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INTERVIEWS

Erika Bochereau* talks to Alicja Jagielska-Burduk** and Andrzej Jakubowski***

Challenges and Prospects for the Art Market Vis-à-vis the Evolving EU Regime for Counteracting Illicit Trade in Cultural Objects

Alicja Jagielska-Burduk (AJB) and Andrzej Jakubowski (AJ): We would like to thank you very much for taking the time to talk to us. The last two years have been a difficult but interesting time for the global and European art market.

* **Erika Bochereau** is Secretary General of the International Federation of Art and Antique Dealer Associations (CINOA).

Established in 1935, CINOA is the principal international confederation of Art & Antique art market professional associations. Affiliated dealers from 30 leading associations cover a wide array of specialties, from antiquities to contemporary art. CINOA's associate members include leading associations of auction houses and the International League of Antiquarian Booksellers (ILAB), which alone represents an additional 22 book seller associations. CINOA, and all of its member organizations, have a strict application process to ensure acceptance of only peer-vetted art professionals that have established businesses, reputable galleries, and/or practices. CINOA-affiliated groups abide by a high standard of business practices and codes of ethics which include strict due diligence. During the past nearly 70 years, dealers have been changing their practices to abide by biodiversity, cultural property, and heritage legislation. The CINOA Code of Conduct is updated regularly to reflect these changes. The vast majority of CINOA's members are businesses of four people or less who work hard to cultivate their clientele: http://www.cinoa.org. UNESCO uses the term partnership for very specific relationships. I don't think we can keep this sentence.

** **Alicja Jagielska-Burduk** is Editor-in-chief of the "Santander Art and Culture Law Review" (SAACLR) and the holder of the UNESCO Chair in Cultural Property Law at the University of Opole.

*** **Andrzej Jakubowski** serves as SAACLR Deputy Editor-in-chief and Leader of the project "Legal Forms of Cultural Heritage Governance in Europe – A Comparative Law Perspective", No. UMO-2019/35/B/HS5/02084, financed by the National Science Centre (Poland).

The present interview was undertaken within the framework of this research project.

AJB: The recent Art Basel UBS mid-year review 2021 has reported a significant increase in art sales, while businesses still experience a downsize in their workforce. What is your view on the situation of the global art market in the post-pandemic reality?

Erika Bochereau (EB): The buying public has never been in a better position for buying art, or things such as antiques, antiquities, tribal art, etc. There are several reasons for this. Prices have become less inflationary as dealers are more concerned with diminishing their inventory rather than adding to it and thus are re-stocking far less than in pre-pandemic times. Indeed, many gallerists and private dealers are more interested than ever in reducing stock because of the uncertainty of the future, which can lead to lower prices and higher turnover. Many galleries are less inclined to have standard opening hours, allowing for a reduction in staff and more private appointments, which in turn are likely more productive. Larger galleries are in a similar position. The desirability of large shows, important as they are, has been diminished by the pandemic protocols. Staff personnel will inevitably decline in such a situation.

AJB: How has the CINOA been affected by COVID-19 in terms of its everyday functioning? Given that the Board Members are from different countries, I presume that shifting to online communication was not new to the Federation. However, we would like to ask how it influenced the statutory activities, such as the annual general meeting organization and communications?

EB: CINOA has member organizations located through Europe, North America, and Australia. We have always worked using online communications; however our AGM and at least two Board meetings a year have always been face-to-face meetings, which provides for a better opportunity to build relationships and address sensitive issues. The same is true for our working groups, which have always worked electronically with an occasional physical meeting.

Our way of working has not really been influenced that much by COVID-19, although we have not had any physical meetings since 2020. The federation has adjusted by having more video and telephone conferences using Zoom and WhatsApp.

AJB: CINOA is a key stakeholder in terms of consulting new legal acts to be introduced at the international or the EU levels. How do you find cooperation with other international organizations? For example participation in the meetings concerning the 1970 Convention is important for the Association and its mission. In the "Perspectives" section of your website, we saw that it includes an *Open Letter: CINOA congratulates UNESCO for their 50-year anniversary of the 1970 Convention and*

pleads for better representation of the facts and better cooperation with the art trade **(10 November 2020). Could you refer to this?**

EB: During the last few years, there has been a need for better representation in terms of the art market trade. CINOA has filled this void, but it is an uphill battle. We continuously seek better cooperation with all international organizations that are involved in activities affecting the art trade. We believe that it is important to work together.

Regarding UNESCO, we attend their meetings relating to the art trade, but we do not have observer status nor are we considered a key partner. This puts the art market at a disadvantage since we are not always aware of or included in UNESCO's activities relating to the art trade. We have asked UNESCO to allow CINOA to work more closely with UNESCO on topics linked to the art trade so that CINOA, as representatives of the art market trade, can provide insight on practical aspects of the market and help UNESCO develop more effective strategies which will not harm the legitimate art market.

Specifically, we find it unacceptable that UNESCO promotes bogus facts regarding the size and scope of the illicit trade. There have been numerous studies and still there are no clear facts and figures supporting claims of rampant illicit trade. It is clear that the scope of "illicit activity" involving antiquities has been highly exaggerated by advocates of implementing new controls which is analysed in the CINOA Fact Sheet: *Fighting Bogus Information about the Art Market – 2021*.[1] Sensationalized headlines about illicit trade abound. However, they are not supported by the data on the trade in general, nor by specific details of cases of illicit trade. Unfortunately, unfounded claims are repeated by UNESCO and believed by policy makers, academics, and researchers who have not carefully verified the sources and methodology.

In fact, many available figures show that the problem is not widespread and that figures are often based on anecdotal events. We have written a paper debunking false claims which can be found on our website, in the "Perspectives" section, where we post the majority of our position papers.[2] Two important studies – *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*[3] conducted within the RAND Homeland Security Operational Analysis Center, and the paper titled "Why

1 https://www.cinoa.org/cinoa/perspectives?action=view&id=VoZu6XcBrQ_E_O4rixrh [accessed: 21.01.2022].

2 Ibidem.

3 M. Sargent et al., *Tracking and Disrupting the Illicit Antiquities Trade with Open Source Data*, Homeland Security Operational Analysis Center operated by the RAND Corporation, 2020, https://www.rand.org/pubs/research_reports/RR2706.html [accessed: 12.12.2021].

There is Still an Illicit Trade in Cultural Objects and What We Can Do About It",[4] published in 2021 in the *Journal of Field Archaeology* – should be read by anyone interested in the subject.

It is important to understand the actual workings of the legitimate art market and current established business practices in order to clearly identify suspect or illicit practices. Regulatory choices should be made based on factual economic data and actual evidence of crime. Instead of relying on unfounded information, policy makers should utilize the work of recognized, independent sources.

AJB: Coming back to CINOA's work, what are the next plans of the Federation regarding cooperation with entities from other sectors? Does CINOA have any plans to be involved in international research projects with academic members? Many projects now assume cooperation within consortium partners from academia, business, and NGOs to offer an interdisciplinary approach. Perhaps there is a need to involve external experts to provide documents and a roadmap referring to the current economic and legal challenges for the CINOA members, as some problems, especially at the international level, are the same for all members?

EB: CINOA is open to working with any group that is working on an activity or project that is related to developing or promoting responsible trade in the art market. We would be delighted to work with international research projects and academics.

There is a real need for external experts to analyse the economic and societal benefits of a thriving art market. The benefits should also be presented in a way that different countries and/or EU policy-makers can use the information.

Regarding regulations, studies evaluating the appropriateness, effectiveness, and potential of new trade regulation policies targeting art-related crime are also necessary. For example, papers or studies that use fact-based evidence to gain an understanding of the level and frequency of the targeted problem should also explore the "who, what, why, and how" of the problem so that patterns can be detected and it can be tackled proportionately. These kinds of details are very important since the art market is made up of many different niche markets which have their own buying and selling characteristics.

Many current studies and groups focused on illicit trade are trying to tackle the problem without taking into account this basic data. In fact, we often wonder how it is possible that tens of millions of euros are spent on ineffective projects to tackle

[4] N. Brodie et al., *Why There is Still an Illicit Trade in Cultural Objects and What We Can Do About It*, "Journal of Field Archaeology" 2021, DOI: 10.1080/00934690.2021.1996979.

the illicit trade of cultural property and what is the motivation behind promoting false figures and claims regarding such illicit trade? Some clues, but not enough, can be found in the above-mentioned paper published in the *Journal of Field Archaeology*,[5] which identifies a gap in the analysis to assess under-performing policies and practices. Leading researchers argue that a poor understanding of how the trade is organized and operates and of how it might be regulated hinders effective policy formulation.

We believe that efforts should focus on the prevention of crimes before they happen, rather than throwing a wide net in hopes of catching a criminal who has already committed a crime. As a colleague often says to me, it is as though policy-makers are fishing with dynamite. They are bound to catch some, but what about the collateral costs? Studies and research are needed to avoid poor policies which have the unintended consequences of damaging the legitimate trade in art.

AJ: We would also like to ask you about CINOA's views on Regulation (EU) 2019/880 on the introduction and the import of cultural goods to the European customs area. The Federation was sceptical about this instrument from the very beginning. What were the major reasons for this scepticism?

EB: CINOA's preliminary analysis of the proposed detailed rules for implementing certain provisions regarding the Import of Cultural Goods (ICG) and Regulation (EU) 2019/880 on the introduction of the regulations reveals that the rules are unnecessarily complicated, burdensome, and disproportionate vis-à-vis the majority of ordinary cultural goods that are traded legally and will be unworkable unless modified. Consequently, it will limit the circulation of cultural property that has been legally owned for decades or even centuries, without succeeding in its primary objective of combatting terrorist financing using cultural goods. In fact, in the past 5 years no evidence of this phenomenon has been presented. Further analysis of some of the detailed rules for implementing certain provisions, such as the required documentation for import, reveal that it will be unrealistic for the art market professionals and private individuals to provide them. The required documentation is nearly impossible to provide, stemming from the fact that most non-European cultural property circulating in overseas markets does not have export papers for very legitimate reasons.[6]

The following two case studies highlight some of the practical issues in our comments. It is worth noting that, in CINOA's opinion, this is just the tip of the iceberg and there will be an impact on imports from the Asian art market, the Islamic

[5] Ibidem.

[6] More detailed comments are posted on https://www.cinoa.org/cinoa/perspectives.

& Indian art markets, the ethnographic market, arms & armour, works of art, and occasionally ceramics, antique glass & jewellery of non-EU origin.

Case Study A: The requirement for import or export licence paperwork

Take the example of a high quality English landscape oil painting by a late 18th century artist. This was exported from England to the United States in the 1930s, but any record of the year this happened was lost long ago.

The painting appears in a present day auction in New York, as a result of a clearance from the home of an elderly widow, who has died without family beneficiaries. No records remain to indicate how long the painting was in her ownership, nor indeed when it was imported into the United States. A French citizen bids for it at auction and pays €250,000. When it arrives in France the painting will not be accompanied by an export licence (none is currently needed by the United States customs and the United Kingdom for the time it was actually exported in the 1930s, when it did not require an export licence). If the painting was currently being exported direct from the UK to France it would require a UK cultural goods export licence, since its value would exceed the current export threshold for paintings of £180,000. However, it is not being exported direct from the UK to France and it is simply not known when the painting left the UK, nor how long it was located in the United States. Consequently the importer of this legally-acquired antique painting, exported in accordance with the relevant laws of the countries in which it was located in the past, will be unable to demonstrate that it left the UK lawfully, because the date it left the UK is unknown and so it is unclear which export rules/thresholds should apply. Furthermore, it will not be possible to benefit from the Article 5(2) five year exemption for pre-1972 exports, since it cannot be demonstrated (a) that it left the UK before 1972; and (b) how long it was in the United States.

Case Study B: import declarations, import licences, and the temporary admission scheme

An Iranian terracotta vessel acquired by non-EU dealer R from a private collector in Japan in 2003 and taken by R to TEFAF Maastricht under the temporary admission scheme (Implementing Regulation Article 5), where it is bought by client S who wants to take it to Belgium. It is a portable object, but client S has to leave it with the dealer so they can arrange the import licence.

Given the paperwork, documentation, and other requirements, there is a 90-day delay in the licence being processed and further carriage costs to send it to Belgium, when previously it could have been paid for, collected, and driven back to

Brussels by client S on the day of the fair. Buyer S would need to have an extremely strong desire to own that vessel if he or she is prepared to wait that long and pay for the additional cost of transport. In addition to this, there is the uncertainty as to whether the licence will ultimately be granted. This adds hugely to the stress for the dealer. It is also likely that the item would not have been paid for by S, in case the licence is not granted, so the item has to be kept to one side and "off market" and reserved for the buyer for 90-plus days at a secure location, adding further to the cost. This is simply uneconomic, and yet this type of sale is common and is what allows dealers to earn a living. Furthermore, the buyer's enjoyment of attending a fair, building a relationship with the dealer, and being able to walk away with a newly-acquired cultural artefact would be much dampened by the uncertainty and most likely would put buyers off from purchasing such an item in the first place.

Under these circumstances dealers would be unlikely to bring to TEFAF any goods of non-EU origin unless an import licence had already been granted prior to shipping (if this is an option). Without this possibility, which in itself is full of problems and pitfalls, a large swathe of affected cultural goods, previously taken to be sold by non-EU based exhibitors at TEFAF, will simply not be brought to the fair and this may make it uneconomic for many non-EU based dealers to exhibit at the fair at all. The same would apply to other big EU fairs, such as BRAFA Brussels and some others.

AJ: Are CINOA's opinions and arguments reflected in the adopted text of Regulation (EU) 2019/880?

EB: It does not appear that any of our concerns or recommendations have been taken into account in the adopted text and implementing provisions, although we were assured that this would happen. The only significant change that was made to the draft was an expansion of the Article 20 provisions concerning the division of data control responsibilities between the Commission and Member States.

Of the 58 responses received to the EU consultation on the implementation regulation, all submissions were consistent in terms of their condemnation of the Regulation for generally similar reasons – with the exception of ICOM (International Council of Museums).[7] However, we established communication with the European Commission. Following several email exchanges, we finally had a first meeting with the unit in charge of the file to discuss the technicalities of the regulation.

[7] Submissions can be read here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11562-Imports-of-cultural-goods-into-the-EU-rules/feedback_en?p_id=22635125 [accessed: 12.12.2021].

We are hopeful that this new "working dialogue" will be productive so that the regulation is workable when it comes into force in 2025.

CINOA believes that it is vital for policy-makers, researchers, academics, and representatives of the trade to engage in very detailed focused discussions aimed at developing viable solutions.

AJ: Now, two years after its entry into force, has your opinion changed? Do you think it has the potential to contribute to a more ethical art market in the EU? Will it serve as an effective tool to curb illicit trade in objects originating from conflict-ridden territories?

EB: Our opinion has not changed; we do not think that this will be an effective tool for combatting illicit trade. We have concerns about the overall scope of the proposed implementation of the regulation, and how it compares and if it is compatible with other legislation, particularly the Export Licence Regulation (EU) 116/2009, which is considerably simpler; the simplicity of which it should mirror in our opinion. It will now be more complicated to import cultural goods than to export them.

It is important to understand that the vast majority of imports of cultural items into the EU comprise items which left their country of creation many, many years ago, and most of the import trade in cultural property is from countries, such as the United States and the UK, that are not the country of creation of the works being imported.

It is estimated that the trade of antiquities accounts for less than 0.5% of the global art market, with Middle Eastern antiquities – the focus of the terrorism financing claims – accounting for 15% of global antiquities figures, or less than 0.02% of the global art market.

Objects which can be linked to a conflict zone – either by the objects' origin or through direct links of the purchaser and/or seller to a conflict zone – are already considered by the art trade as "higher-risk" objects for transactions, and the circulation of such objects is already limited by current due diligence practices followed by both buyers and sellers. Certain categories of antiquities, the sale of which we agree should be restricted, are also already subject to import restrictions. Such items are sometimes offered by overseas sellers to uninformed buyers, and if they were purchased by EU buyers, they would already be subject to seizure at Customs for lack of documentation.[8]

[8] For more details, see https://www.cinoa.org/cinoa/perspectives.

AJB: What is your view on the regime and impact of the European anti-money laundering directives (AMLD) on the art market?

EB: As representatives of the art and antiques trade, CINOA supports effective measures against money-laundering and terrorist-financing. Art dealers and art intermediaries have already for many years had to abide by the EU's anti-money--laundering rules concerning payments in cash, and art dealers are already obliged to report suspicions regarding possible illicit funding.

We therefore suggest a cautious, proportionate approach to amending the AML legislation. Unless a proportionate approach is adopted there is a risk of a reduction in sales of works of art and less promotion of works of art, ultimately leading to reduced interest for the preservation of heritage works and a loss of tangible movable culture.

CINOA's 26 page submission to the European Commission explains our rationale for focusing on those high-risk transactions that are the most likely to attract those who wish to launder money or fund terrorism, while filtering out low-risk sales by defining the in-scope art market sector using a higher transaction threshold than the €10,000 currently applied.

This recommendation is also based on the fact that nowadays very few cash transactions for art occur, and if cash transactions over thresholds do occasionally occur, they are subject to existing AML controls. All non-cash transactions already flow through highly regulated financial institutions and gatekeepers which have the departments and resources to monitor transactions, regardless of the business activity. All gatekeeper parties scrutinize the details of how and with whom such transactions are executed and must report any suspicious activity relating to AML. For this reason it has been a source of some confusion to us as to why small shopkeepers should also be required to carry out detailed customer due diligence on the very same parties who have been checked by gatekeepers, particularly if those gatekeepers operate in the same jurisdiction as the art gallery.

Based on the available data, a more proportionate risk-based approach focused on high-risk transactions should yield the desired results, i.e. of preventing illicit funding involving art works. It will also help eliminate the financial and administrative burden for businesses selling items less attractive to money launderers.

From what we know of the few reported ML cases allegedly involving the art market, such schemes consist of many layers to hide the real buyer and source of money and are developed to make international purchases of expensive well--known artists' works. A more proportionate approach to AML should focus on high value transactions concerning artworks which can more easily be resold.

High value works by known artists are more susceptible to being used to launder money or fund conflicts than low value purchases, which are harder to sell as they do not have an international market.

The current monetary threshold of €10,000 for "in-scope" transactions, which is appropriate for cash transactions, is far too low for non-cash transactions, particularly with respect to artworks priced in the low tens of thousands of euros, which will cause customers who are extremely unlikely to be part of a money laundering scheme to be subject to AML controls.

Using a risk-based approach and art market sales statistics, CINOA proposes an increase in the transaction threshold to €500,000. The higher risk works make up a small percentage of sales by number, but still represent a significant proportion in terms of total value. Most registered art trade businesses have a limited number of clients, with a high proportion being locally based (i.e. in the same country), and have very low annual sales turnovers. These statistics, which render most transactions involving art to be low risk, need to be taken into account when establishing AML measures.

Without some amendments to the proposed regulation, many small shopkeepers or micro-businesses trading in art will not be able to afford the costs and resources required to trade in art works that fall within the scope of the proposed regulation.

AJB and AJ: Thank you once again for this interview and for clearly presenting CINOA's views on the currently-evolving EU regime for counteracting illicit trade in cultural objects. Please also accept our best wishes for a fruitful New Year 2022.