The balanced solution enshrined in Articles 3 and 4 of the UNIDROIT Convention inspired the text of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State,⁸ and later was copied almost word for word in the text of the Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State,⁹ with the exception that they apply only to illegally exported cultural objects rather than to those stolen.

⁶ Adopted by the UNIDROIT Governing Council in 1974 and published in 1975 in the “Uniform Law Review”, Vol. os-3(1), p. 69, together with its Explanatory Report, <https://academic.oup.com/ulr/article-abstract/os-3/1/69/2565562> [accessed: 04.05.2023].

⁷ 14 November 1970, 823 UNTS 231.

⁸ OJ L 74, 27.03.1993, p. 74.

⁹ OJ L 159, 28.05.2014, p. 1; M. Schneider, *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, “Santander Art and Culture Law Review” 2016, Vol. 2(2).

Although many art-importing countries opposed the ratification of the UNIDROIT Convention, which in their view seemed to favour countries of origin, the influence of the Treaty could not be ignored. It is undeniable that the solution adopted by UNIDROIT for the restitution of stolen cultural objects sold *a non domino* – which reconciles two legal systems that appeared irreconcilable – made a fundamental contribution to the harmonization of private law on this point. First of all, many Member States of the European Union which were not parties to the UNIDROIT Convention found themselves indirectly subject to the provisions of the Convention for illegally exported cultural objects, as embodied in the text of the EU Directives that they had to implement internally.¹⁰ Secondly, some states, such as The Netherlands, Switzerland and Germany, that were already parties to the 1970 UNESCO Convention, or well advanced in the ratification process when transposing the text into their domestic rules, in particular the provisions of Article 7(b)(ii), looked to the UNIDROIT Convention for uniform, widely-accepted rules. This opened up the phenomenon known as the “UNESCO Plus” implementation of the 1970 UNESCO Convention.¹¹ Third, the “flexible” standard of due diligence¹² created by UNIDROIT – which easily adapts to any possessor of an object purchased *a non domino* and is a standard that is increased for experienced or professional purchasers, and softened for first-time buyers – influenced the case-law of both States Parties and non-parties. Italian Courts, for instance, applied the standard of Article 4 of the UNIDROIT Convention to define good faith, which is one of the constitutive elements of Article 1153 of the Italian Civil Code. The echo of the UNIDROIT’s definition also inspired the due diligence standards applied by the US Federal and New York State Courts.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

The UNIDROIT Secretariat played a key role in the preparatory work of the 1954 Hague Convention and its First Protocol. The first draft of the Convention – submitted by the Italian delegation during the Fifth UNESCO General

¹⁰ In Preamble 16 of Directive 2014/60/EU, “the Council recommended that the Member States consider the ratification of the UNESCO Convention [...] and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signed in Rome on 24 June 1995”. This paragraph was quoted in a recent decision ruling on the appeal brought by the owner of a Giotto painting against the UK’s denial of an export application to Switzerland, when the temporary export license had been already annulled by Italy. Court of Appeal, *The Queen (Kathleen Elizabeth Simonis) v. Arts Council England v. Ministero dei Beni e delle Attività Culturali e del Turismo, The Secretary of State for Digital, Culture, Media and Sport*, [2020] EWCA 374 (Civ).

¹¹ “The practice of ratifying the UNESCO Convention and implementing internal legislation according to both the UNESCO and the UNIDROIT Conventions, without adopting the latter instrument, has been called ‘the Convention of 1970 plus option’”; M. Schneider, *The 1995 UNIDROIT Convention...*, p. 157.

¹² A. Ouedraogo, *La due diligence en droit international: de la règle de la neutralité au principe general*, “Revue générale de droit” 2012, Vol. 42(2), p. 644.

Conference held in Florence in 1950 – was in fact a “product” of the UNIDROIT Secretariat. The Italian government entrusted the UNIDROIT Secretary-General Mario Matteucci, as well as UNIDROIT President Massimo Pilotti, to submit a proposal for an instrument aimed at protecting cultural property and sites *pendente bello*. The Draft prepared by UNIDROIT on behalf of the Italian Government sapiently mixed new elements with provisions already included in the Roerich Pact¹³ and the Geneva Conventions of 1949.¹⁴ The Draft introduced a new way of protecting cultural properties: they were no longer perceived as national, as had been the case under The Hague IV Convention of 1907,¹⁵ but international.¹⁶ The innovative and broad definition of “cultural property” used in the Draft appears today, in some respects, unsurpassed.¹⁷

¹³ The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, also known as the Roerich Pact, is an inter-American treaty that recognized the protection of cultural objects during armed conflicts. R. O’Keefe, *Cultural Heritage and International Humanitarian Law*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020, p. 45; L. Lixinski, *Central and South America*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook...*, pp. 902 ff.

¹⁴ Other sources of inspiration were the International Museums Office (IMO) draft international Convention for the Protection of Monuments and Works of Art in Time of War; the 1947 Inter-American Treaty of Reciprocal Assistance; and studies carried out by UNIDROIT in the previous years. M. Matteucci, *Nota sulla Convenzione per la protezione dei beni culturali in caso di conflitto armato*, “Rivista di Diritto Internazionale” 1958, Vol. 41, pp. 670-671; idem, *La protection des biens culturels en cas de conflits armés: une initiative italienne*, 1977 (unpublished), p. 3; UNESCO, *Historical Note concerning the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 1 March 1954, UNESCO Doc. CBC/7; UNESCO, *Measures for Ensuring the Co-Operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historic Sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration*, 27 March 1950, UNESCO Doc. 5C/PRG/6, pp. 2-3.

¹⁵ The 1899 Hague II Convention and the 1907 Hague IV Convention were the first multilateral treaties that addressed the conduct of land-based warfare. T. Kono (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, Martinus Nijhoff, Leiden-Boston 2010, p. 443.

¹⁶ G. Reichelt, *La protection internationale des biens culturels*, “Uniform Law Review” 1985, Vol. o.s. 13(1), p. 51. This interpretation of cultural objects as belonging to mankind inspired the doctrine of so-called “cultural internationalism”. In general, J.H. Merryman, *Cultural Property Internationalism*, “International Journal of Cultural Property” 1985, Vol. 12(1); idem, *Two Ways of Thinking about Cultural Property*, “The American Journal of International Law” 1986, Vol. 80(4), pp. 835-836.

¹⁷ The categories contained in the definition have inspired the definitions employed in almost all cultural conventions and regional instruments, albeit with one significant difference: while the 1954 Hague Convention and the UNIDROIT Convention’s definitions require no state designation of the cultural property protected by the agreement, the 1970 UNESCO Convention and the EU Directive’s definitions do so require. The reason behind such a restriction lies in the subject matter: while the 1954 Hague Convention and the UNIDROIT Convention deal with crimes like the unlawful removal of cultural property from states and from private individuals, the 1970 UNESCO Convention and the EU Directive focus on the illegal export of state-owned cultural property. K.V. Last, *The Resolution of Cultural Property Disputes: Some Issues of Definition*, in: *The Resolution of Cultural Property Disputes*, Kluwer Law International, The Hague 2004.

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The Draft 1954 Hague Convention prepared by the UNIDROIT Secretariat also contained a provision for the restitution of cultural property unlawfully removed in wartime.¹⁸ Article 12 of the October 1951 Draft prohibited any seizure, requisition, or removal of cultural property in occupied territory and ordered the restitution of those artworks that changed hands during the occupation. Exceptionally, both states and private individuals had *locus standi* in front of the competent court to bring a restitution action. A revised version of Article 12, which became Article 8 in a later draft, gave the dispossessed owner the right to recover “any cultural property [that] changed hands during an occupation” from “the person in whose possession it [wa]s found”. However, the enforcement of the common-law principle by which a person with no legal title cannot transfer it (*nemo dat quod non habet*) was immediately perceived as problematic by civil law countries that favour, to varying degrees, the good faith purchaser (*possession vaut titre*). Therefore, Article 8 reached a compromise between the two differing legal systems¹⁹ by entitling a possessor/purchaser in good faith to a fair compensation. The *praesumptio iuris tantum* that the sale of a cultural property occurred under illegal circumstances could be reversed by a possessor who could “pro[ve] that the operation in question was a regular or normal legal transaction and that no prohibition on export has been violated”.²⁰

This was the first time that an international treaty attempted to facilitate the restitution of illegally removed cultural objects by harmonizing their good faith acquisitions. The party who could successfully show its subjective good faith and its compliance with an objective good faith standard (such as the regularity of the transaction and compliance with export rules) was entitled to a just compensation. The time limitation envisaged for a restitution action was a period of five years “from the date of the cessation of the hostilities”.²¹ The drafters chose to retain a five-year limitation period from the moment when “bringing an action became possible” because they believed that a shorter period would balance the “presumption” of illegality created by the shifted *onus* and cope with

¹⁸ UNESCO, *Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 11 July 1952, UNESCO Doc. CL/656, Annex.

¹⁹ The term “differing” is preferable to “opposing” as “there are, in both systems, exceptions which make them seem not as opposed as might appear from a superficial comparison”. See M.-A. Renold, *Stolen Art: The Ubiquitous Question of Good Faith*, in: *The Resolution of Cultural Property Disputes*, Kluwer Law International, The Hague 2004, republished in: L.V. Prott (ed.), *Witnesses to History: A Compendium of Documents and Writings on the Return of Cultural Objects*, UNESCO, Paris 2009, p. 252. For the common-law exception, see M.E. Phelan, *op. cit.*, p. 654.

²⁰ UNESCO Doc. CL/561, Annex I, p. 8.

²¹ Article 8 of the Draft. The United States requested an increase in the time limitation period to meet the threshold of ten years from the time when the possession was “open and notorious”. UNESCO, *Draft Convention...*, UNESCO Doc. CL/656, Annex, p. 28. Other countries, like Belgium, pushed to delete the entire Paragraph 3. *Ibidem*, pp. 3-4.

the increasing market uncertainty with respect to cultural objects that change hands during or immediately after a war.²²

Despite the hard work, at the seventh UNESCO General Conference the United States called the Draft Convention “not effective” and suggested having the Article on restitution moved from the body of the Convention to a separate protocol. At the same time, civil law countries looked at the text with scepticism and only a few expressed their intention to ratify a Convention that contravened the fundamental principles of their legal systems.²³

To better understand the legal implications concerning the post-war restitution of cultural objects, in the fall of 1953 UNESCO instructed UNIDROIT to draw up a study on point. The study, titled *Remarks of the International Institute for the Unification of Private Law on the Restitution of Cultural Property Which Has Changed Hands During a Military Occupation* (henceforth *Remarks*) was eventually issued in December 1953.²⁴ This was the first time UNIDROIT conducted in-depth research on a *non domino* acquisitions, the restitution of stolen cultural objects, the return of those illegally exported, and on the possibility for a possessor in good faith to be compensated for her loss. In its *Remarks*, UNIDROIT discouraged the adoption of the draft Protocol as it stood, since it confused “matters entirely different in nature”. Indeed, the Protocol considered both the situation in which cultural objects change hands illegally because stolen or proceeds of a forced sale, and the case when the cultural objects are illegally exported from one state to another or regularly exported by the owner in violation of the national export rules, with the connivance of the occupying power, before being sold abroad. UNIDROIT suggested dealing with the two situations separately.

The first of the two scenarios considered by UNIDROIT concerned the restitution of stolen property, property illegally excavated, or subject to forced sales and governed by the criminal law and private law of the occupied state. UNIDROIT thought that restitution actions should be brought by either the owner deprived of the property (a private individual, a public institution, or the state itself) or any dispossessed party. The second situation concerned the return of property that crossed the state's boundaries in breach of a national export law, and UNIDROIT explained that since the interest offended was a state's interest protected by public law, only the state should have had the right to institute a proceeding for the return of the object.

²² G. Giardini, *The Principle of International Restitution of Cultural Property in the 1954 Hague Convention: the UNIDROIT Contribution*, “Uniform Law Review” 2018, Vol. 23(1), p. 65.

²³ “Il Protocollo aggiunto [...] è stato tenuto distinto dalla Convenzione, essendosi la Conferenza resa conto dei delicati problemi di diritto pubblico e privato che le norme in esso contenute sollevano”. M. Matteucci, *Nota sulla Convenzione...*, p. 675.

²⁴ UNIDROIT, *Remarks of the International Institute for the Unification of Private Law on the Restitution of Cultural Property Which Has Changed Hands During a Military Occupation*, U.D.P. 1953 - *Etudes*: XXXVIII, *Cultural Property - Document 1*, 5 March 1954, UNESCO Doc. CBC/6. See M. Matteucci, *Nota sulla Convenzione...*, p. 675.

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In a second study, titled *Brief Comparative Survey of the Legal Protection Afforded to the Holder under the Law Concerning the Transfer of Movable Property*,²⁵ UNIDROIT looked into the first situation only: the sale of stolen cultural objects. The Institute considered the presumption of illegality, placed on the cultural property holder who had to demonstrate that the purchase was “carried out without extortion or consent”, to be too heavy a burden.²⁶ Moreover, the said condition appeared too vague and UNIDROIT thought that the Protocol should define what was in fact considered to be a “legal transaction”.²⁷ UNIDROIT also took into consideration that in the art market written sales contracts were often replaced by oral agreements, and that in order to prove a sale was concluded fairly it would have been necessary to introduce “public registration of the cultural property”.²⁸ At that time states were not ready to harmonize their domestic laws regarding the *a non domino* acquisition of cultural property, thus UNIDROIT suggested suspending the project for the time being.

Following UNIDROIT’s study and various countries’ opposition, the restitution provisions did not make it to the final text of the 1954 Hague Convention and were moved to a separate, optional protocol: the First Protocol.²⁹ As predicted by UNIDROIT, the harmonization of the good faith acquisition of cultural objects and the shifting of the *onus probandi* on the possessor was perceived as highly problematic by many delegations and was deleted from the final text.³⁰

²⁵ UNIDROIT, *Brief Comparative Survey of the Legal Protection Afforded to the Holder under the Law Concerning the Transfer of Movable Property*, U.D.P. 1953 - *Etudes*: XXXVIII, *Cultural Property - Document 2*, 5 March 1954, Appendix to UNESCO Doc. CBC/6, p. 8.

²⁶ “Ce texte a été sévèrement critiqué, notamment par l’Institut International pour l’Unification du droit privé, qui a fait observer, entre autres, que le texte crée une présomption d’illégalité qui met sur le détenteur une très lourde charge de la preuve”. J.G. Sauveplanne, *Etudes XLV - Doc. 5: Les mesures protectrices relatives à la conservation des objets d’arts*, 1963, p. 2.

²⁷ UNIDROIT, *Remarks...*, UNESCO Doc. CBC/6.

²⁸ G. Reichelt, *La protection...*, pp. 42-152.

²⁹ The United States declared that rather than a compromise, the provision contravened some basic principles of both systems. G. Giardini, *op. cit.*, p. 67.

³⁰ UNIDROIT, *Remarks...*, UNESCO Doc. CBC/6, Appendix. In the end, the First Protocol, adopted by the diplomatic Conference, prevents the export of cultural objects from a territory occupied during an armed conflict (Article 1) and compels states to return, at the close of hostilities, to the competent authorities of the territory previously occupied any cultural object (not retainable as war reparation) which is in their territory and was imported during the war (Article 3). Articles 1 and 4(1) of the First Protocol also stipulate the State Parties’ obligation “to pay an indemnity to the holders in good faith” of the cultural object, which does not necessarily have to be located in the territory of a State Party. L.V. Prott, *The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954*, in: M. Briat, J.A. Freedberg (eds.), *Legal Aspects of International Trade in Art*, Kluwer Law International, The Hague 1996, p. 170; T. Kono (ed.), *op. cit.*, p. 456; G. Reichelt, *La protection...*, p. 51.

The UNIDROIT Law on the Acquisition in Good Faith of Corporeal Movable (LUAB)

Years later, in the 1970s, UNIDROIT conducted a study similar to the *Remarks* for the drafting of the LUAB. The draft LUAB was approved by the UNIDROIT Governing Council in 1974; however, it did not make the grade as an international instrument for lack of a consensus to convene a diplomatic Conference for its adoption. The LUAB refers to the two 1964 Hague Conventions on international sale,³¹ and applies to any good faith purchase for value, such as “sale, exchange, pledge, of rights in rem” of corporeal movables (Article 1). In seeking the harmonization of domestic laws on good faith acquisitions of movable property, the study group acknowledged that the only scope for manoeuvre was to be found in the definitions of a “legitimate sale” and of “good faith”. In other words, the basic idea was to identify actions which, if done or not done, would give or deny a purchaser the right to claim that she acted *bona fide* at the time of the sale. Good faith was defined as “the reasonable belief that the transferor has the right to dispose of the movables in conformity with the contract” (Article 7(1)), and the action to be considered was that of the transferee, who “must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case” (Article 7(2)). In determining the good faith of the transferee, Article 7(3) pays specific attention to “the nature of the movables concerned; the qualities of the transferor or his trade; any special circumstances in respect of the transferor’s acquisition of the movables known to the transferee; the price; and provisions of the contract and other circumstances in which it was concluded”. For a sale to be legitimate, according to Article 7 the good faith of the purchaser must exist at the time of the negotiation and conclusion of the contract (Article 9), and when the movables are handed over to the transferee even after the contract is concluded (Article 8). The Draft Convention resonated with common law legal systems, as Article 11 states that “the transferee of stolen movables cannot invoke his good faith”. In truth, the initial purpose of the Draft Convention was to favour the good faith purchaser and thus protect the interests of the market. The original title was in fact Draft Uniform Law on the Protection of the Bona Fide Purchaser of Corporeal Movable. However, some countries, and in particular the United States, were strongly against it. Therefore, when UNIDROIT convened a Committee of Governmental Experts, the Committee recommended

³¹ The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC), 1 July 1964, <https://www.unidroit.org/instruments/international-sales/ulfc-1964/> [accessed: 04.05.2023]; and the Convention relating to a Uniform Law on the International Sale of Goods (ULIS), 1 July 1964, <https://www.unidroit.org/english/conventions/1964ulis/convention-international-sale-goods1964.pdf> [accessed: 04.05.2023].

appropriate changes. The Draft Convention resulting from the revisions was published in 1975 with a changed title – the current one. Article 11, added on that occasion, reversed the position taken in the original Draft Convention. In the end, the fact that solutions were chosen from among differing legal systems (rather than seeking a compromise solution) impaired the widespread acceptance of the treaty. Reaching a compromise was not easy and some countries were not ready. Years later, the study group set up by UNIDROIT during the preparatory work of the UNIDROIT Convention noted that “legal traditions were so deep-rooted that there was little prospect of achieving a solution which had escaped the authors of the draft LUAB”; and also noted how difficult it had been to “devis[e] a uniform rule acceptable to all Parties to any future instrument [...] even if the application of that rule were to be limited to cultural objects”.³² Despite the failure to harmonize *a non domino* sales of cultural objects, the draft LUAB did clarify the meaning of a “legal transaction” – an undertaking that had garnered UNIDROIT’s attention since the time of their *Remarks*.

The wording of Article 7 of the LUAB was used as a template during the preparatory work on the UNIDROIT Convention, and was modified to take into account the special features of cultural objects. In drafting Article 4 of the UNIDROIT Convention, the experts used as a template the good faith criteria of Article 7(3) of the LUAB, which spelled out the precautions to be taken by any purchaser in accordance with the circumstances of the case.³³ The LUAB also established the basis of Article 4(4) of the UNIDROIT Convention, introducing a sort of legal test or indicator to prove whether a purchaser acted diligently at the time of the sale of cultural objects, as well as to guide a purchaser in the acquisition. The provisions of Article 7 of the LUAB also inspired the civil law rules on good faith purchases contained in an early draft of the 1985 Convention on Offences relating to Cultural Property (known as “the Delphi Convention”). Eventually however, the European Committee on Legal Co-operation suggested to eliminate those civil law provisions from the draft Delphi Convention, since it already included criminal and administrative law rules.³⁴

³² UNIDROIT, *Study LXX – Doc. 10: Summary Report on the First Session of the UNIDROIT Study Group on the International Protection of Cultural Property*, January 1989, p. 7.

³³ *Ibidem*, p. 8.

³⁴ G. Reichelt, *La protection...*, p. 63. The Convention on Offences relating to Cultural Property was opened for signature in Delphi, Greece, on 23 June 1985, but never entered into force as only six states have signed the instrument, and none have ratified it. The 2017 Council of Europe Convention on Offences relating to Cultural Property (19 March 2017, CETS 221), which opened for signature in Nicosia, Cyprus on 17 May 2017 and entered into force on 1 April 2022, supersedes and replaces the Delphi Convention. G. Reichelt, *Study LXX – Doc. 1: The Protection of Cultural Property*, December 1986, pp. 8-9.

Study Requested by UNESCO from UNIDROIT Concerning the International Protection of Cultural Property

The 1970 UNESCO Convention stemmed from the need to protect cultural property in peace time, and set up international obligations for states to draft preventive measures; to cooperate internationally to limit the illicit trafficking of art; and to return illegally removed cultural objects. The Convention is based on previous studies and, as an early report points out, the restitution pillar builds precisely on the First Protocol of the 1954 Hague Convention.³⁵ The impact that UNIDROIT's works had on the 1970 UNESCO Convention, in particular the provisions regarding the return of illegally imported cultural objects, is evident from an early draft. The old Article 10(c), now Article 7(b)(ii) of the 1970 UNESCO Convention, seemed capable of delving into private international law matters.³⁶ It originally allowed international civil claims to be filed by "the owner of the cultural property in question, his authorized agent or the State of which he is a national".³⁷ In the end, this provision regarding individual legal standing was not adopted, but – with respect to stolen cultural objects – the provision appears now in the UNIDROIT Convention.³⁸

Other private law issues concerning the good faith acquisition of cultural objects were not touched upon and they began to be perceived as weaknesses of the 1970 UNESCO Convention. The said "weaknesses" are in fact a reflection of the ontological incompetence of a public law organization to deal with matters of private law falling outside its statutory mandate.³⁹ In particular, Article 7(b)(ii) compels states to "take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned". The Article subjects the return of the cultural property (using the term "provided that") to the payment of a "just compensation" – either "to an innocent purchaser" or, alternatively, "to a person who has valid title to that property".⁴⁰ The article provides neither information regarding the applicable law, nor indications about the placement of the burden of proving the possessor's good faith (which could be

³⁵ UNESCO Executive Board, *Report on the Possibility of Drafting a Convention concerning the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 22 April 1968, UNESCO Doc. 78 EX/9.

³⁶ UNESCO, *Preliminary Draft Convention concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 8 August 1969, UNESCO Doc. SHC/MD/3, Annex, Art. 10(c). P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 2nd rev. ed., Institute of Art and Law, Bülth Wells 2007, p. 60.

³⁷ UNESCO, *Preliminary Draft Convention...*, UNESCO Doc. SHC/MD/3, Annex, Art. 10(c).

³⁸ P.J. O'Keefe, *op. cit.*, p. 60.

³⁹ M. Schneider, *The 1995 UNIDROIT Convention...*, pp. 152-154.

⁴⁰ P.J. O'Keefe, *op. cit.*

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either on the requesting party or on the holder of the cultural object). It resorts to different domestic laws, a solution that has generated uncertainty. Over the years this uncertainty was not resolved by either scholars or the international case law. Therefore, in 1983 UNESCO felt the need to commission a study to address the private law issues stemming from restitution claims and, in particular, the good faith acquisition of cultural objects under the Convention, and it entrusted UNIDROIT with the research.⁴¹

Not oblivious to the lessons learned from its *Remarks*, in the study, UNIDROIT immediately separated the restitution of stolen cultural objects from the return of those illegally exported, and dealt with the two issues in two different chapters. In December 1986, Gerte Reichelt delivered her *Study Requested by UNESCO from UNIDROIT concerning the International Protection of Cultural Property in the Light in Particular of the UNIDROIT Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable of 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.⁴² The original idea was to deliver an instrument that would take the form of an adaptation of the LUAB, but focusing only on cultural property; or a special protocol to the 1970 UNESCO Convention; or, alternatively, a new draft uniform law regulating the legal aspects of the protection and circulation of cultural property.⁴³ In the end the ideas of a special protocol or an adaptation of the LUAB were dismissed in favour of a set of uniform rules. Reichelt's study addressed, and paid particular attention to, *a non domino* sales of stolen cultural objects across different jurisdictions.⁴⁴ The drafting of special rules – as a “compromise between the [differing] principles which the majority of States would not be willing to abandon” – appeared to be the only way “of resolving the paradox existing in the field of the protection of cultural property”.⁴⁵

After Reichelt delivered her research, Richard Loewe prepared a draft Convention to submit to the study group for discussion. The study group, set up under the auspices of UNIDROIT, opted for a solution that compelled the restitution of the stolen property to its rightful owner and, at the same time, envisaged an economic compensation for any possessor who could prove her due diligence. In com-

⁴¹ The difficulties encountered by States Parties with respect to the implementation of the 1970 UNESCO Convention were discussed at the Consultation on Illicit Traffic of Cultural Property, held in Paris (UNESCO Headquarters), from 1 to 4 March 1983. M. Schneider, *The 1995 UNIDROIT Convention...*, p. 153; L.V. Prott, *UNESCO/UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, “Uniform Law Review” 1996, Vol. 1, p. 60.

⁴² G. Reichelt, *Study LXX – Doc. 1: The Protection...*

⁴³ G. Reichelt, *La protection...*, p. 105.

⁴⁴ *Ibidem*.

⁴⁵ G. Reichelt, *Study LXX – Doc. 1: The Protection...*, p. 43. See A. Schwartz, R.E. Scott, *Rethinking the Laws of Good Faith Purchase*, “Columbia Law Review” 2011, Vol. 111, p. 4, http://digitalcommons.law.yale.edu/fss_papers/4166/ [accessed: 04.05.2023].

mon law countries, “innocent purchasers of stolen artwork are exposed indefinitely to claims of true ownership. This potential liability mandates that potential buyers conduct due diligence investigations before acquiring valuable art and collectibles”.⁴⁶ The drafters sought to compensate the efforts made by any possessor who acted diligently in good faith by a fair and reasonable compensation. Instead of relying only on subjective and objective good faith as interpreted in domestic laws, UNIDROIT chose to set up a due diligence standard with *ad hoc* criteria, which if not met constitute the absence of diligence. Article 4(4) of the UNIDROIT Convention urges collectors, dealers, and auction houses to simply comply with many years of judicial admonitions, to ensure that persons who buy and sell expensive artworks on the international market take appropriate precautions against trading in stolen property.⁴⁷ The subjective good faith of Article 4(1) and the diligence standard of Article 4(4) work together as a legal test to prove whether or not the possessor is entitled to a fair and reasonable compensation.⁴⁸ Already the first draft avoided making any reference to the “good faith” of the possessor of stolen cultural objects.⁴⁹ The group of experts considered it dangerous to use a term so widely and differently interpreted in domestic laws.

The UNIDROIT Definition of Due Diligence and Its Impact

In dealing with the restitution of stolen cultural property (Chapter II), and mindful of the complexity of the laws regulating *a non domino* purchases worldwide, UNIDROIT decided the time was ripe to take the step that neither the 1954 Hague Convention protocol nor the 1970 UNESCO Convention dared to take. The UNIDROIT Convention compels the possessor of a cultural object which

⁴⁶ M.E. Phelan, *op. cit.*, p. 643.

⁴⁷ In *Menzel v. List*, when a client sued the dealer seeking damages for selling a stolen painting, the Court ruled that “the ‘potential ruin’ is not beyond the control of the seller since he can take steps to ascertain the status of title so as to satisfy himself that he himself is getting good title”. *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969). In 1976, the New York Court of Appeals called the art market “an industry whose transactions cry out for verification”. *Porter v. Wertz*, 416 N.Y.S.2d 254, 259 (N.Y. App. Div. 1979), *aff’d*, 421 N.E.2d 500 (N.Y. 1981). In 1980, the New Jersey Judge defined the art market as “the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance”. *O’Keeffe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980). In the famous *Autocephalous Greek-Orthodox Church v. Goldberg Feldman Fine Arts, Inc.*, 917 F.2d 278, 294 (7th Cir. 1990), the US Court pointed out that “those who wish to purchase an art work in the international market [...] are not without means to protect themselves. Especially when circumstances are suspicious [...] protective purchasers would do best to do more than make a few last-minute phone calls”.

⁴⁸ “[They] preferred a relatively succinct version which would explain what was meant by diligence rather than a longer formula which might create problems of interpretation”. UNIDROIT, *Study LXX - Doc. 18: Summary Report on the Third Session of the UNIDROIT Study Group on the International Protection of Cultural Property*, May 1990, p. 17.

⁴⁹ M. Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, “Uniform Law Review” 2001, Vol. 3, p. 516.

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has been stolen to return it (Article 3(1)). Contrary to the provisions of Article 11 of the LUAB (“the transferee of stolen movables cannot invoke his good faith”), the common-law-friendly provision of Article 3(1) was balanced with the possibility for the possessor of a stolen cultural property to invoke his or her good faith (Article 4(1)) in order to obtain a compensation for the loss caused by the restitution of the object. The shifting of the burden of proof was coupled with a detailed definition of good faith⁵⁰ and diligence.⁵¹ The drafters derived the innovative standard of due diligence from the United States business practice.⁵² Based on Article 4(1), the possessor must prove that she “neither knew nor ought reasonably to have known that the object was stolen”. This criterion still owes its content to the centuries-old case law on good faith behaviour. Specifically, the adverb “reasonably” evokes the “reasonable person” standard of care.⁵³ In addition to the subjective good faith of Article 4(1), the possessor should demonstrate, before the competent authority, that “[she] exercised due diligence when acquiring the object”. The diligence standard of Article 4(4) is not entirely left to the parties or to a national judge to decide, but it is unfolded in Paragraph 4 like a legal test or indicator.⁵⁴ Paragraph 4 requires general attention to “all the circumstances of the acquisition”, which is

⁵⁰ From a comparative law perspective, the Study Group noted that “in some civil law systems the principle of good faith in certain circumstances leads to the shifting of the burden of proof, in particular when the claimant is in a situation in which it would be very difficult for him to adduce proof [*probatio diabolica*]”. UNIDROIT, *Study LXX – Doc. 23: Report on the First Session of the Committee of Governmental Experts on the International Protection of Cultural Property*, July 1991, pp. 19-20; M. Schneider, *UNIDROIT Convention...*, p. 516.

⁵¹ In the drafting of international conventions and contracts there is a great variety of expressions other than “diligence”. Clauses such as “best efforts”, “reasonable care”, and “due diligence” are more likely to be found in the drafting of contracts. Some of these expressions may have specific interpretations under the particular system of law governing the contract. The term “due diligence” is frequently used to define the service and efforts expected of the person under the duty, e.g. an agent must diligently seek orders from his clients. M. Fontaine, *Best Efforts, Reasonable Care, Due Diligence et règles de l’art dans le contrats internationaux*, “Revue de droit des affaires internationales” 1988, Vol. 8, pp. 983-986 and 1015-1016.

⁵² Historically, the concept of “due diligence” first appeared in international public law in the domain of neutrality, which was linked to the *ius belli*. “La diligence a toujours été appréhendée par rapport à une norme qui constitue la mesure de conduit dans les sens de ‘regula’. On parle alors de diligence due, ou diligence requise, ou encore de la diligence raisonnée pour désigner la due diligence ou due care d’expression anglosaxonne”. A. Ouedraogo, *op. cit.*, pp. 644-645. A due diligence investigation is an appropriate investigation carried out by a potential buyer “to eliminate or at least minimize the chance that the buyer will make unpleasant discoveries after the sale has been completed” and “to confirm in advance that the buyer will receive what it believes it is purchasing”. H. Sher, *Due Diligence Investigations*, “Juta’s Business Law” 1988, Vol. 6(1), pp. 15-16.

⁵³ This notion embodies a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability. When the standard applies to a merchant, the standard of care required is increased.

⁵⁴ L.V. Prott, *Commentary on the UNIDROIT Convention*, 2nd rev. ed., Institute of Art and Law, Built Wells 2020, p. 68; eadem, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On*, “Uniform Law Review” 2009, Vol. 14(1-2).

broken down into two particular moments: the time before the sale, and the time during the sale.⁵⁵ The conduct taken by the possessor in the moments after the sale is not relevant as *mala fides* [or diligence] *superveniens non nocet*. Before the sale the potential buyer must examine the character of the seller or the intermediary; appraise the condition(s) of the object(s); and evaluate the price at which the piece was offered for sale. She should also consult any accessible register of stolen objects, and try to gather “any other relevant information and documentation” which she could reasonably obtain, including consulting accessible agencies. During the sale, the buyer must pay attention to the identity of the seller, the premises where the sale takes place,⁵⁶ and take note of any haste in conducting the sale or any lack of information. The list of *criteria* is not exhaustive, in fact the phrase: “took any other step that a reasonable person would have taken in the circumstances” lets the reasonable person decide what else could possibly be done under the circumstances.

The impact of Article 4 of the UNIDROIT Convention on the European Union secondary law

As of 2022, 63 countries are Member States of UNIDROIT, and the Member States include all European Union Member States, which contribute approximately half of UNIDROIT's regular budget, making this contribution significant for the Institute. The European Union had been and still is an important partner of UNIDROIT, and their cooperation focuses prominently on the drafting of standard-setting instruments. In 1989, the European Community participated in the preparatory work that led to the adoption of the UNIDROIT Convention. During the first session of the UNIDROIT Study Group on the International Protection of Cultural Property, the rapporteur Pieter Van Nuffel noted the presence of an “observer representative of the Commission of the European Community” in his report.⁵⁷ At that time, the European Community was moving forward towards the development of the Single European Market, which was launched on 1 January 1993. After observing

⁵⁵ The party invoking her due diligence must provide *evidence* that she took the actions listed in Article 4(4). A mere assertion on the part of the plaintiff that she did so will not – when the evidence points the other way – be sufficient, as *protestatio contra factum nihil relevant*. L.V. Prott, *Commentary...*, p. 64; eadem, *The Unidroit Convention...*, p. 219.

⁵⁶ The place where the sale takes place has always played an important role since medieval times. In old England, the Market Ouvert rule allowed the sale of stolen objects in designated markets between sunrise and sunset. The provision provided by the Sale of Goods Act of 1979 was abolished in 1995, through an amendment adopted in conjunction with the entry into force of the UNIDROIT Convention. In *Lee v. Bayes* (and *Robinson S. C.* 25 L. J. C. P. 249; 2 Jur. N. S. 1093), it was held that a market ouvert is an open public legally constituted market, where sales happen in the daylight. B. Adebisi, *Legal and Other Issues in Repatriating Nigeria's Looted Artefacts*, independently published, 2009, p. 211; L.V. Prott, *Commentary...*, p. 72.

⁵⁷ UNIDROIT, *Study LXX - Doc. 10: Summary...*, p. 18.

UNIDROIT's work, in 1989 the Commission sent a Communication to the Council of the European Communities on the protection of national treasures possessing artistic, historic or archaeological value and the "needs arising from the abolition of frontiers in 1992".⁵⁸ According to the UNIDROIT Secretariat, a draft of the UNIDROIT Convention circulated as an attachment to the said Communication. The "needs" referred to in the Communication found their *raison d'être* in Article 36 of the Treaty on the Functioning of the European Union,⁵⁹ which allows Member States to take measures to protect national interests in the form of goods when such protection is justified by general, non-economic considerations like the safeguarding of national treasures possessing artistic, historic, or archaeological value. On 9 December 1992, one month before the opening of the single market, the Council adopted Regulation (EEC) No. 3911/92 on the export of cultural goods.⁶⁰ The Regulation set up a European export licensing system for art objects, defined in the Annex to the text. In 1993, while the preparatory work for the UNIDROIT Convention was coming to a close, the new Regulation was circulated, considered, and digested by the working group convened by UNIDROIT.

Several months later, on 15 March 1993, the Council adopted Directive 93/7/EEC, which established international rules, albeit only for the return of cultural objects illegally exported from European Member States in breach of the European and national export laws. The draft UNIDROIT Convention served as a basis for the Directive 93/7/EEC. The Directive, together with the previous Council Regulation (EEC) No. 3911/92, was originally aimed at supplementing the protection afforded by fragmentary national rules before the establishment of a single European market. As such, it sought to facilitate the return of "national treasures possessing artistic, historic and archaeological value" (Article 1 and Annex) unlawfully removed from the territory of a Member State (Article 2) after 1 January 1993. Unlike the UNIDROIT Convention, Directive 93/7/EEC made no determination on the applicable law and the burden of proof (Article 9(2)). Directive 93/7/EEC also provided no definition of "due care and attention", the standard that the Court had to apply to assess whether the "careful" possessor was entitled to compensation (Article 9(1)). The standard applied by Article 9(1) of Directive 93/7/EEC was similar to the good faith of Article 6(1) and (2) ("[the possessor] neither knows nor ought reasonably to have known that the object had been illegally exported") of the UNIDROIT Convention, a standard less strict than the diligence of Article 4(4).⁶¹ The absence of a defined formulation of "due care and attention" allowed for great

⁵⁸ UNIDROIT, *Study LXX - Doc. 17: Communication from the Commission of the European Communities to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992*, December 1989.

⁵⁹ OJ C 326, 26.10.2012, p. 47.

⁶⁰ OJ L 395, 31.12.1992, p. 1.

⁶¹ M. Schneider, *UNIDROIT Convention...*; T. Kono (ed.), *op. cit.*, p. 502.

discretion on the part of the judge, who could require either the proof of diligence (or objective good faith) or subjective good faith. The influence of Article 4 of the UNIDROIT Convention on the EU regulation is even more evident in the Recast of Directive 93/7/EEC – i.e. Directive 2014/60/EU. The revised Directive takes the provisions of the UNIDROIT Convention for stolen objects, in particular those of Article 4, and extends them to (only) Member States' national treasures illegally exported from their territory. The Directive does not belong to the sphere of private law, because a claim for return is granted exclusively to Member States and in relation to objects removed in violation of a domestic administrative law. The burden of proof is allocated to the possessor, and the criteria for "due care and attention" are spelled out in the new Article 10, "taken almost word for word from Article 4(4) of the UNIDROIT Convention".⁶² The time limitation period is extended from one to three years, to mirror the provision of Article 5(5) of the UNIDROIT Convention.

The impact of Article 4 of the UNIDROIT Convention on the domestic legislation of non-party states

The innovation brought by Article 4 of the UNIDROIT Convention had an impact on the domestic laws of some civil law countries which were not parties to the treaty, but ratified the 1970 UNESCO Convention or are Member States of the EU. The Netherlands, Switzerland, and Germany, in transposing and implementing the 1970 UNESCO Convention and Directive 93/7/EEC, overcame the issues posed by the *a non domino* sale of stolen cultural objects by looking at the solution proposed by the UNIDROIT Convention. The exception to the laws regulating the sale of goods by a non-owner, which were introduced for cultural objects, marks a significant step forward in the international harmonization of *a non domino* sale of cultural objects, in line with the provisions of the UNIDROIT Convention.

In The Netherlands, Article 3:86(1) of the Dutch Civil Code⁶³ protects the good faith purchaser of an artwork sold by a person having no authority to dispose of the same. An exception is made for stolen objects (Article 3:86(3)): the owner of a stolen object can claim his property within three years of the theft.⁶⁴ Directive 93/7/EEC, inspired by the UNIDROIT Convention, imposed a revision of the system outlined in Article 3:86(1) with respect to objects illegally exported and recognized as cultural objects by The Netherlands (Article 3:86(a)).⁶⁵ In transposing the provisions of Article 7(b)(ii) of the 1970 UNESCO Convention, The Netherlands resorted in Article 3:86(b) to UNIDROIT's shifting of the burden of proof.

⁶² M. Schneider, *The 1995 UNIDROIT Convention...*, p. 161.

⁶³ *Burgerlijk Wetboek*.

⁶⁴ M. van Gaalen, A. Verheij, *The Consequences for the Netherlands of the UNIDROIT Convention*, "Art Antiquity and Law" 1998, Vol. 3(1), p. 4.

⁶⁵ *Ibidem*.

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In particular, Article 3:86(b)(2) states that the Court awarding a restitution claim “shall grant the possessor a fair compensation in accordance with the circumstances if he has observed the necessary diligence at the acquisition of the movable thing”. The article provides no definition of the “necessary diligence”, leaving the task of interpreting it to the judge. Finally, Article 3:87 imposes an obligation on the good faith purchaser to provide information on the seller, otherwise the party loses its right to invoke protection under the previous Articles (3:86, 3:86a, and 3:86b).⁶⁶ Scholars have argued that the provisions of Article 3:8 are also “derived from Article 4(4) of the UNIDROIT Convention” when referring to “the ‘character of the parties’”.⁶⁷

As for Switzerland, Article 9(5) of the Swiss Federal Act on the International Transfer of Cultural Property (CPTA)⁶⁸ orders the return of illegally imported cultural property and the payment of a compensation to the good faith purchaser.⁶⁹ Article 24 CPTA sets out the “duty of diligence” criteria,⁷⁰ and Article 16(2) CPTA imposes special obligations on “persons active in the art trade and in the auction business”. Insofar as regards good faith in the context of the purchase of artworks, the Swiss Federal Supreme Court has held that “a higher degree of diligence is required in businesses frequently encountering offers on objects of dubious origin and, consequently, facing a higher risk of deprivation”.⁷¹ The provisions of the CPTA create an *exception culturelle* – inspired by the provisions of the UNIDROIT Convention – to the rule set by Article 933 of the Swiss Civil Code (“L’acquéreur de bonne foi auquel une chose mobilière est transférée à titre de propriété ou d’autre droit réel par celui auquel elle avait été confiée, doit être maintenu dans son acquisition, même si l’auteur du transfert n’avait pas l’autorisation de l’opérer”).⁷²

⁶⁶ C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar, Cheltenham 2015, p. 97; M. Schneider, *The 1995 UNIDROIT Convention...*, p. 157.

⁶⁷ M. Schneider, *Protection and Return of Cultural Objects: The Interplay of Law and Ethics*, in: *Realising Cultural Heritage Law: Festschrift for Patrick Joseph O’Keefe*, Institute of Art and Law, Bülthel Wells 2013, p. 129.

⁶⁸ *Bundesgesetz über den internationalen Kulturgütertransfer (Kulturgütertransfergesetz, KGTG)*, 20 June 2003, AS 2005, pp. 1869 ff., as amended, implements the 1970 UNESCO Convention and the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001. M. Schneider, *Protection and Return...*, p. 129.

⁶⁹ Since 1917 the Swiss federal courts applied the general presumption of good faith pursuant to Article 3 of the Swiss Civil Code of 10 December 1907, which states that “no-one may plead good faith if to do so would be incompatible with the degree of attention the circumstances required of him”. Pierre Lalive, who took notice of that, surmised that “this may have inspired the drafters of the UNIDROIT Convention”. P. Lalive, *A Disturbing International Convention: UNIDROIT, “Art Antiquity and Law”* 1999, Vol. 4(3), p. 323.

⁷⁰ Prott refers to the articles of the Swiss law as “the test of good faith”. L.V. Prott, *The UNIDROIT Convention...*, p. 217.

⁷¹ Federal Supreme Court decisions BGE 122 III 1 E. 2 and BGE 123 II 134 E. 6, cited in: M.G. Noth, E.K. Noth, *Switzerland’s New Federal Act on the International Transfer of Cultural Property*, “Art Antiquity and Law” 2005, Vol. 10(1), p. 81.

⁷² *Schweizerisches Zivilgesetzbuch*, AS 24 233.

Stolen or lost cultural objects can therefore be claimed even after a period of five years from the theft or the loss (Article 934 of the Swiss Civil Code) if the possessor did not act in good faith at the time of the purchase.

Both The Netherlands and Switzerland signed the UNIDROIT Convention, but owing to pressure from their internal art markets have not yet ratified the instruments.⁷³ Despite the strong lobbying against ratification, Article 18 of the Vienna Convention on the Law of Treaties (1969) compels signatory states “not to defeat the object and purpose of a treaty prior to its entry into force” in particular stating that “a State is obliged to refrain from acts which would defeat the object and purpose of a treaty”.⁷⁴

In Germany, where the general rule is that a person can acquire ownership over a movable property sold by a non-owner provided that at the time of the transfer the transferee was acting in good faith (§ 932(1)-(2) of the German Civil Code, BGB)⁷⁵ and the property was not stolen or lost (§ 935 BGB); the provisions of Chapter 4 of the 2016 German Cultural Property Protection Act (CPPA)⁷⁶ on the “Requirements related to the placing on the market of cultural property” raised the level of good faith for sale of cultural objects. The CPPA is one of the so-called UNESCO Plus implementations, where Chapter 4 sets up a due diligence standard for a person who first buys, and later sells a cultural object. The CPPA states that, after making sure that the cultural object was not lost, stolen, or unlawfully excavated (Section 41(1)) and no doubt remains that none of the mentioned offences were committed (Section 41(2)), the seller of a cultural object shall comply with the general due diligence requirements of Article 41. In particular, special attention is given to the circumstances of the previous acquisition. Two red flags are listed in Section 41(2): 1) when the seller demands an extremely low price; and/or 2) when the seller demands cash payment for a price exceeding €5,000. In addition, the purchaser must gather any additional relevant information when placing the object on the market (Section 41(3)). Section 42(1) provides a detailed description of the due diligence requirements related to the placing of such an object on the market for commercial reasons. The criteria recall and extend the list of Article 4(4) of the UNIDROIT Convention. In general, the provisions of the CPPA raise the level of scrutiny and therefore the standard of good faith (“Der Erwerber ist nicht in gutem Glauben, wenn ihm bekannt oder infolge grober Fahr-lässigkeit unbekannt ist, dass die Sache nicht dem Veräußerer gehört”, § 932(2) BGB) required when buying and selling cultural objects.

⁷³ M. Schneider, *The 1995 UNIDROIT Convention...*, p. 157.

⁷⁴ 23 May 1969, 1155 UNTS 331.

⁷⁵ P. Gröschler, *L'acquisto a non domino dei beni mobili nell'ordinamento tedesco tra diritto germanico e tempi moderni*, “Cultura giuridica e diritto vivente” 2020, Vol. 7, p. 2.

⁷⁶ *Gesetz zum Schutz von Kulturgut*, 31 July 2016, Federal Law Gazette (BGBl.) Part I, p. 1914.

The impact of Article 4 of the UNIDROIT Convention on the case law of State Parties and non-parties

Among the differing legal systems which favour, to various degrees, the good faith purchaser⁷⁷ over the owner of a stolen object,⁷⁸ Article 1153 of the Italian Civil Code regulating a *non domino* sales of movable objects is placed to one “extreme [...] which offers the *bona fide* purchaser an absolute protection”.⁷⁹ There are three constitutive elements of Article 1153 of the Italian Civil Code: (1) that possession of the item is transferred to the transferee⁸⁰ (consent is necessary, but not sufficient, because the delivery of the object is necessary);⁸¹ (2) that the transferee is in good faith at the time when the possession is transferred to her, because *mala fide superveniens non nocet*;⁸² and (3) that this transfer of possession takes place by virtue of a title which is abstractly suitable for the purchase. Transferring the possession of a cultural object in Italy, therefore, could favour abusive behaviours and impair owner’s rights. It may be argued that Article 1153 of the CC creates a “congenial

⁷⁷ Article 2276 of the French Civil Code (*Code civil*) states: “(1) As far as movables are concerned, possession equals title. (2) Nevertheless, one who has lost a thing or from whom a thing has been stolen may claim back its ownership for three years following the day of its loss or theft, against the person in whose hands he finds it; that person can exercise his recourse against the person from whom he obtained it”. A similar rule is present in Article 464 of the Spanish Civil Code; Articles 930-936 of the Swiss Civil Code; and Sections 932-934 of the German Civil Code (BGB). Section 935(1) of the BGB further declares: “The acquisition of ownership under sections 932 to 934 does not occur if the thing was stolen from the owner, is missing or has been lost in any other way. The same applies where the owner was only the indirect possessor, if the possessor had lost the thing”. Similarly in Belgian, Dutch, Portuguese, Quebec, and Louisiana law. For a comparative approach between different civil law systems, see, in general, P. Gröschler, *op. cit.*; G. Magri, *L’acquisto a non domino tra diritto privato italiano e tendenze europee*, “Cultura giuridica e diritto vivente” 2020, Vol. 7; and M. Comperti, *Per una diversa lettura dell’articolo 1153 cod. civ. a tutela dei beni culturali*, in: *Scritti in onore di Luigi Mengoni*, Vol. 1, Giuffrè, Milano 1995, pp. 399 ff.

⁷⁸ The Sale of Goods Act 1979 c. 54, section 21(1). The Act contains the general rule in England and Wales, that: “subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell”. D. Fincham, *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, “Syracuse Journal of International Law and Commerce” 2010, Vol. 37(2), p. 163. In addition to common law systems, this category also includes civil law countries that favour the owner’s “unconditional recovery” of the object, such as Norway, Denmark, and Iceland. P. Gröschler, *op. cit.*; M. Cenini, *Gli acquisti a non domino*, Giuffrè, Milano 2009, pp. 29 ff.

⁷⁹ G. Reichelt, *La protection...*, p. 119; T. Szabados, *In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications*, “International Journal of Cultural Property” 2020, Vol. 27(3), p. 325.

⁸⁰ “The moment of the purchase is decisive”. R. Sacco, R. Caterina, *Il possesso*, 3rd ed., Giuffrè Editore, Milano 2014, pp. 439 ff.

⁸¹ *Ibidem*.

⁸² “At that moment, the transferee should not have ‘knowledge of the infringement of another’s right’”. *Ibidem*.

place” for buying stolen cultural objects.⁸³ What is an Italian domestic concern becomes international in international cases where Italian law is found to be applicable.⁸⁴ The diversity in legal systems and conflict-of-law rules allow for both “forum shopping” and “law shopping”. Since a reform of the Italian Civil Code, or of Legislative Decree No. 42 of 22 January 2004 (Code of Cultural Heritage and Landscape or CCHL)⁸⁵ is still not in sight, Italian Courts are left with two options: to limit the enforcement of Article 1153 of the Italian Civil Code in domestic and international cases; or to raise the good faith threshold, one of the structural elements of such provision, and, if it is the case, decline its applicability. In a recent decision, the Italian Supreme Court, called upon to interpret the good faith necessary for perfecting an *a non domino* sale, applied the good faith and the diligence of Article 4 of the UNIDROIT Convention with “a declared hermeneutical purpose” to guide the reasoning.⁸⁶ The Court considered the subjective good faith and the due diligence of a dealer specialized in the sale of pre-Columbian artefacts and tapestries in the light of Article 4(1) and (4) of the UNIDROIT Convention. It first considered the character of the party (“qualità soggettiva”) to determine the subjective good faith and the level of diligence expected from “one of the major ancient tapestry experts, a dealer, a promoter of cultural initiatives in that specific sector”.⁸⁷ For the Court, a person so well educated in ancient tapestry art, like the dealer, must immediately have known what he was buying, and, therefore, under the circumstances, it was impossible to talk about the subjective good faith of the dealer. The Court ended up resorting to a dynamic where good faith, which adapts to different types of art buyers, is no longer presumed, and requires the possessor to prove his or her compliance with Article 4(4) of the UNIDROIT Convention.⁸⁸

Similarly, in the US both Federal and State Courts have interpreted the due diligence standard in *a non domino* sales as a shifting standard: the more qualified

⁸³ T. Szabados, *op. cit.*, pp. 342-344.

⁸⁴ In *Winkworth v. Christie Manson and Woods Ltd.* [1980] 1 ER (Ch) 496, involving the determination of the ownership over a collection of Japanese paintings stolen in the UK and sold in Italy, the English Court applied Article 1153 of the Italian Civil Code and ruled in favour of the good faith purchaser. In 1982, the Tribunal of Turin applied Article 1153 of the Italian Civil Code and ruled in favour of the good faith purchaser of tapestries stolen from the Palace of Justice in Riom, France and sold *a non domino* in Italy. *Trib. Torino, 25 marzo 1982*, “Rivista di diritto internazionale privato e processuale” 1982, pp. 625 ff.

⁸⁵ *Decreto Legislativo 22 gennaio 2004, n. 42: Codice dei beni culturali e del paesaggio*, Gazzetta Ufficiale No. 45.

⁸⁶ Supreme Court of Cassation (Italy), 2nd Civil Section, Judgment No. 5349 of 18 February 2022. For an analysis of the case, see G. Giardini, *Taming the Italian ‘Trojan Horse’: The a non domino Sales of Cultural Objects*, “Uniform Law Review” 2023, Vol. 28(1), pp. 1-19.

⁸⁷ *Ibidem.*

⁸⁸ This interpretation is consistent with that of Article 4 of the UNIDROIT Convention given by Italian Law No. 213 of 7 June 1999. R. Rossi, *Due Diligence in the Acquisition of Cultural Objects*, “Uniform Law Review” 2015, Vol. 20(4), pp. 656-658.

the buyer, the higher the standard.⁸⁹ In *United States v. 10th Century Cambodian Sandstone Sculpture*, the Court was appalled that Sotheby's – an auction house claiming to have “unparalleled experience in the field of Indian and Southeast Asian Art” – authorized the sale of a Cambodian statute even though it had come from an area of widely publicized looting and the statue itself showed unmistakable signs of looting.⁹⁰ Under United States' federal law, “due diligence” reflects the provisions of Article 4(4) of the UNIDROIT Convention as well as New York's “reasonable inquiry” case law,⁹¹ and emphasizes that certain events will heighten the judicial scrutiny of a buyer, a dealer, and a collector's due diligence. Such triggering events include civil unrest in the country of origin; wide-spread looting in the source area of the antiquities; opaque or murky histories of such antiquities; and false, inconsistent, or misleading provenance (ownership history) about those antiquities.

Conclusions

Reconciling the different interests in play in the Eternal Triangle of Cultural Property Law through uniform rules has been haunting the dreams of international legal scholars for almost a century. The works of UNIDROIT in the international sale of goods significantly contributed – already at the time of the drafting of the First Protocol of the 1954 Hague Convention – to the harmonization of national private laws on point. The *Remarks* and the *Comparative Survey* published by UNIDROIT

⁸⁹ In favour, N.Y. County District Attorney's Office, Michael Steinhardt's Statement of Fact, 6 December 2021; *contra*, *Republic of Turkey v. Christie's Inc.*, 17 Civ. 3086 (AJN) (S.D.N.Y. 2021), 36-37; and *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (2d Cir. N.Y. 2010).

⁹⁰ 2013 U.S. Dist. LEXIS 45903, 7 (S.D.N.Y. 2013). Before the entry into force of the UNIDROIT Convention, in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278, 294 (7th Cir. 1990), the Court awarded stolen Byzantine mosaics to Cyprus, stressing that anyone buying art work, especially from war- or strife-torn countries of origin “can (and probably should) take steps such as a formal [International Foundation for Art Research] search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title [...] and the like”. P. Gerstenblith, *Art, Cultural Heritage, and the Law*, Carolina Academic Press, Durham, NC 2018, p. 652; M.E. Phelan, *op. cit.*, pp. 715-727.

⁹¹ §165.55 of the New York Penal Code does not define “reasonable inquiry”. No New York courts have addressed it in the context of a case involving cultural objects. Nevertheless, the Court noted that the concept has been applied in other contexts when a defendant failed to make a reasonable inquiry under PL §165.55. It cited cases wherein an auto-parts business made no inquiry into the ownership of the parts purchased and prepared “no internal documentation of the purchase”. *People v. Agnello*, 178 A.D. 2d 414, 416 (2d Dep't 1991); a purchaser bought goods under suspicious circumstances and failed to turn over business records during the criminal investigation. *People v. Grossfeld*, 216 A.D. 2d 319 (2d Dep't 1995); a horse dealer did not “ask for registration papers [...] obtain a receipt for the purchase [or] record the names of the [...] sellers”. *People v. Landfair*, 191 A.D. 2d 825, 827 (3d Dep't 1993); and a jewellery dealer “failed to take any steps to reasonably ascertain that the person from whom he obtained the stolen jewelry [...] had legal title to it”. *People v. Reichbach*, 131 A.D. 2d 515, 516 (2d Dep't 1987). L. DuBoff, M.D. Murray, *Art Law. Cases and Materials*, 2nd ed., Aspen Publishing, Frederick, MD 2018.

highlighted the thorny problems of public and of private law associated with the subject matter, and were used as an inspiration for future works. Years later, the adoption of the 1970 UNESCO Convention and the simultaneous failure of the LUAB made it evident that while states were not ready to reach a compromise in the field of *a non domino* sales for most kinds of objects, they could make an exception for cultural objects: an *exception culturelle*. After all, the High Contracting Parties of the 1954 Hague Convention already unanimously confirmed that a cultural object is of the utmost importance to mankind and needs to be given adequate protection.

With this in mind, the drafters of the UNIDROIT Convention attempted to introduce at least a common denominator in *a non domino* sale of stolen cultural objects: a mandatory restitution provision for stolen objects, coupled with the possibility for the dispossessed holder to prove her due diligence in court in order to obtain a compensation for her loss. The standard envisaged, which imposes a due diligence investigation on the side of the purchaser, appears fair to both the victims of thefts and to good faith purchasers. It rewards a comprehensive investigation and promotes commercial certainty. Moreover, in a world where a cultural object is ever more seen or intended as a financial asset, attorneys, art advisories, and institutional fiduciaries that advise wealthy collectors and investors in their estate planning owe their clients a thorough investigation of the provenance of their objects of desire and/or their investments. The same degree of intensive investigation for expensive artworks coincides with the fiduciary responsibilities of both state-owned or tax-exempt museums or public cultural institutions as public trustees; and collectors or art purchasers themselves who often end up donating artworks in order to obtain tax benefits.

UNIDROIT's studies – which resulted from almost 20 years of preparatory work – and the innovations brought about by the final text of the UNIDROIT Convention on the harmonization of *a non domino* sales of cultural objects – influenced the EU legislation and led to domestic adoptions of the so-called “UNESCO Plus” implementation of the 1970 UNESCO Convention. In instances where governments and law-makers were not brave enough to embrace the shifting of the burden of proof, the compensation provision, and the due diligence standard set up by UNIDROIT, courts have started looking beyond national borders and applying the UNIDROIT's solutions even to national art sales. The path towards harmonization remains a long and bumpy road, but the UNIDROIT Convention seems to have found its way into national experiences and case law.

References

Adebiyi B., *Legal and Other Issues in Repatriating Nigeria's Looted Artefacts*, independently published, 2009.

Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278, 294 (7th Cir. 1990).

GENERAL ARTICLES

Giuditta Giardini

- Autocephalous Greek-Orthodox Church v. Goldberg Feldman Fine Arts, Inc.*, 917 F.2d 278, 294 (7th Cir. 1990).
- Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (2d Cir. N.Y. 2010).
- Bundesgesetz über den internationalen Kulturgütertransfer (Kulturgütertransfergesetz, KGTG)* [Swiss Federal Act on the International Transfer of Cultural Property], 20 June 2003, AS 2005, pp. 1869 ff., as amended.
- Bürgerliches Gesetzbuch* [German Civil Code].
- Burgerlijk Wetboek* [Dutch Civil Code].
- Cenini M., *Gli acquisti a non domino*, Giuffrè, Milano 2009.
- Code civil* [French Civil Code].
- Codice civile* [Italian Civil Code].
- Comporti M., *Per una diversa lettura dell'articolo 1153 cod. civ. a tutela dei beni culturali*, in: *Scritti in onore di Luigi Mengoni*, Vol. 1, Giuffrè, Milano 1995.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.
- Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.
- Council of Europe Convention on Offences relating to Cultural Property, 19 March 2017, CETS 221.
- Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1.
- Court of Appeal, *The Queen (Kathleen Elizabeth Simonis) v. Arts Council England v. Ministero dei Beni e delle Attività Culturali e del Turismo, The Secretary of State for Digital, Culture, Media and Sport*, [2020] EWCA 374 (Civ).
- Criminal Tribunal of Pesaro, Order No. 35-2016 of 8 June 2018.
- Decreto Legislativo 22 gennaio 2004, n. 42: Codice dei beni culturali e del paesaggio* [Legislative Decree No. 42 of 22 January 2004: Code of Cultural Heritage and Landscape], *Gazzetta Ufficiale* No. 45.
- Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast), OJ L 159, 28.05.2014, p. 1.
- Draft Convention Providing a Uniform Law On the Acquisition in Good Faith of Corporeal Movables, "Uniform Law Review" 1975, Vol. os-3(1).
- DuBoff L., Murray M.D., *Art Law. Cases and Materials*, 2nd ed., Aspen Publishing, Frederick, MD 2018.
- Fincham D., *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, "Syracuse Journal of International Law and Commerce" 2010, Vol. 37(2).
- Fontaine M., *Best Efforts, Reasonable Care, Due Diligence et règles de l'art dans le contrats internationaux*, "Revue de droit des affaires internationales" 1988, Vol. 8.
- Gerstenblith P., *Art, Cultural Heritage, and the Law*, Carolina Academic Press, Durham, NC 2018.
- Gesetz zum Schutz von Kulturgut* [Cultural Property Protection Act], 31 July 2016, Federal Law Gazette (BGBl.) Part I, p. 1914.

- Giardini G., *Taming the Italian 'Trojan Horse': The a non domino Sales of Cultural Objects*, "Uniform Law Review" 2023, Vol. 28(1).
- Giardini G., *The Principle of International Restitution of Cultural Property in the 1954 Hague Convention: the UNIDROIT Contribution*, "Uniform Law Review" 2018, Vol. 23(1).
- Gröschler P., *L'acquisto a non domino dei beni mobili nell'ordinamento tedesco tra diritto germanico e tempi moderni*, "Cultura giuridica e diritto vivente" 2020, Vol. 7.
- Jagielska-Burduk A., *Nabycie własności dobra kultury od nieuprawnionego: wybrane zagadnienia* [Purchase of a Cultural Object from a Non-Owner: Selected Problems], "Santander Art and Culture Law Review" 2015, Vol. 1(1).
- Kono T. (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, Martinus Nijhoff, Leiden–Boston 2010.
- Lalive P., *A Disturbing International Convention: UNIDROIT*, "Art Antiquity and Law" 1999, Vol. 4(3).
- Last K.V., *The Resolution of Cultural Property Disputes: Some Issues of Definition*, in: *The Resolution of Cultural Property Disputes*, Kluwer Law International, The Hague 2004.
- Lee v. Bayes* (and Robinson S. C. 25 L. J. C. P. 249; 2 Jur. N. S. 1093).
- Lixinski L., *Central and South America*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020.
- Magri G., *L'acquisto a non domino tra diritto privato italiano e tendenze europee*, "Cultura giuridica e diritto vivente" 2020, Vol. 7.
- Matteucci M., *La protection des biens culturels en cas de conflits armés: une initiative italienne, 1977* (unpublished).
- Matteucci M., *Nota sulla Convenzione per la protezione dei beni culturali in caso di conflitto armato*, "Rivista di Diritto Internazionale" 1958, Vol. 41.
- Mautner M., *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, "Michigan Law Review" 1991, Vol. 90(1).
- Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969).
- Merryman J.H., *Cultural Property Internationalism*, "International Journal of Cultural Property" 1985, Vol. 12(1).
- Merryman J.H., *Two Ways of Thinking about Cultural Property*, "The American Journal of International Law" 1986, Vol. 80(4).
- N.Y. County District Attorney's Office, Michael Steinhardt's Statement of Fact, 6 December 2021.
- Noth M.G., Noth E.K., *Switzerland's New Federal Act on the International Transfer of Cultural Property*, "Art Antiquity and Law" 2005, Vol. 10(1).
- O'Keefe P.J., *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 2nd rev. ed., Institute of Art and Law, Built Wells 2007.
- O'Keefe R., *Cultural Heritage and International Humanitarian Law*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020.
- O'Keefe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980).
- Quedraogo A., *La due diligence en droit international: de la règle de la neutralité au principe general*, "Revue générale de droit" 2012, Vol. 42(2).

GENERAL ARTICLES

Giuditta Giardini

- People v. Agnello*, 178 A.D. 2d 414, 416 (2d Dep't 1991).
- People v. Grossfeld*, 216 A.D. 2d 319 (2d Dep't 1995).
- People v. Landfair*, 191 A.D. 2d 825, 827 (3d Dep't 1993).
- People v. Reichbach*, 131 A.D. 2d 515, 516 (2d Dep't 1987).
- Phelan M.E., *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, "Seattle University Law Review" 2000, Vol. 23.
- Porter v. Wertz*, 416 N.Y.S.2d 254, 259 (N.Y. App. Div. 1979), *aff'd*, 421 N.E.2d 500 (N.Y. 1981).
- Prott L.V., *Commentary on the UNIDROIT Convention*, Institute of Art and Law, Buih Wells 2nd rev. ed. 2020.
- Prott L.V., *The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954*, in: M. Briat, J.A. Freedberg (eds.), *Legal Aspects of International Trade in Art*, Kluwer Law International, The Hague 1996.
- Prott L.V., *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On*, "Uniform Law Review" 2009, Vol. 14(1-2).
- Prott L.V., *UNESCO/UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, "Uniform Law Review" 1996, Vol. 1.
- Reichelt G., *La protection internationale des biens culturels*, "Uniform Law Review" 1985, Vol. o.s. 13(1).
- Reichelt G., *Study LXX – Doc. 1: The Protection of Cultural Property*, December 1986.
- Renold M.-A., *Stolen Art: The Ubiquitous Question of Good Faith*, in: *The Resolution of Cultural Property Disputes*, Kluwer Law International, The Hague 2004.
- Republic of Turkey v. Christie's Inc.*, 17 Civ. 3086 (AJN) (S.D.N.Y. 2021).
- Reversal in Two California Cases Prompt Debate on Time Limits*, "IFAR Report" 1996, Vol. 17(5).
- Roodt C., *Private International Law, Art and Cultural Heritage*, Edward Elgar, Cheltenham 2015.
- Rossi R., *Due Diligence in the Acquisition of Cultural Objects*, "Uniform Law Review" 2015, Vol. 20(4).
- Sacco R., Caterina R., *Il possesso*, 3rd ed., Giuffrè Editore, Milano 2014.
- Sauveplanne J.G., *Etudes XLV – Doc. 5: Les mesures protectrices relatives à la conservation des objets d'arts*, 1963.
- Schneider M., *Protection and Return of Cultural Objects: The Interplay of Law and Ethics*, in: *Realising Cultural Heritage Law: Festschrift for Patrick Joseph O'Keefe*, Institute of Art and Law, Buih Wells 2013.
- Schneider M., *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, "Santander Art and Culture Law Review" 2016, Vol. 2(2).
- Schneider M., *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, "Uniform Law Review" 2001, Vol. 3.
- Schwartz A., Scott R.E., *Rethinking the Laws of Good Faith Purchase*, "Columbia Law Review" 2011, Vol. 111, http://digitalcommons.law.yale.edu/fss_papers/4166/ [accessed: 04.05.2023].
- Schweizerisches Zivilgesetzbuch* [Swiss Civil Code], AS 24 233.
- Sher H., *Due Diligence Investigations*, "Juta's Business Law" 1988, Vol. 6(1).
- Supreme Court of Cassation (Italy), 2nd Civil Section, Judgment No. 5349 of 18 February 2022.

- Supreme Court of Cassation (Italy), 3rd Penal Section, Judgment No. 22 of 30 November 2018.
- Supreme Court of Cassation (Italy), 3rd Penal Section, Judgment No. 42458 of 22 October 2015.
- Szabados T., *In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications*, "International Journal of Cultural Property" 2020, Vol. 27(3).
- The Sale of Goods Act 1979 c. 54.
- Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.
- Trib. Torino, 25 marzo 1982*, "Rivista di diritto internazionale privato e processuale" 1982.
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.
- UNESCO, *Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 11 July 1952, UNESCO Doc. CL/656.
- UNESCO, *Historical Note concerning the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 1 March 1954, UNESCO Doc. CBC/7.
- UNESCO, *Measures for Ensuring the Co-Operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historic Sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration*, 27 March 1950, UNESCO Doc. 5C/PRG/6.
- UNESCO, *Preliminary Draft Convention concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 8 August 1969, UNESCO Doc. SHC/MD/3, Annex.
- UNESCO Executive Board, *Report on the Possibility of Drafting a Convention concerning the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 22 April 1968, UNESCO Doc. 78 EX/9.
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.
- UNIDROIT Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC), 1 July 1964, <https://www.unidroit.org/instruments/international-sales/ulfc-1964/> [accessed: 04.05.2023].
- UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (ULIS), 1 July 1964, <https://www.unidroit.org/english/conventions/1964ulis/convention-international-sale-goods1964.pdf> [accessed: 04.05.2023].
- UNIDROIT, *Brief Comparative Survey of the Legal Protection Afforded to the Holder under the Law Concerning the Transfer of Movable Property, U.D.P. 1953 - Etudes: XXXVIII, Cultural Property - Document 2*, 5 March 1954, Appendix to UNESCO Doc. CBC/6.
- UNIDROIT, *Remarks of the International Institute for the Unification of Private Law on the Restitution of Cultural Property Which Has Changed Hands During a Military Occupation, U.D.P. 1953 - Etudes: XXXVIII, Cultural Property - Document 1*, 5 March 1954, UNESCO Doc. CBC/6.
- UNIDROIT, *Study LXX - Doc. 10: Summary Report on the First Session of the UNIDROIT Study Group on the International Protection of Cultural Property*, January 1989.
- UNIDROIT, *Study LXX - Doc. 17: Communication from the Commission of the European Communities to the Council on the Protection of National Treasures Possessing Artistic, Historic*

GENERAL ARTICLES

Giuditta Giardini

or Archaeological Value: Needs Arising from the Abolition of Frontiers in 1992, December 1989.

UNIDROIT, *Study LXX – Doc. 18: Summary Report on the Third Session of the UNIDROIT Study Group on the International Protection of Cultural Property*, May 1990.

UNIDROIT, *Study LXX – Doc. 23: Report on the First Session of the Committee of Governmental Experts on the International Protection of Cultural Property*, July 1991.

United States v. 10th Century Cambodian Sandstone Sculpture, 2013 U.S. Dist. LEXIS 45903, 7 (S.D.N.Y. 2013).

van Gaalen M., Verheij A., *The Consequences for the Netherlands of the UNIDROIT Convention, "Art Antiquity and Law"* 1998, Vol. 3(1).

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

Visconti A., *Problemi e prospettive della tutela penale del patrimonio culturale*, Giappichelli, Torino 2023.

Winkworth v. Christie Manson and Woods Ltd. [1980] 1 ER (Ch) 496.