

How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property

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The International trade and transfer of art and antiquities faces problems because nations have erected very different rules with respect to movable property. All nations forbid theft, however most cultural property disputes involve an original owner and a subsequent good faith possessor. Different jurisdictions have chosen to allocate rights and responsibilities between these two relative innocents in very different ways. Disharmony in the law is seldom a good thing, but in the realm of cultural property it can be particularly damaging to the interests of nations, museums, individuals, and our collective cultural heritage. The lack of harmony ensures no overarching policy choices will be furthered, which prevents parties from anticipating legal outcomes and giving substance to policies.

This article explores the default conflict of law rules which are applied to cultural property, and shows how the lex situs rule exploits the various legal rules which apply to art and antiquities. It challenges the lofty position enjoyed by the lex situs rule and proposes a radical reform of the default choice of law analysis. By employing the law of the Nation of Origin or lex originis courts can ensure the jurisdiction with the most tangible connection to an object enjoys the benefit of applying its legal rules to a given dispute. This will not only ensure the security of art and antiquities transactions, but impart much-needed transparency into the cultural property trade, and finally will decrease the theft and illegal excavation of art and antiquities.

The article begins by presenting some examples of recent disputes, and the problems they present for the law and cultural heritage policy. Section II describes the fundamental difficulty of adjudicating claims between two relative innocents, and the disharmony which has resulted as different jurisdictions have resolved this conundrum in very different ways. Section III lays out the ways in which private international law impacts art and antiquities disputes. Section IV analyzes the 1995 UNIDROIT Convention, the most recent attempt to harmonize the law affecting cultural property. Section V proposes a radical reform of the choice of law enquiry taken by courts.

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I. Introduction

The most famous work of art in the world, Leonardo da Vinci's Mona Lisa (*La Gioconda*) was stolen in 1911 from the Louvre, but it was recovered two years later in Florence and the thief Vincenzo Peruggia was tried and convicted.² This was an easy case to resolve as the work was so valuable and famous that it was unmerchantable. However the problems are far more acute for objects which are less well-known, or which may have been recently excavated. Take for example a case in which an original owner could not recover a stolen Claude Monet work because she did not bring her replevin suit in time and was held to be negligent in seeking its return.³ In that case the work of art was not sufficiently-known as

² See Seymour V. Reit, *The Day they Stole the Mona Lisa* (1981).

³ *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), 836 F.2d 103 (2d Cir. 1987), *relief granted* under Rule 60 F.R.C.P., 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 38 F.3d 1266 (2d Cir. 1994).

to be unmerchtable, and the original owner did not take the necessary steps to alert potential buyers. Important archaeological objects and masterworks from antiquity have been the subject of recent legal disputes as well: ancient coins,⁴ Etruscan tomb stones,⁵ Turkish grave *stelae*,⁶ red-figure vases from Southern Italy,⁷ Pre-Columbian artifacts from Central and South America,⁸ and even the well-known Lydian hoard⁹ and Sevso treasure.¹⁰

There are countless other examples. An ancient palimpsest containing 10th century copies of formulations by Archimedes, long in the possession of a French family was consigned for auction at Christie's in New York before a claim was brought by a monastery.¹¹ A renaissance portrait stolen from a German castle by an American soldier and sold to a citizen on Long Island was claimed by a German museum.¹² Byzantine mosaics were stripped from a church in northern Cyprus, sold in Switzerland to an Indiana gallery owner, who then offers them for sale to the Getty before the Church reclaims them.¹³ Also, works by Egon Schiele on loan from Austria at the Museum of Modern Art were seized by state and federal officials after heirs of the original owners claimed the works were stolen by the Nazis.¹⁴ Surprisingly perhaps, all these cases are governed by the default legal rules which are applied to any good.

⁴ Oberlandesgericht Schleswig of 10 February 1989, 1989 Neue Juristische Wochenschrift 3105 + Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre 1989 no. 75.

⁵ Bundesgericht of 6 February 1985 (Staat Italien gegen X und Appellationsgericht des Kantons Basel-Stadt), 111 Entscheidungen des Schweizerischen Bundesgerichts part I a, p. 52.

⁶ Bundesgericht of 22 May 1996 (Turkische Republik gegen Kanton Basel Stadt und Peter Ludwig (still unpublished), see Kurt Siehr, *The Protection of Cultural Heritage and International Commerce*, 6 Int. J. Cult. Prop. 304, n. 7 (1997).

⁷ See Peter Watson, *Sotheby's Inside Story* 113 *et seq.* (1997).

⁸ *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Calif.), *aff'd*, 933 F.2d 1013 (9th Cir. 1989); *United States v. McClain*, 545 F. 2d 988 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1979).

⁹ See Jeanette Greenfield, *The Return of Cultural Treasures* 305-07 (2d ed., Cambridge 1996).

¹⁰ *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566 (N.Y. App. Div. 1990).

¹¹ *Greek-Orthodox Patriarchate v. Christie's, Inc.* 1999 U.S. Dist. LEXIS 13257, at *8-9 (S.D.N.Y. Aug. 30, 1999).

¹² *Kunstammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 832 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982).

¹³ *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts*, 917 F.2d 278, 283-84 (7th Cir. 1990).

¹⁴ *In re Grand Jury Subpoena Duces Tecum*, 719 N.E.2d 897 (N.Y. 1999).

As a result, many claimants have resorted to a different kind of extra-legal claim because the default private law offers little or no assistance in many cases.

Peru has recently come close to concluding a potential agreement with Yale University regarding the return of objects excavated at Machu Picchu following Hiram Bingham's rediscovery of the site in 1912.¹⁵ Noteworthy restitutions took place in recent years as three major North American Museums, the J. Paul Getty Museum, the Metropolitan Museum of Art in New York, and the Museum of Fine Arts in Boston all agreed to return a significant number of antiquities including master works.¹⁶ They were returned to Italy and Greece after it was shown they were illegally excavated; however there was no binding legal requirement under American or International law which compelled that they do so. Rather Italy exerted considerable public pressure to return the objects.

These cases highlight the monetary, aesthetic and intellectual value at stake; as well as the embarrassment and reputational harm suffered by museums and institutions with important educational missions. We can certainly place a great deal of blame at the feet of the individuals and institutions who acquired the questionable works, however private law does not do a good job ensuring there are claims for these objects. These agreements secured by Italy in particular have taken place in many cases without the use or guidance of private law. The important consideration has been public pressure and moral arguments. However not every nation of origin or original owner may have the resources to sway public opinion in this way. Though it has not been acknowledged by many cultural policy makers, these agreements reveal substantial shortcomings in the body of private law which applies to art and antiquities.

¹⁵ Randy Kennedy, *Yale Officials Agree to Return Peruvian Artifacts*, New York Times (Sept. 17, 2007); Derek Fincham, *More on Yale and Peru*, Illicit Cultural Property, <http://illicit-cultural-property.blogspot.com/2008/04/more-on-yale-and-peru.html> (Apr. 16, 2008).

¹⁶ See Christopher Chippindale and David Gill, *From Malibu to Rome: Further Developments on the Return of Antiquities*, 14 International Journal of Cultural Property 205 (2007).

When these disputes *do* reach courts of law, resolving the conflicts will always be difficult as both parties are often relative innocents: the original owner from whom the work was taken, and the good faith purchaser. Complicated cultural property policy and private rights issues come into play, but unfortunately different jurisdictions will often have rules which reflect different policy preferences. Take for example a theft and subsequent sale connected with a single jurisdiction. The policy choices of that state should be furthered by the outcome of the dispute. Irrespective of the burdens and policy which may favor the original owner or subsequent purchaser, the intrastate sale will be governed by the laws of that jurisdiction and as a result interested parties can adjust their behavior accordingly. But if a dispute touches multiple jurisdictions a given outcome may further one nation's policy interest on the micro level, but may undermine almost all policy considerations on a macro level.¹⁷ The lack of harmony ensures no overarching policy choices will be furthered, which prevents parties from anticipating legal outcomes and giving substance to the policy.

Though the Second Circuit Federal Court of Appeals predicted in 1987 that the legal issues raised when original owners attempt to recover cultural property from good-faith purchasers, though interesting, would not appear frequently, there has been a dramatic increase in such cases.¹⁸ Underlying each dispute are the competing claims of two relative innocents, making it “impossible for the law to mete out exact justice.”¹⁹

¹⁷ Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 Duke L.J. 955, 962 (2001).

¹⁸ *DeWeerth v. Baldinger*, 836 F.2d 103, 108 n.5 (2d Cir. 1987).

¹⁹ Ray Brown, *The Law of Personal Property*, 193 (3d ed. 1975). It should be stressed that the harm to the losing party can often be minimized. In some cases the original owner will have collected on insurance coverage if the work has been stolen. *E.g. Erisoty v. Rizik*, no. 93-6215, 1995 U.S. Dist. LEXIS 2096 at *3-4 (E.D. Pa. Feb. 23, 1995), *aff'd*, no. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996) (revealing the owners had collected on an insurance policy covering art stolen from the owners' home). Of course many extremely valuable works are uninsurable either because a policy may be unobtainable or the costs of such a policy are prohibitive. In the US, a good-faith purchaser may be able to recover from her seller because of a breach of the warranty. *See* U.C.C. §2-312(1)(a) (granting an implied warranty by the seller that the title shall be good and transferrable). However such a claim may often be difficult to make. Take for example the situation which faced the Seattle Art Museum which returned *Odalisque* to the Rosenberg heirs. Regina Hackett, *Seattle's Matisse Will Go Back to Owners: Museum Return Art Stolen by Nazis*, Seattle Post Intelligencer, June 15, 1999. The museum sued the dealer who sold the work to the Bloedels, who donated the work. The suit was dismissed by the United States District Court for the Western District of Washington

A. The *Lex Situs* Rule Generally

The majority rule throughout the world governing the validity of a transfer of a movable object is that the *lex situs* (the law of the location where the object was located at the time of the transaction) will govern.²⁰

Perhaps the most surprising application of private international law to cultural heritage involved Japanese works of art stolen from England, transported to and sold in Italy.²¹ The works then found their way back to England when a purchaser in good faith delivered them to an auction house for sale.²² The defendant argued that despite the fact the objects had returned to the nation where they were stolen the plaintiff Winkworth had no legal claim because their sale was done in good faith and Italian law recognized the defendant's superior title.²³ The English court agreed, holding the validity would be determined according to Italian law, which was the law of the place where the goods were situated at the time they were transferred.²⁴ Application of the *lex situs* is nearly unanimous in multijurisdictional cases involving goods. It has the dual advantage of simplicity and certainty. If an object has been acquired in good faith, the acquisition will be protected even if the location of the object changes in the future.

because the museum had not been defrauded and had not acquired the right to sue from the donors. *Rosenberg v. Seattle Art Museum*, 70 F. Supp. 2d 1163, 1167 (W.D. Wash. 1999). The court later vacated the dismissal order after the museum secured from the Bloedels' heirs an assignment of the fraud claim. *Rosenberg v. Seattle Art Museum*, No. C98-1073L, 2000 U.S. Dist. LEXIS 7770, at *8 (W.D. Wash. Mar. 22, 2000).

²⁰ See, e.g., Judgment of Mar. 25, 1982 (Repubblica dell'Ecuador-Casa della cultura ecuadoriana c. Danusso, Matta e altri), Trib. de Torino (Italy), reprinted in 18 *Rivista di diritto internazionale privato e processuale* 625 (1982); Christopher Staker, *Public International and the Lex Situs Rule in Property Conflicts and Foreign Expropriations*, 58 *Brit. Y.B. Int'l L.* 151, 164 (1988) ("The number of authorities supporting [the *lex situs* rule] as a rule of private international law are too vast to mention"); Steven Grover, *Note, The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A comparative Study*, 70 *Tex. L. Rev.* 1431, 1457, 1445-58 (1992) (examining the United States, United Kingdom, Switzerland, Germany, France and Italy and concluding "it seems well-nigh impossible that any nation, civil or common law, will modify the *lex situs* rule").

²¹ *Winkworth v. Christie, Manson & Woods, Ltd.* [1980] 1 Ch. 496.

²² *Id.* at 498-99.

²³ *Id.* at 500-501.

²⁴ *Id.* at 514.

A number of sound policy rationales support the general application of the rule in ordinary cases. For one, “the country of the situs has the effective power over the chattel ...”²⁵ Also it furthers the principle of comity as it allows states to determine the law applicable to property situated within their jurisdiction.²⁶ Perhaps most importantly it facilitates commercial convenience and predictability as a purchaser need only ascertain the law of one jurisdiction before concluding a transaction.²⁷ An early English case illustrates the advantages of this rule. In *Cammell v. Sewell* an Englishman owned some timber which he acquired in Russia.²⁸ He shipped it from Russia to England, but the ship sank and the shipmaster sold the timber to another party in Norway. The Englishman brought suit but the third party acquired good title to the timber under Norwegian law even though English law would have given title to the English citizen.²⁹

Courts and lawmakers rightly point to these as significant attractions for continued use of the rule. In fact though, the rule can have some pernicious effects on claims to recover stolen cultural objects. Perhaps surprisingly then, the *lex situs* rule is “virtually universal” in disputes involving art and antiquities. The tremendous monetary value and singular nature of art and antiquities overtake the ordinary advantages of simplicity and certainty.³⁰ The best example of this is of course *Winkworth*.³¹ In the U.K. the *lex situs* rule applies to all cultural objects and all chattels in general.³² It applied to the netsuke objects in the *Winkworth* claim,

²⁵ Pierre A. Lalive, *The Transfer of Chattels in the Conflict of Laws* 101, 115 (1955).

²⁶ Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 *Va. J. Int'l L.* 1, 6 (1990).

²⁷ Christie, [1980] 1 Ch. at 513 (“In [those situations in which the *lex fori* and the *lex situs* conflict] there are, in my view, very strong grounds of business convenience for applying the [*lex situs* rule] ...”).

²⁸ 157 Eng. Rep. 1371 (Ex. Ch. 1860).

²⁹ *Id.* at 1378.

³⁰ The tremendous value of art and antiquities makes it feasible for individuals to hide or store works in bank vaults or elsewhere until the relevant limitations periods or legal claims have lapsed. See Catherine Hickley, *Nazi Art Dealer's Will Disperses Dutch Masters, Expressionists*, <http://www.bloomberg.com/apps/news?pid=20601088&sid=a1pbz19FN.G0&refer=home> (Jul. 12, 2007) (noting the investigation by three nations into a looted Camille Pissarro painting discovered in 2007 in a Swiss bank vault that had been stolen from a Vienna apartment in 1938 by the Gestapo).

³¹ [1982] Ch. 496; See Dicey, Morris and Collins, *Conflict of Laws*, Rule 113 at 26R-025 (2006).

³² *Cammell v. Sewell* (1860) 5 H. & M. 728; *Glencore International AG v. Metro Trading Inc.* [2001] 1 All E.R. (Comm.) 103; *Hockey v. Mother O' Gold Consolidated Mines*, (1903) 29 V.L.R. 196.

as well as to a Lorca manuscript in *Manuel Fernandez-Montesinos Garcia and others v. Manola Saavedra de Aldama*,³³ the rule applied to portable antiquities, as were at issue in *Islamic Republic of Iran v. Barakat Galleries Ltd.*;³⁴ finally the rule has been applied to painted works, as in *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.*³⁵

Many of the negative consequences of the rule are directly tied to its dual or sequential application. In a restitutionary claim, it is likely that the primary effect of the law of the situs allegedly conferring original title on a State or foreign finder will be implicated. The secondary effect of the law of the situs often confers substitute title on a later acquirer, who may allegedly be violating the earlier primary title. This typically occurs in Civilian jurisdictions which favor good-faith acquisition. The primary application will of course be found in vesting title in the claimant state or the ownership laws benefitting the original owner. The secondary applications, which often shift title, involve a sale and purchase in another nation which confers good title to a buyer in good faith.

There has been a dramatic paradigm shift in the policy governing cultural property in recent years.³⁶ Observers are increasingly asking how art and antiquities enter public and private collections, and are questioning whether individuals should even be allowed to buy and sell important pieces of antiquity. Cultural property, as defined by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and

³³ [2002] EWHC 2087 (Ch); noted by P. McGarrick, *Case note: Lorca's Poet in New York – a 64-Year-Long Saga*, 8 Art Antiquity & L. 241(2003).

³⁴ See *infra* n 171 *et seq.*

³⁵ In the High Court of Justice Queen's Bench Division Case No: 1993 C 3428 and 1997 G 185; judgment discussed in Norman Palmer, *Museums and the Holocaust* (2000); for comment by practitioners see P. Lomas and S. Orton, *Potential repercussions from the City of Gotha decision*, 2 Art Antiquity & L. 159 (1999); A. Mair, *Misappropriation and Skulduggery in Germany and Russia: The case of Wtewael's 'The Holy Family'*, 4 Art Antiquity & L. 413 (1998).

³⁶ The most dramatic example of this is perhaps the bold new recommendations issued by the American Association of Art Museum Directors, which though only voluntary go further than the previous guidelines. Association of Art Museum Directors, *New Report on Acquisition of Archaeological Materials and Ancient Art*, <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (June 3, 2008); see Randy Kennedy, *Museums Set Stricter Guidelines for Acquiring Antiquities*, *New York Times* <http://www.nytimes.com/2008/06/04/arts/design/04coll.html?ref=arts> (June 4, 2008) (quoting Prof. Patty Gerstenblith who said “[o]n an overarching level this is a significant step forward”).

Transfer of Ownership of Cultural Property is “property which, on religious or secular grounds is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.”³⁷ Not all claims are made by states, and when a claimant – either an individual, a museum, or a nation of origin – loses possession of a piece of cultural property, a court should swiftly and fairly give access to justice and uphold the private rights of possession and ownership. Unfortunately such swift justice is the exception in most cases involving the theft or illicit excavation of cultural property. Much of the blame can be placed at the predominant choice-of-law rule, the *lex situs* rule. Courts and lawmakers the world over have been reluctant to abandon it, despite disastrous consequences for the movement, protection and study of our collective cultural heritage.

This article argues that the typical policy goals forwarded by the *lex situs* rule – namely convenience and commercial security – are wholly lacking in cultural heritage disputes. Rather, the forum with the closest connection to the piece of cultural property should have its law govern the disposition of the object. A defendant should not be able to escape the ordinary application of the law because it has been hidden away or smuggled out of a jurisdiction which has conferred secondary title.

The complicated body of private law affecting the international trade in cultural property has received surprisingly little academic attention. A respected private international law scholar, Symeon Symeonides has argued for application of the *lex originis* rule as applied to cultural property disputes.³⁸ Also, Patricia Youngblood-Reyhan has argued persuasively for harmony across jurisdictions, pointing out the pernicious results created by the status

³⁷ UNESCO Convention on the Means of prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231; (“UNESCO Convention”).

³⁸ Symeon Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 Vand. J. Transnat'l L. 1177 (2005).

quo.³⁹ This article directs its focus at the conflict of laws issues presented by cultural property disputes in the U.S. and the U.K. – the two largest art and antiquities markets in the world – and looks at how application of the majority of the *lex situs* rule has in fact created a legal landscape which ensures that illegally excavated antiquities and stolen works of art can routinely be bought and sold under the right conditions.

B. Overcoming the Difficulties Courts Have Recognizing Foreign Claims

To better understand the glaring weaknesses in the current body of private international law, we can examine in some detail two cases involving illegally excavated antiquities in both Peru and Iran. We can see that despite decades of hard-fought advocacy which has brought a real sea-change to private law in the U.S. and the U.K., all this can be undone by the current dominance the *lex situs* rule enjoys.

1. *Peru v. Johnson*⁴⁰

Peru v. Johnson, was a private action in which Peru sought the return of 89 allegedly stolen or illegally excavated pre-Columbian gold, ceramic and textile objects in the defendant's collection. Peru based its claim on its own vesting statutes providing that pre-Columbian objects located in Peru are property of the State. It asserted a theft had occurred upon the removal of the objects without government permission, on the basis of a primary application of the *lex situs* principle. The Federal District Court denied the claimant source nation's claim.

Peru was unable to show the contested objects originated from Peru. Second, Peru did not prove the objects were removed while the applicable vesting statutes were in force. Both of these legal questions are endemic to illegal excavations. When an object is removed

³⁹ Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DU.K.e L.J. 955, 962 (2001).

⁴⁰ *Government of Peru v. Benjamin Johnson*, 720 F. Supp. 810 (CD Cal. 1989).

from a site and surfaces in a collection or an auction catalogue, they are seldom accompanied by a provenance or information about where and under what circumstances the object was found. But even if such evidence was produced, under the District Court's view Peru's action would still have failed.

Even if Peru was able to show that the objects were removed from a Peruvian site, the State ownership law was not meaningfully enforced. A Peruvian law of June 13, 1929 proclaimed that artifacts in historical monuments are "the property of the State" and unregistered artifacts "shall be property of the State." As the Federal District Court expressed:

The domestic effect of such a pronouncement appears to be extremely limited. Possession of the artifacts is allowed to remain in private hands, and such objects may be transferred by gift or bequest or intestate succession. There is no indication in the record that Peru ever has sought to exercise its ownership rights in such property, so long as there is no removal from that country. The laws of Peru could reasonably be considered to have no more effect than export restrictions.⁴¹

Export restrictions are of course clearly public laws, and therefore will not be enforced abroad unless pursuant to a treaty or similar agreement.⁴² So not only must a source nation clearly define ownership, but under *Johnson*, it must also act in a manner consistent with ownership. This Federal District Court holding may be inconsistent with two earlier decisions, *United States v. McClain*⁴³ and *United States v. Hollinshead*.⁴⁴ *United States v. McClain* first established the principle that U.S. courts will enforce foreign ownership declarations in what has come to be known as the McClain doctrine. The trade in cultural property is an international problem which requires international solutions. The starting point and the foundation for those remedies will always be the domestic regulatory framework in

⁴¹ *Johnson*, 720 F.Supp. 810.

⁴² "They do not create 'ownership' in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner." *United States v. McClain*, 545 F.2d 988, 1002 (5th Cir. 1977).

⁴³ *Id.*

⁴⁴ *U.S. v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

Source nations. States must protect sites, preserve objects, and regulate the trade domestically.

Clearly declaring some form of state ownership is an important regulatory step in policing the antiquities trade. Achieving recognition among market states of these ownership declarations has been a long and difficult task for cultural heritage advocates. A recent culmination of this crucial legal development can be seen in an by Iran to secure the return of illegally excavated antiquities from the U.K..

2. *Republic of Iran v. Barakat Galleries*⁴⁵

In *Republic of Iran v. Barakat Galleries*, Iran was able to apply its own domestic laws as the primary *lex situs*. At issue were a number of 5,000 year-old carved jars, bowls and cups made from chlorite. Iran argued these originated from the Jiroft civilization, an area located on the Halil river in Southeast Iran. At the initial High Court trial two issues were raised.⁴⁶ First, did the various cultural heritage laws of Iran successfully grant title to Iran? Second, assuming title was granted to Iran, are the provisions “penal” or “public”, which would mean they would not be given extra-territorial effect?

On the first issue, Iran was unable to establish that title to undiscovered antiquities vests with Iran. As Justice Gray stated, “I have come, with some regret, to the conclusion that Iran has not discharged the burden of establishing its ownership of the antiquities under the laws of Iran.”⁴⁷ Iran relied on a number of different legal enactments which provide that neither the finder of an antiquity, nor the owner of the land on which an antiquity is found can acquire ownership rights of an antiquity. It was unable to point to a single vesting provision but rather argued that title to the objects falls to Iran because private ownership was prohibited. Among the provisions relied upon by Iran was the Iranian Civil Code, Article 26:

⁴⁵ [2007] EWCA Civ 1374.

⁴⁶ [2007] EWHC 705 (QB).

⁴⁷ *Id.* at para. 59.

Government properties which are capable of public service or utilization, such as fortifications, fortresses, moats, military earthworks, arsenals, weapons stored, warships and also government furniture, mansions and buildings, government telegraphs, public museums and libraries, historical monuments and similar properties, and in brief, *any movable or immovable properties which may be in the possession of the government of public expediency and national interest, may not be privately owned.*⁴⁸

Iran also argued the Legal Bill Regarding Prevention of Unauthorized Excavations and Diggings (1979) declares Iran the owner of all its undiscovered antiquities. However, ownership only arises when objects are seized under circumstances in “favour of the public treasury ... upon conviction of an offender in a criminal court for undertaking unlawful excavation or digging or where ... discovered objects are for sale or purchase”.⁴⁹ As a result, these and other provisions were not sufficient.

The Court of Appeal reached the opposite result by holding that a claim for conversion is tenable so long as the various rights granted to Iran amount to an ownership interest under English law.

Two preliminary issues were raised:

- i) Whether under the provisions of Iranian law pleaded in the Amended Particulars of Claim, the claimant can show that it has obtained title to the Objects as a matter of Iranian law and if so by what means, and
- ii) If the claimant can show that it has obtained such title under Iranian law, whether this court should recognise and/or enforce that title.

The Court of Appeal answered both in favor of Iran.

Departing sharply from the reasoning of Justice Gray, the Court of Appeal noted that the lower court had concluded the relevant Iranian law was "both penal and public in character" and as a result it "could not be enforced in this country". As the Court of Appeal noted, “This also was a conclusion which the judge described (para 100) as ‘a regrettable

⁴⁸ *Id.* at para. 20. Emphasis added.

⁴⁹ *Id.* at para. 54.

one', and added (presumably not having been informed that the United Kingdom had ratified the UNESCO Convention) that the answer might be the one given by Lord Denning MR in the *Ortiz* case, namely an international convention on the subject."⁵⁰

Crucially, "it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant. If the rights given by Iranian law are equivalent to ownership in English law, then English law would treat that as ownership for the purposes of the conflict of laws." At issue of course was whether Iran's rights were sufficient to give it a claim for conversion under English law. The distinction turned not on the legal significance of a proclamation such as "Iran declares itself the owner of all undiscovered antiquities"; but rather in the individual rights which Iran has given itself in these objects. If the sum of these rights amounts to ownership under English law, then Iran has a viable legal claim:

We consider that this is an arid issue. Given our conclusion that the finder did not own the antiquities (and the fact, as was common ground, that the owner of the land from which they came had no claim to them), there are only two possibilities. Either they were "bona vacantia" to which Iran had an immediate right of possession and which would become Iran's property once Iran obtained possession and which could not become the property of anyone else or they belonged to Iran from, at least, the moment that they were found. We consider that the former alternative is artificial. Iran's personal rights in relation to antiquities found were so extensive and exclusive that Iran was properly to be considered the owner of the properties found.⁵¹

The question then became, under English law does the Iranian interest in the objects support a claim in conversion, and if so is the claim founded on a penal or public law? The relevant 1979 Legal Bill was not penal with respect to ownership of antiquities, though other segments dealing with criminal penalties for unlawfully excavating or dealing with antiquities may have been. The court, clearly distinguished export restrictions and assertions

⁵⁰ *Id.* at para. 8 (emphasis added).

⁵¹ *Id.* at para. 80.

of ownership. The former is clearly a public law and unenforceable absent another treaty obligation while the latter is justiciable. When a state owns property in the same way as a private citizen "there is no impediment to recovery."⁵²

Though it did recognize difficulty in enforcing Iran's sovereign authority, the Court of Appeal classified the claim as a "patrimonial claim". In distinguishing this claim reference was made to U.S. precedent, *United States v Schultz*,⁵³ in which the Second Circuit recognized an Egyptian patrimony law even though Egypt had never reduced the objects at issue to possession. The Court of Appeal reasoned that even if it was wrong in not characterizing the claim as the enforcement of foreign public law, the claim would still not be barred because there exists no "general principle that this country will not entertain an action whose object is to enforce the public law of another State."⁵⁴ In supporting this principle reference was made to the UNESCO Convention, the UNIDROIT Convention, the Commonwealth Scheme (which has not apparently been fully implemented), as well as the relevant EU directives.⁵⁵

The appeal clearly establishes English courts will in fact recognize foreign ownership declarations even when they are not explicit, and will apply English legal remedies such as conversion, so long as they grant rights to the source nation similar in nature to ownership requirements under English law. Faye Barakat the owner of the gallery indicated in a newspaper account, "This means that the Iranian government could claim every Persian item at a British Museum, and that doesn't make any sense."⁵⁶ Such comments are sadly indicative of the exaggerations which often occur after an important ruling like this. The British Museum will not be emptied of its Persian collection because of this decision; rather nations

⁵² See *King of Italy v de Medici* (1918) 34 TLR 623.

⁵³ 333 F 3d 393 (2d Cir. 2003)

⁵⁴ *Id.* at para. 151.

⁵⁵ See *infra* n. 118 *et seq.*

⁵⁶ T. Wagner, "U.K. Court Reinstates Iran's Claim to Art" AP News, <http://www.film.com/news/story/britainiranart/17737332> (Published Dec. 21, 2007).

of origin such as Iran have clear precedent which allows them to bring private legal claims in England when violations of their patrimony laws have taken place and objects appear for sale there.

The court in *Barakat* reached the right conclusion, in a vitally-important holding which can and should be used by dispossessed source nations. However, the rule can be undone very easily by members of the antiquities trade who choose to conclude their bargain in another jurisdiction which may not recognize Iran's vesting declaration in quite the same way, or may use different limitations periods, or may favor bona fide purchasers. This situation puts unnecessary pressure on the public law and criminal enforcement mechanisms which attempt to regulate the cultural property trade. Sadly, the net effect will not lead to more scrutiny of the art and antiquities market, rather the market will likely move to other more accommodating forums to buy and sell objects. To see how we can look at the ways in which private laws of various nations often undercut each other.

II. Manifestations of the Conflict

Civilian and common law legal systems handle disputes involving the sale or transfer of a contested object very differently, and it is worth emphasizing the distinction. Broadly speaking, civilian systems favor good-faith purchasers; while common law jurisdictions tend to favor original owners.⁵⁷ Where the original owner or nation has been dispossessed by theft

⁵⁷ In France the owner of a stolen object has three years with which to make a claim under the French Civil Code, Art. 2279:

In matters of chattels, possession is equivalent to a title. Nevertheless, the person who has lost or from whom a thing has been stolen, may claim it within three years from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

In England and Wales the general rule is found in Section 21(1) of the Sale of Goods Act 1979:

or illegal excavation, rules may grant title in the good faith purchaser upon immediate purchase;⁵⁸ they may characterize the possession by the good faith purchaser as wrongful but place a limitation on the time the original owner can bring a claim;⁵⁹ they may toll the limitations period for fraudulent concealment;⁶⁰ they may delay the cause of action until the original owner discovers or should have discovered the cause of action;⁶¹ they may allow the owner to bring a claim for an extended period as long as she exercised due diligence in searching for it;⁶² or finally they may overwhelmingly favor the original owner and hold a claim open until a demand and refusal has taken place.⁶³ This range of different policy choices, which attempt to solve the difficulty when both parties are relative innocents leads to inconsistent results, forum-shopping, and ultimately makes it difficult for cultural institutions and others to purchase, transport or loan art and antiquities across jurisdictions.

Consider a typical example. When an original owner knows their work will be on display or at an auction in a jurisdiction which favours original owners, they are wise to

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.

⁵⁸ Stolen art and antiquities are almost always sold or transferred from the thief to other parties. This is because a thief cannot transfer good title because he has no legally cognizable claim. In the United Kingdom the *nemo dat quod non habet* rule applies. Section 21(1) Sale of Goods Act 1979. The *market overt* exception to the general *nemo dat* rule was abolished with the Sale of Goods (Amendment) Act 1994. Italy is another example. In the *De Contessini* case in Italy an Italian court upheld the title of a local bona fide purchaser against the French government. The defendant De Contessini prevailed by arguing he purchased stolen French tapestries in good faith. Tribunale di Roma 27 June 1987 (Stato francese c. Ministero per I beniculturali e ambientali e De Contessini), 71 Rivista Di Diritto Internazionale 920 (1988); confirmed by Corte di Cassazione 24 November 1995, n. 12166, Foro

italiano 1996, I, 907. Italy favors bona fide purchasers when the original owner is a private person or entity, but not when the victim is a public institution. Francesca Galgano, *Legal Aspects of Trade in Art in Italy*, in *Geneva Workshop, International Sales of Works of Art*, 129 (Pierre Lalive ed., 1985).

⁵⁹ For a decision highlighting the general practice in various American States see *Kunstammlungen zu Weimar*, 536 F. Supp. at 832, (applying New York law).

⁶⁰ *Bernson v. Browning-Ferris Industries of California, Inc.*, 873 P.2d 613 (Cal. 1994). For an example in the art law context in which the court provided an alternate ground for its holding see *Autocephalous*, 917 F.2d at 288.

⁶¹ *O'Keefe v. Snyder*, 416 A.2d 862, 869 (N.J. 1980).

⁶² *Autocephalous*, 917 F.2d at 289.

⁶³ *Kunstammlungen zu Weimar*, 536 F. Supp. At 848.

immediately bring suit.⁶⁴ However current possessors of a work can avoid these jurisdictions, or even conclude a transaction for an object in a more favorable jurisdiction. The following sections will step through how the different policy considerations of states undermine each other via limitations rules, tort rules, and movable property rules.

Before looking at the ways conflicts of laws impact art and antiquities disputes, we should note of course that not every dispute presents conflict-of-law issues.⁶⁵ This can occur for one of three reasons. First, there may not be a multijurisdictional aspect to the case, or the law of the involved states may both favor the same party.⁶⁶ Second, the parties may choose to minimize the links with other jurisdictions, or fail to raise them.⁶⁷ Third, what may appear to be a conflict initially may in fact not produce a real conflict. As Youngblood Reyhan notes, “differences in law without litigation consequences are not ‘conflicts’ with which choice of law rules are concerned.”⁶⁸ This false conflict arises most often when an original owner has voluntarily relinquished possession. As we will see in the following section both civil and common law systems generally favor good-faith purchasers in that context.

A. Entrustment v. Theft or Wrongful Dispossession

⁶⁴ Two examples highlight this. See *In re Grand Jury Subpoena Duces Tecum*, 719 N.E.2d at 900, in which the heirs of Lea Bondi brought suit to prevent Egon Schiele’s *Portrait of Wally* from returning to Austria (at the time of writing the dispute was still ongoing); see also *Greek Orthodox Patriarchate*, 1999 U.S. Dist. LEXIS 13257, in which a Jerusalem monastery brought suit in New York against a French purchaser who consigned the work for sale in New York.

⁶⁵ *E.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991).

⁶⁶ *E.g.*, *Soc’y of Cal. Pioneers v. Baker*, 50 Cal. Rptr. 2d 865, 866-69 (Ct. App. 1996) (in which the case was entirely centered in California).

⁶⁷ *Mucha v. King*, 792 F.2d 602, 604 (7th Cir. 1986) (“Where as in this case, the parties either explicitly or by implication agree to be governed by the substantive law of the forum state, their agreement will be enforced.”).

⁶⁸ Youngblood Reyhan *supra* n. 17 at 1005. Such was the case in *Erisoty v. Rizik* No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), which involved different limitations periods. Three states were involved in the events which gave rise to the action: Maryland, Pennsylvania, and the District of Columbia. They all used a triggering principle for limitations periods known as the discovery rule, though Pennsylvania had a two-year statute of limitations while the other two jurisdictions provided three years. There was no conflict because the original owners had not brought the claim within even the more generous three-year period, and therefore the court applied the forum law of Pennsylvania in holding for the defendant.

When an owner voluntarily gives over possession of an object, the range of possible rules governing her rights is relatively narrow. For example when an owner voluntarily parts with possession by the creation of a bailment, and the bailee then converts the object in a manner which allows a reasonable buyer to conclude that the bailee is empowered to pass the owner's title; the good faith purchaser acquires superior title to the original owner.⁶⁹ This scenario can arise when an object is loaned for exhibit or consigned to an art gallery for sale.⁷⁰ In this case, the law places at least part of the blame with the original owner for failing to choose a consignee more carefully.⁷¹ As one California court explained, "an owner who entrusts his property to another bears some responsibility for creating a situation whereby an innocent purchaser is led to buy goods from an agent who is acting in excess of his authority."⁷² This situation does not produce choice-of-law problems because jurisdictions have almost universally adopted similar policies in this situation.

The more common situation involving wrongful dispossession presents a more difficult range of applicable laws. In most American states, the question of whether a claimant has brought their action within the limitations period is often outcome-determinative. If the action is timely, the original owner often prevails. However, the

⁶⁹ A bailment can arise when one who is not the owner of a chattel is in possession:

[A bailment] may be created by operation of law. It is the element of lawful possession, and the duty to account for the things as the property of another that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained. It makes no difference whether the thing be entrusted to a person by the owner or by another. Taking lawful possession without present intent to appropriate creates a bailment.

Seaboard Sand & Gravel Corp. v. Moran Towing Corp., 154 F.2d 399, 402 (2d Cir. 1946).

⁷⁰ *See Mucha v. King*, 792 F.2d 602 (7th Cir. 1986). The case involved a 59 year-old bailment. The artists consigned the painting at issue in 1921. The consignment letter suggested a purchase price of \$10,000 for the work at issue, and unusually the agreement allowed the gallery owner to keep any of the purchase price which exceeded that amount. Therefore the gallery owner put the work in storage in the hopes the work would appreciate in value, as he would keep most of the appreciated value.

⁷¹ *See Morgold, Inc. v. Keeler*, 891 F. Supp 1361, 1366-67 (N.D. Cal. 1995). In that case one of two owners of a work by Alfred Bricher called *Marlton's Cove, Grand Manan, Maine* sold the work in violation of a written agreement with his co-owner. The court recognized that a good-faith purchaser could acquire good title of the work.

⁷² *Naftzger v. Am. Numismatic Soc'y*, 49 Cal. Rptr. 2d 784, 789 (Ct. App. 1996).

question of the timeliness of an action is seldom straightforward due to the difficulty in pinpointing a triggering period for the limitations period.

B. When Limitations Periods Conflict

The traditional choice-of-law rule, which a number of American states still apply, relegates limitations periods to a procedural inquiry.⁷³ This means the forum limitations period would apply. The idea that limitations periods were procedural for choice-of-law purposes stems from the notion that “the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld...the right subsists, and the forum may choose to allow its courts to provide a remedy, even though the jurisdiction where the right arose would not.”⁷⁴ Characterizing limitations periods as a procedural inquiry however can often lead to forum shopping.⁷⁵ As a result some American courts have questioned whether this serves any policy goals.⁷⁶

Because the question of which limitations period to apply can often be outcome-determinative, a number of courts use alternative tests such as the connection of the parties to the forum, the nature of the transaction, or underlying events with the forum. Unfortunately these alternative tests will often result in a domestic plaintiff receiving the benefit of a forum’s more-generous limitations period though the action arose elsewhere; however a domestic defendant will sometimes gain the benefit of a shorter limitations period in the

⁷³ For an overview of limitations periods focusing on the US, see Ruth Redmond-Cooper, *Time Limits in Art and Antiquity Claims (Part I)*, 4 *Journal of Art, Antiquity and Law*, 1 (1999); and Ruth Redmond-Cooper, *Limitation of Actions in Art and Antiquity Claims (Part II)*, 5 *Journal of Art, Antiquity and Law*, (2000). See *Charash v. Oberlin Coll.*, 14 F.3d 291, 296-97 (6th Cir. 1994) (interpreting Ohio law to apply the Ohio limitations period regardless of where the claim arose and whether Ohio law governed the substantive rights of the parties). But see *Bournias v. Atl. Mar. Co.*, 220 F.2d 152, 155 (2d Cir. 1955) (holding “where the foreign statute of limitation is regarded as barring the foreign right sued upon, and not merely the remedy, it will be treated as conditioning that right and will be enforced by our courts as part of the foreign ‘substantive’ law”).

⁷⁴ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725 (1987).

⁷⁵ See *Keeton v. Hustler Magazine*, 465 U.S. 770, 772-73 (1984) (in that case the plaintiff was a New York resident who sued the defendant, an Ohio corporation, in New Hampshire because that was the only state where the action was not time-barred).

⁷⁶ See *Cameron v. Hardisty*, 407 N.W.2d 595, 597 (Iowa 1987) (noting that limitations periods do have substantive rationales).

forum where the claim arose when suit is brought by a foreign defendant.⁷⁷ This disproportionate treatment encourages forum shopping, makes it more difficult to predict outcomes, and cuts against the policy choices of different forums. The high value of art and antiquities make these problems more acute. These qualities may motivate underhanded individuals to quickly ship or smuggle objects through a number of jurisdictions to launder title.

Despite these problems, two reasons are often given to support the general preference for forum procedural rules. First, it can be difficult to ascertain and apply foreign practice. Second, it may be unlikely that the application of the foreign rule would change the outcome of the dispute.⁷⁸ Two New Jersey cases highlight this problem.

In *Heavner v. Uniroyal Inc.*, a suit was brought in the courts of New Jersey by North Carolina plaintiffs against a New Jersey defendant and a Delaware corporation for injuries suffered in an auto accident.⁷⁹ In that case the court chose the shorter North Carolina statute of limitations to bar the claim.⁸⁰ However the opposite was true in *Pine v. Eli Lilly & Co.*, in which the New Jersey Supreme Court noted that if the plaintiff was domiciled in New Jersey, the New Jersey limitations period, which considered the action timely, would apply over a foreign limitation where the cause of action occurred in that foreign forum, and the foreign

⁷⁷ Youngblood Reyhan *supra n.* 17 at 1010, arguing “this differing result can create a particularly unattractive result in the art theft context”.

⁷⁸ For example, in *Guaranty Trust v. New York*, 326 U.S. 99 (1945), the Supreme Court warned against concluding statutes of limitations were procedural or substantive because the appropriate inquiry should be whether the choice will “significantly affect” the outcome. As a leading textbook states, “The more inconvenient it would be to find and apply a foreign rule and the less likely it is that the rule will affect the result, the greater the justification for a ‘procedural’ label.” Maurice Rosenberg, Peter Hay, Russell J. Weintraub, *Conflict of Laws, Cases and Materials* 402 (10th ed. 1996).

⁷⁹ 305 A.2d at 417-48 (N.J. Super Ct. App. Div. 1985).

⁸⁰ The New Jersey Supreme Court Stated:

[W]hen the cause of action arises in another state, the parties are all present and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will “borrow” the limitations law of the foreign state.

law time-barred the action.⁸¹ The court reached this result because “New Jersey’s interest in compensating its domiciliary is paramount [and] outweighs our policy of discouraging forum shopping”.⁸²

The best example of a court treating a conflict of law as a conflict among different statutes of limitations in the art theft context is *O’Keeffe v. Snyder*.⁸³ The choice was between New York law which would allow the action, and New Jersey law which barred the action. New Jersey applied its own limitation period unless the cause of action arose in another state, all parties were amenable to jurisdiction in that state, New Jersey had no substantial interest in the matter, and the limitation period of the foreign state had expired.⁸⁴ Because the painting at issue was located in New Jersey and none of the parties were from New York, the court applied New Jersey’s statute of limitations. The dissent in *O’Keeffe* strongly objected though:

The issue, however, is not whether the New Jersey statute of limitations should be followed rather than that of New York. The New York rule of subsequent conversions, rejected by the majority, is not a “statute of limitations,” but rather is a substantive principle of the law of torts. The majority simply sidesteps the question of which state’s tort law ought to be applied to this case.⁸⁵

The conflict in *O’Keefe* arose not because of differing limitations periods; rather it was a product of different conceptions of what triggered the running of the period. This seems to be a different substantive legal provision: New York starts the running of the period when a demand and refusal of the object takes place, while New Jersey starts the cause of action at the point when reasonable due diligence would disclose the identity and location of the current owner. This is not a procedural issue at all, but rather a substantive view of the timeliness of actions.

⁸¹ 492 A.2d 1079 (N.J. Super Ct. App. Div. 1985).

⁸² *Id.*

⁸³ 416 A.2d 862 (N.J. 1980).

⁸⁴ *Id.* at 868 (citing *Heavner*, 305 A.2d at 412).

⁸⁵ *Id.* at 879 (Handler, J., dissenting).

The position in England and Wales encompasses this better view of limitations periods. The leading case in the art and antiquities context is *City of Gotha v. Sotheby's*, in which Moses J. had to choose between German and English limitations periods.⁸⁶ International claims before the courts of England and Wales are governed by the Foreign Limitation Periods Act 1984. Section 1(1) will generally apply the limitations period to the law of the forum whose system of law, under the rules of private international law, govern the main dispute. However section 1(2) presents a number of exceptions to the general rule. Namely, section 1(1) will not apply where the law of both England and Wales and some other nation must be taken into account. Such was the situation facing Moses J. in *City of Gotha*. When section 1(2) applies, the law of both systems must be considered and if they conflict the shorter of the two limitations period will apply.

The work at issue was Joachim Wtewael's *Holy Family with Saints John and Elizabeth* (1603). The painting had been removed to the Soviet Union in 1946, and remained there until the 1980s when it was stolen and taken to West Berlin in 1987. It was then acquired by Mina Breslov in 1988 who consigned it to Sotheby's later that year. The Federal Republic of Germany then brought suit against the auction house.⁸⁷ In ruling for the City of Gotha, Moses J. applied the German limitations period under section 1(2) of the Foreign Limitation Periods Act because the laws of both England and Wales and Germany "govern[ed] the matter before the court".⁸⁸

Germany's limitations period extended to thirty years from the point at which a claim arises, and the claim did not start to run until 1987. However, had the foreign limitations

⁸⁶ [1998] unreported 9, September QBD Moses J.

⁸⁷ *Id.* at sections I-II.

⁸⁸ *Id.* at sec. II.2.

period contravened English public policy, that limitation period would not have been given effect.⁸⁹

Some American states do not consider the establishment of a triggering date for a limitations period as a substantive rule despite the divergent results this important conceptualization can engender. Though the Anglo-Welsh approach is better, there still remains an ambiguous public policy hurdle under section 1(2) which could allow a court to apply the limitations rules of England and Wales. The precise nature of this policy analysis remains unclear and subject to a great deal of judicial discretion.

C. When Tort Rules Conflict

Courts often characterize multijurisdictional cultural property disputes by the nature of the harm suffered by the plaintiff. In tort claims the law at the location of the tortious act will apply. This may be the law of the State where the object has been taken or the law of the State where the object has been wrongfully held by the tortfeasor. Two American cases highlight this possible conflict.

Charash v. Oberlin College involved works painted by Eva Hesse which were donated to Oberlin College.⁹⁰ The Plaintiff was Helen Charash a New Jersey resident and Hesse's sister and sole heir. When Hesse died she was a New York resident and the alleged conversion took place in that state.⁹¹ Charash alleged a New York art dealer, Donald Droll, misappropriated the works. She brought suit in the Federal District Court for the Northern District of Ohio, the location of the College. The federal court sitting in diversity applied Ohio's choice-of-law rules.⁹²

⁸⁹ *Id.* It has been suggested that the limitation period of an Australian State which favoured a buyer not in good faith would not be applied. Kevin Chamberlain, *U.K. Accession to the 1970 UNESCO Convention*, 7 *Art, Antiquity & L.* 231, 241 (2002).

⁹⁰ 14 F.3d 291 (6th Cir. 1994).

⁹¹ Based on the plaintiff's pre-trial deposition, it is understood that it was necessary to remove all of Hesse's belongings from her New York City loft. A trunk containing a number of drawings disappeared during this process. *Id.* at 294.

⁹² *Id.* at 296.

The primary conflict-of-laws issue was the appropriate burden of proof. Ohio placed the burden of proof on the plaintiff, requiring her to establish the property was converted.⁹³ However New York law insists people deal with property at their own risk, and the defendant must prove her title is valid.⁹⁴ In this case the burden fell to the defendant Oberlin College to prove there was no conversion. As both Hesse and the New York dealer were deceased, meeting the burden of proof was very difficult. Ohio had adopted the position of the Restatement (Second) of Conflicts of Laws, which provides that the local law should apply, unless another state has a “more significant relationship ... to the occurrence.”⁹⁵ Nearly all of the relevant contacts were with Ohio in this case, and as such the court held there was “little support under any of these [principles] for holding that New York law governs this case.”⁹⁶

In another case, the Seventh Circuit Court of Appeals characterized the conflict of law as one of three different tort laws. The dispute arose from the theft of mosaics from a church in Cyprus. In *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts*, the court applied Indiana law at every turn.⁹⁷ The court applied Indiana rules despite the defendant’s assertion that the dispute involved transfer of chattels and should be subject to the property situs rules.⁹⁸ The Seventh Circuit applied Indiana’s choice-of-law rules as applied to tort in affirming the trial court’s holding that “Indiana law and rules govern every aspect of this action, from the statute of limitations issues through the application of the substantive law of replevin.”⁹⁹

⁹³ *Id.*

⁹⁴ *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991).

⁹⁵ Restatement (Second) of Conflict of Laws §147 (1971).

⁹⁶ *Charash*, 14 F.3d at 297.

⁹⁷ 917 F.2d 278 (7th Cir. 1990).

⁹⁸ The Greek Orthodox Church sought the return through a replevin action. No other Indiana cases had characterized a replevin action, but both the trial and appeals court classified the action as sounding in tort because “it is identical in all relevant respects to a tort claim for conversion.” *Id.* at 286 n.10.

⁹⁹ *Id.* at 287.

The trial court noted that although Switzerland was the location of the wrongful activity, it bore little connection to the cause of action.¹⁰⁰ None of the parties or important actors were Swiss; the mosaics were never in the stream of commerce in Switzerland; and they were only on Swiss soil for four days.¹⁰¹ In fact, Indiana's choice-of-law rules pointed to Indiana as the rightful source of governing law. Indiana was the purchaser's home state; the purchase had been brought about because of the efforts of another Indiana citizen; the purchase was financed by an Indiana bank; the agreement to share the profits from the sale was made subject to Indiana law; and finally the mosaics were present in Indiana.¹⁰²

In this case the court reached the right decision holding the mosaics should be returned to Cyprus, but it used flawed reasoning. By characterizing the conflict as one of conflicting tort laws, the court used the prevailing view. Though Switzerland certainly had only tenuous contacts with the mosaics and as such the *lex situs* rule should not apply to this case, the jurisdiction with the closest connection to the objects must certainly have been Cyprus, not Indiana. After all, the mosaics had been firmly fixed to the church for over 1400 years. However, courts have shown a persistent hesitancy to apply the law of the source nation or *lex originis*. This can be partly attributed to the dominance of the *lex situs* rule as we will see in the following section.

D. When Movable Property Rules Conflict

Disputes between original owners and good-faith purchasers of stolen art or antiquities are most often characterized as questions of title to goods. Conventional reasoning argues that characterizing the conflict in this way should produce greater uniformity of result, and parties should be better able to predict outcomes. This is the

¹⁰⁰ *Autocephalous Greek-Orthodox Church v. Goldberg*, 717 F. Supp. 1393, 1393 (S.D. Ind. 1989).

¹⁰¹ *Id.* at 1394. The district court characterized Switzerland's connection to the suit as "fortuitous and transitory" and that "Switzerland [had] no significant interest in the application of its law to [the] suit." *Id.*

¹⁰² *Id.*

position of most American jurisdictions,¹⁰³ the Restatement (Second) of Conflict of Laws,¹⁰⁴ England and Wales,¹⁰⁵ and in most jurisdictions internationally.¹⁰⁶ These jurisdictions all characterize the conflict in a like manner, and apply the law of the situs of the property at the time of the transfer.

Both commercial convenience and the need to maintain strong international and interstate relations underpin the rule.¹⁰⁷ If the law of the *situs* recognizes a valid transfer of title, the state or nation to which the chattel is later taken will recognize that title, despite the fact that its law would not have validated the transfer.¹⁰⁸

The best illustration of the principle is *Winkworth*.¹⁰⁹ Works of art were stolen from the English plaintiff in England. They were then taken to Italy and sold to a good-faith purchaser who brought them back to England where they were consigned for auction. The purchaser argued he had acquired good title under Italian law. The English court agreed. By

¹⁰³ See e.g., *Dobbins v. Martin Buick Co.*, 227 S.W.2d 620, 621 (Ark. 1950) (applying the laws of Tennessee to a replevin action aimed at recovering an automobile where the sale took place in Tennessee); *Ellison v. Hunsinger*, 75 S.E.2d 884, 889 (N.C. 1953) (applying South Carolina law as the *lex situs* to the sale of cotton).

¹⁰⁴ Restatement (Second) of Conflict of Laws §244 (1971):

Validity and Effect of Conveyance of Interest in Chattel

The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in §6. In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law.

¹⁰⁵ Albert Dicey & John Morris, *Conflict of Laws* 942 (11th ed. 1987), recognizing “the validity of a transfer of a tangible moveable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the moveable is at the time of the transfer (*lex situs*).” See also *Berend* E.W.H.C. 132 (refusing to apply the *renvoi* doctrine to a moveable antiquity, choosing instead to apply French law as the *lex situs* in denying Iran’s claim).

¹⁰⁶ Spanish, Swiss and Italian law all apply the *lex situs* doctrine as well. See Julio D. Gonzales-Campos & Miguel Virgos Soriano, *International Art Trade in Spanish Law*, in *Geneva Workshop, International Sales of Works of Art*, 355, 355-56 (Pierre Lalive ed. (1985) (stating Spanish law adopts a *lex situs* choice-of-law rule for determining the governing law regarding moveable property); Francois Knowfpler, *Art Trade and Swiss Private International Law*, *Id.* at 386 (stating the *lex situs* rule under Swiss law); Riccardo Luzzatto, *Trade in Art and Conflict of Laws: The Position of Italy*, *Id.* at 415 (stating “the valid transfer of title on the basis of the foreign law of the *situs* while the object was situated abroad shall be recognized by the Italian law once the object has been brought to Italy”).

¹⁰⁷ Restatement (Second) of Conflict of Laws §247(a) (1971).

¹⁰⁸ Peter Carter, *Transnational Trade in Works of Art: The Position in English Private International Law*, in *Geneva Workshop*, *supra* n. 106 at 329 (arguing “It would seem...that the mere fact of moving property across a frontier ought not in itself to affect title. A contrary rule would be liable to promote chaos. Title should only be affected by virtue of the occurrence of a new transfer taking place in the new *situs*”).

¹⁰⁹ [1980] 1 Ch. 496.

applying the *lex situs* rule, title was determined under Italian law. The court reached this result despite the claimant's argument that the dispute had a number of strong connecting factors to England: the theft took place in England, the owner was domiciled there, the owner did not know the art had ever been removed from England, the art works had been returned to England, and finally an English court was judging the dispute.¹¹⁰ However the court stressed that "[i]ntolerable uncertainty in the law would result if the court were to permit the introduction of a wholly fictional English situs when applying the principle to a particular case, merely because the case happened to have a number of other English connecting factors."¹¹¹

The court was exactly right about the uncertainty which might arise, and the *lex situs* rule certainly seems a good policy for most movable objects. However, the great value of art and antiquities makes it feasible for parties to routinely transport objects across national borders or to wait decades before attempting to sell stolen works.¹¹² Works of art and antiquities are not treated like other objects. As a result the *lex situs* rule allows parties to choose more favorable jurisdictions, and strongly weakens the effectiveness of the protection of cultural property. At least in the art and antiquities context, the *lex situs* rule actually leads to less uniformity of result.

Using movable property rules as the characterizing factor allows courts to focus on the important issues in a conflict. If courts characterize a conflict merely as one of differing limitations periods, parties will unfortunately choose a forum based on their limitations rules which will seriously undermine the underlying policies of the states involved. The wide

¹¹⁰ *Id.* at 502-03.

¹¹¹ *Id.* at 509.

¹¹² Take for example the art dealer Bruno Lohse. He was appointed by Hermann Goering to acquire works during the German occupation of France. Lohse recently died in March, when it was learned he had kept a looted Camille Pissarro painting in a Swiss bank vault since the Second World War, a fact that only came to light after his recent death. Catherine Hickley, *Nazi Art Dealer's Will Disperses Dutch Masters, Expressionists*, Bloomberg, <http://www.bloomberg.com/apps/news?pid=20601088&sid=a1pbz19FN.G0&refer=home> (published July 12, 2007).

inconsistency of the rules which govern art and antiquities disputes creates a private legal regime which cuts against individual rights and the cultural property policy objectives of states, individuals and institutions. The trade is truly global. The inconsistency of rules coupled with the multijurisdictional nature of art and antiquities litigation create problems which are not present in disputes involving other goods.

E. The Consequences

The current lack of harmony weakens the position of original owners, good faith purchasers, nations of origin, market nations, museums, and the cultural property trade generally. Multijurisdictional cultural property disputes are most often characterized as a conflict of movable property rules. The *lex situs* rule, which guides courts when movable property laws conflict, does not work well to prohibit or remedy the illicit trade in cultural property. In fact, the rule can produce disastrous effects for art and antiquities. The *Winkworth* decision is the best example: an owner of previously stolen art sees his missing objects in a Christie's auction catalogue but has no claim for its recovery because its title has been laundered abroad.

In any true conflicts analysis a choice must be made between differing laws. The public policy implications which support the chosen rule will of course be advanced while that supporting the "losing" law will be subordinated. The general ease of commerce and promotion of international trade mean the *lex situs* rule works very well for disputes involving ordinary movables. In individual cases the choice-of-law decision may not reveal many ill-effects. But in art and antiquities litigation the subordination of those important private and public interests will almost always be undermined on a massive scale.

As we have seen, civil law systems generally favor good faith purchasers, while most common law systems support the original owner. This conflict renders broad policy solutions difficult. As such, international conventions could play an important role, but unfortunately

they are often vaguely drafted and subject to polarizing influences. Consider this: if every jurisdiction favoured good faith purchasers, then a system could be created in which more rigorous checks are required of buyers to achieve good faith status. But because of the dual regime currently facing cultural property policy-makers, we have two incomplete policy preferences which continue to work against each other.

The current state of private international law undercuts the legal options of both original owners and good faith purchasers. Imagine an owner who discovers her painting has been stolen. If she is domiciled in a forum which favours the transfer of good title by a good-faith buyer, she can only hope for the work's ultimate movement across a border. If the law of the owner's domicile requires the exercise of due diligence in publicizing the theft, the owner should consult the relevant law enforcement bodies and theft databases such as the Art Loss Register. However if the owner suffers her theft in a demand and refusal jurisdiction such as New York, she must exercise diligence in publicizing the theft, but that diligence may make recovery less probable. In this way, the demand and refusal and due diligence limitation-tolling rules cut against each other. She cannot simply wait until the work resurfaces because the work may ultimately end up in a due diligence forum. However if she conducts her due diligence, chances are greater that the object will stay hidden longer. Thieves or their middlemen will be able to anticipate these diligent efforts, which will cause them to delay a sale.

The good-faith purchaser has a difficult set of options as well. To claim superior title, the purchaser must establish her good faith by showing she did not know or have reason to know the object was stolen. Unfortunately, the law of the original owner's domicile might apply, and because the identity or existence of an original owner outside the previously known provenance is unknown or deliberately hidden, the good faith purchaser's rights will

be defined by any one of a number of rules. This leads to a situation where a good-faith purchaser is potentially blindsided by a claim from an original owner.¹¹³

Interests of individual nations are similarly compromised. When a piece of cultural property is stolen and both the original owner and good-faith purchaser make a claim, a forum may have laid out a set of policy preferences. In demand and refusal jurisdictions, the rights of original owners are given priority. As a result, in the absence of agreement on the tolling of limitations periods a dispossessed owner must conduct due diligence, even though her jurisdiction may have adopted the demand and refusal rule. As a result she is forced to publicize a theft (and as a result send the work further underground in many cases), the very thing which the demand and refusal rule tries to avoid.

But the policy foundations of the discovery rule are not advanced either. The discovery rule rests on the joint notions of repose and the security of acquisition by requiring buyers to make a careful investigation into the provenance of a work to meet the good-faith threshold.¹¹⁴ As the court noted in *Winkworth*,

[W]ere the position otherwise, it would not suffice for the protection of a purchaser of any valuable moveables to ascertain that he was acquiring title to them under the law of the country where the goods were situated at the time of the purchase; he would have to try to effect further investigations as to the past title, with a view to ensuring so far as possible, that there was no person who might successfully claim a title to the moveables by reference to some other system of law; and in many cases even such further investigations could result in no certainty that his title was secure.¹¹⁵

That may be true, but in the art and antiquities context such a rigorous title investigation is exactly the kind of activity courts should be encouraging. The alternative gives varying

¹¹³ A high-profile recent example is director Steven Spielberg's discovery he had unwittingly purchased a Norman Rockwell painting which had been stolen in 1973. *Spielberg Collection is Found to Contain Stolen Rockwell Art*, New York Times available at <http://select.nytimes.com/search/restricted/article?res=F10F1EFB3C550C778CDDAA0894DF404482> (published March 4, 2007).

¹¹⁴ The Supreme Court long ago argued limitations periods "promote repose by giving security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

¹¹⁵ *Winkworth*, [1980] 1 Ch. at 512-13.

degrees of commercial certainty and often results in a chilling effect on the legitimate movement of works of art.

This confusion is particularly felt by museums and cultural institutions which can either be an original owner or a good-faith purchaser or recipient of a stolen work. As Second Circuit Court of Appeals Justice Newman articulated,

In some situations a work of art is in the possession *of* a museum, where it has remained for many years after purchase from a reputable dealer; it subsequently develops that the work was stolen from its original owner, who years after the theft claims the property from the museum. In other situations, a work of art is stolen *from* a museum, which ultimately locates the work and claims it from the possessor who may have purchased the work from a reputable dealer. Museums in possession of stolen art will probably think it preferable to fashion rules that place some obligation on owners to act with diligence in seeking to locate works they claim were stolen from them. On the other hand, museums that are the victims of theft will probably think it preferable to have rules that minimize the obligation of owners to locate their stolen property.¹¹⁶

As a result museums are acutely subject to the problems in private international art and antiquities law.

Even the art market loses viability because of the uncertainty. As we have seen, original owners and good-faith purchasers often make persuasive claims and are two relative innocents. The current system does not support either side uniformly, but rather shifts back and forth between jurisdictions. Galleries, dealers, curators and even artists rely on the security of acquisition. When there is uncertainty this chips away at the foundation of the legitimate market.

Another unintended consequence of the confusion is the growing reluctance of institutions to share their works in the United States.¹¹⁷ In fact, as a work of art gains more connections to different fora, the confusion surrounding what private law will apply becomes

¹¹⁶ *Hoelzer v. City of Stamford*, 933 F.2d 1131, 1139 (2d Cir. 1991) (Newman, J., concurring, emphasis added).

¹¹⁷ Nearly ten years on, the *Portrait of Wally* litigation has still not managed to reach the substantive issues of the case, and the work remains in storage in the New York Museum of Modern Art in a tragic echo of the fictional Jarndyce v. Jarndyce in Charles Dickens' *Bleak House*. For criticism of the criminal penalty regime this dispute may produce, see Derek Fincham, *Why U.S. Federal Penalties for Dealing in Illicit Cultural Property are Ineffective and a Pragmatic Alternative*, 25 *Cardozo Arts & Ent. L. J.* 597 (2007).

more difficult. The current choice-of-law analysis for art and antiquities disputes runs counter to the interests and values of every component of the cultural policy-making universe, save for the dishonest individuals who profit off the illicit trade. These problems are not new, unfortunately the efforts aimed at harmonizing the relevant private international law have been badly flawed.

III. The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”) was an ambitious effort aimed at harmonizing the private laws of various states so as to reduce the harmful effects which occur when laws conflict.¹¹⁸ It establishes common rules for the restitution and return of cultural objects between States Party to the Convention.¹¹⁹ At present there are 29 States Party.¹²⁰

The UNIDROIT Convention primarily seeks to return objects to their original private owner.¹²¹ It attempts to fill the gaps in the UNESCO Convention by firmly placing the regulatory efforts on the market end of the illicit supply chain. It recognizes the inherent difficulty in relying on developing nations to police their own borders and archaeological

¹¹⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted on June 24, 1995, 34 I.L.M. 1322, available at

<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

¹¹⁹ UNIDROIT's purpose is to study means and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States. *See* "Purpose" of UNIDROIT, <http://www.unidroit.org/english/presentation/main.htm> (last accessed June 7, 2008). *See also* UNIDROIT Convention, pmbl. ("Determined to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimum legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage interest of all.").

¹²⁰ <http://www.unidroit.org/english/implement/i-95.pdf> (last accessed June 7, 2008).

¹²¹ UNIDROIT Convention, art. 1:

This Convention applies to claims of an international character for:

- a. the restitution of stolen cultural objects;
- b. the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of promoting its cultural heritage.

sites.¹²² UNIDROIT creates a uniform law which requires cultural property to be returned even if a theft cannot be firmly established.¹²³ It also allows for a private right of action. Its major focus is the harmonization of private international law. It produced a number of excellent and innovative approaches to the problem, however a number of fatal flaws render its widespread application in most major art-market states highly improbable.

Immediately after its completion it was met with a great deal of criticism, especially among art and antiquities dealers. The European Fine Arts Foundation threatened in 1996 to move its fairs away from Basel and Maastricht if Switzerland or the Netherlands ratified the Convention.¹²⁴ James Fitzpatrick argued that dealers, collectors and museums could find themselves constantly in court in “expensive”, “time-consuming, distracting and debilitating litigation”.¹²⁵ Much of this criticism seems unfair, and exaggerated; and will likely be heaped upon any efforts to seriously modify the art trade.¹²⁶ As we will see there are serious shortcomings with the Convention, but it introduced some novel and effective measures into international cultural property law which could have made a real impact. Unfortunately the shortcomings and changes made to the convention during various drafts render widespread implementation difficult.

The best way to understand the UNIDROIT Convention may be to compare it with the 1970 UNESCO Convention. The UNESCO Convention allowed only State Parties to request restitution of stolen or illegally exported objects; the UNIDROIT Convention

¹²² Catherine Phuong, *The Protection of Iraqi Cultural Property*, 53 Int'l. & Comp. L. Q. 985, 991 (2004) (noting "Since the 1970 UNESCO Convention was criticized for not being sufficiently specific, UNESCO requested the UNIDROIT to work on a supplementary convention on stolen or illegally exported cultural objects.").

¹²³ This provision allows a Contracting State to merely claim that the object was illegally exported in order to demand its return. Theft need not be proven.

¹²⁴ *Maastricht v. UNIDROIT*, ART newsletter, 19 March 1996.

¹²⁵ James Fitzpatrick, *Against UNIDROIT*, The Art Newspaper, 19 January 1997.

¹²⁶ For a good discussion of how the art and antiquities trade have responded to the specter of increased regulation in the United Kingdom, see Simon Mackenzie, *Performative Regulation: A Case Study in How Powerful People avoid Criminal Labels*, 48 Brit. J. Crim., 138 (2008).

remedies this oversight by allowing private parties to initiate restitution.¹²⁷ Second, UNIDROIT attempts to remedy problems with UNESCO's treatment of undiscovered antiquities.¹²⁸ Third, the UNIDROIT Convention applies to unlawfully excavated, or lawfully excavated but unlawfully retained objects.¹²⁹ Finally, unlike the UNESCO Convention, it does not require museum certification or cataloguing by a source nation.

UNIDROIT also provides that a bona fide purchaser of stolen objects will not receive good title.¹³⁰ The purchaser must instead return the object, and is entitled to "payment of fair and reasonable compensation" provided she had no knowledge of the object's prior theft and exercised due diligence when the object was purchased.¹³¹ This important good faith requirement could act to deter the illicit trade, by requiring each purchaser to police their own acquisitions.¹³²

A. What UNIDROIT Got Right

The UNIDROIT Convention introduced three significant changes which would have a beneficial impact on the illicit trade in cultural property. First, it provided that good-faith purchasers or acquirers of stolen or illegally exported cultural objects who have exercised due diligence and who were required to return them were entitled to compensation. Second, it attempted to limit and describe the situations in which a buyer can claim to have exercised due diligence. Finally it set out and defined a limited right of return for illegally exported objects.

1. Compensation for the Diligent

¹²⁷ UNIDROIT Convention arts. 2,8.

¹²⁸ UNIDROIT Convention art. 3.

¹²⁹ See the UNIDROIT Convention art. 3, App. II.

¹³⁰ UNIDROIT Convention art. 4(5) ("The possessor shall not be in a more favorable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.").

¹³¹ UNIDROIT Convention art. 4(1).

¹³² Lehman *supra* n. **Error! Bookmark not defined.** at 547.

Under the UNIDROIT Convention, acquirers of stolen or illegally exported cultural property are entitled to fair and reasonable compensation if they lose title to the original owner. Article 4(1) of the convention provides:

The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

Article 6(1) provides for the same in cases of illegal export. These provisions strike an effective compromise. Giving sole title to either the good faith purchaser or the original owner is a crude legal remedy, especially when we consider many of these disputes span decades, require evidence and testimony that is difficult and expensive to procure, and implicate a number of legal systems. By compensating the diligent, the convention is rewarding and promoting thorough provenance research. The convention was already reaching into new territory in requiring the return of undocumented objects, and this provision allows jurisdictions to justify altering the normal rights of a good faith purchaser by mitigating the problem. By providing some compensation to the good faith acquirer, it lessens the general “winner take all rule” and provides for a more workable solution. It also encourages purchasers to conduct due diligence, and actively research an object’s chain of ownership. If they fail to do so, they cannot claim compensation. This would discourage potential acquirers from receiving objects without clear provenance. If antiquities buyers and museum curators universally stopped acquiring objects without a clean provenance, then a real reduction in the illicit trade would almost certainly follow. Unfortunately, such a widespread movement has not yet taken place, though there are indications that a trend towards responsible due diligence enquiries is emerging.¹³³

¹³³ In the spring of 2007 the Albright-Knox museum in Buffalo, New York auctioned many of its antiquities to shift their focus to buying contemporary art. As a result a number of objects with clean and detailed provenances dating back decades entered the market. One object, a Roman bronze sculpture of the goddess

2. Highlighting Due Diligence

Article 4(4) lays out the conditions for due diligence:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

This noteworthy provision attempts to expand the kinds of activities a diligent acquirer should undertake. Consider some circumstances which would indicate that more research should be conducted before a good faith purchase could take place. If a sale were to take place at unusual locations such as the bond area of an airport,¹³⁴ or a loading dock;¹³⁵ if the time of the sale was unusual;¹³⁶ or if there are indications that an antiquity has recently been in the ground such as caterpillars crawling on the object¹³⁷ or mud and straw on it.¹³⁸ There are also broad classes of antiquities which either because of their find-spot or composition which should perhaps lead to greater research before a responsible acquisition can take place.¹³⁹ Courts have highlighted this problem in the past, and have indicated additional

Artemis with a stag was sold at Sotheby's in New York for a record (for an antiquity) \$28.6 million. Many speculated its high price was earned because of its clean provenance. *Sculpture Sale is a Record*, New York Times available at <http://query.nytimes.com/gst/fullpage.html?res=9507EEDE1F30F93BA35755C0A9619C8B63&scp=1&sq=sculpture+sale+is+a+record&st=nyt> (published June 8 2007).

¹³⁴ *Autocephalous* 717 F.Supp. 1374 (1989).

¹³⁵ Such was reportedly the location of the transfer of the so-called Sevso treasure. David D'Arcy, *the Sevso treasure: who did what and to whom*, 31 *The Art Newspaper*, 14 at 38 October 1993.

¹³⁶ Reid v. Metropolis Police Comr. [1973] 2 All E.R. 97.

¹³⁷ The Sevso Treasure may have been covered in mud and caterpillars when it was acquired. See D'Arcy *supra* n. 135.

¹³⁸ *United States v. McClain*, 545 F.2d 988 (1977).

¹³⁹ Antiquities from the Jakarta region of Iran should be treated with suspicion, as recent floods there uncovered a large number of objects. *Republic of Iran v. Barakat Galleries Ltd.* [2007] EWHC 705 (QB). Cycladic figures are another example. In 1993, of the 1600 known figures at that time, only 143 could have been uncovered archaeologically, while 1400 others appeared on the market. Of course some of these may have been chance finds or fakes, but they certainly indicate purchasers should conduct a thorough provenance inquiry. Christopher Chippindale and David Gill, *Material and intellectual consequences of esteem for Cycladic figures*, 97 *American Journal of Archaeology* 601 (1993).

safeguards should be put in place.¹⁴⁰ The UNIDROIT Convention could have been more specific about what kind of actions should take place, rather than leaving the issue open. A much better system would have required in every art and antiquities transaction that impartial experts should be consulted or at the very least the major art theft databases should be checked before a buyer can claim good faith status. The Convention leaves these specifics to individual nations to determine.

Regardless though, any measure which makes it more likely that more provenance research will be conducted is a welcome change. The single biggest factor perpetuating the illicit trade is the shadow and mystery which routinely surrounds cultural property transactions. The extent of the problem is open to some speculation. We can see though that many of the problems associated with the illicit trade in cultural property can be traced to the nature of the market itself.

Newcomers to the cultural heritage field are often surprised to learn that the majority of cultural property transactions do not involve an exchange of information on title history, or what is called provenance.¹⁴¹ Very little information regarding the authenticity of title is given, nor are there guarantees that any of the provenance information that is given is accurate.

A number of recent quantitative studies have done a tremendous job of moving from anecdotal evidence towards an empirical view of the art and antiquities market.¹⁴² The

¹⁴⁰ As Chief Justice Bauer of the Federal Court of Appeals for the 7th Circuit made clear in *Autocephalous*:

In a transaction like this, 'All the red flags are up, all the red lights are on, all the sirens are blaring.'... In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like.

Autocephalous 917 F. 2d at 294.

¹⁴¹ For a discussion of how provenance affects transactions, see Leslie P. Singer & Gary A. Lynch, *Are Multiple Art Markets Rational?*, 21 J. Cultural Econ. 197 (1997).

¹⁴² See *infra* notes 143-151 and accompanying text.

growing body of evidence indicates a substantial portion of antiquities which appear on the market are illicit.

Professor Ricardo Elia conducted a recent study on South Italian vases from the Apulian region.¹⁴³ Elia analyzed Sotheby's auction catalogues between 1960 and 1998 and found that of the 1,550 vases auctioned; only 15% had provenance information.¹⁴⁴

Another study by Christopher Chippindale and David Gill looked at Cycladic figurines.¹⁴⁵ That study concluded that of the 1,600 known Greek Cycladic figurines, only 143 were recovered by archaeologists.¹⁴⁶

Another study examined the antiquities collections of seven prominent collectors, including Shelby White and Leon Levy who loaned their collection to an exhibition at the Metropolitan Museum of Art in New York in 1990 and 1991.¹⁴⁷ Of the 1,396 objects in these seven collections, only 10% of the objects had stated provenance.¹⁴⁸ Yet another study looked at five auction sales in 1991 and found that only 18% of the objects in the catalogues had a stated provenance.¹⁴⁹

A similar study was undertaken by Elizabeth Gilgan to examine the market for antiquities from Belize in the United States.¹⁵⁰ She looked at auction catalogues from the 1970s through the 1990s to trace pre-Columbian objects which appeared on the market. She found a substantial shift in the descriptions of objects in the catalogues, as the United States began to impose import restrictions on the nearby nations of Guatemala and El Salvador so as

¹⁴³ Ricardo Elia, *Analysis of the Looting, Selling and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, in *Trade in Illicit Antiquities: the Destruction of the World's Archaeological Heritage* 146 (Neil Brodie et al. eds., 2001).

¹⁴⁴ *Id.* at 150-51.

¹⁴⁵ Christopher Chippindale & David Gill, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 3 *Am. J. of Archaeology* 602 (1993).

¹⁴⁶ *Id.*

¹⁴⁷ Christopher Chippindale and David Gill, *Material Consequences of Contemporary Classical Collecting*, 104 *Am. J. of Archaeology* 463 (2000).

¹⁴⁸ *Id.* at 481.

¹⁴⁹ *Id.* at 481-82.

¹⁵⁰ Elizabeth Gilgan, *Looting and the Market for Maya Objects: A Belizean Perspective*, in *Trade in Illicit Antiquities: the destruction of the world's archaeological heritage* 73 (2001).

to elude detection as illegal imports. She found that catalogue descriptions changed to the use of “lowlands” rather than describing the precise region such as “Petén in Guatemala”. Such a generic description makes it more difficult to restrict the movement of these objects.

Though the situation with regards to works of art is marginally better, provenance is often lacking when individuals buy and sell paintings or sculpture as well. Take the recent controversy surrounding Stephen Spielberg, a prominent collector of Norman Rockwell. He recently discovered a Rockwell painting he had innocently purchased at an auction in 1989 had been stolen decades earlier.¹⁵¹

It would perhaps be too easy to claim that all objects sold without a provenance must be stolen or looted. However the market does not routinely give provenance and lacks transparency. No systemic safeguards ensure that individuals are buying and selling licit objects. In dealing with this lack of transparency, legal systems, commentators and judges have had difficulty fitting general legal principles into cultural property disputes.

Where such objects are most likely illicit, individuals should avoid acquiring them. At the very least they have not exercised due diligence under the convention. This heightened review of the circumstances surrounding an object’s acquisition may be the strongest and most useful new aspect of the UNIDROIT Convention.

3. Limited Right of Return

Though other portions of the Convention seem to conflict with it, Article 5(3) is an innovative provision which commits States, in specific situations, to enforce foreign export restrictions. Absent a treaty or special legal provision, states do not generally enforce the public laws of other states.¹⁵² Under the UNIDROIT Convention the foreign export

¹⁵¹ *Spielberg Collection is Found to Contain Stolen Rockwell Art*, NY Times, http://www.nytimes.com/2007/03/04/us/04rockwell.html?_r=1&oref=slogin. (published Mar. 4, 2007).

¹⁵² The issue was one of some importance in both the High Court and Court of Appeal decisions in *Barakat* [2007] E.W.H.C. 705 (QB) and *Berend infra* n 173 *et seq.* In England and Wales courts have no jurisdiction to entertain an action for the enforcement of a penal, revenue or other public law of a foreign state. The difficulty

restrictions will be enforced if those controls serve an international interest and merit foreign enforcement. Article 5(3) provides for the return of an illicitly exported foreign object if the removal “significantly impairs one or more of the following interests:”

1. The physical preservation of the object or of its context;
2. The integrity of a complex object;
3. The preservation of information of, for example, a scientific or historical character;
4. The traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State

The limited right of return is an idea with a lot of promise. The UNIDROIT approach is a good one, as it is often unclear what exactly constitutes a public law.¹⁵³ To derogate from this general rule, there has to be a legitimate international interest above and beyond merely retaining works of art. The UNIDROIT Convention navigated this difficulty quite well, by only requiring enforcement of foreign export restrictions in limited circumstances.

B. Two Weaknesses Prohibiting Widespread Implementation

At present there are only 29 States Party to the Convention.¹⁵⁴ Unfortunately two serious shortcomings render these good policy solutions moot. First and perhaps most importantly, Article 18 provides “No reservations are permitted except those expressly authorized in this Convention.” As such, if states were wary of certain provisions of the Convention, they would be unable to sign on to the provisions which are effective. Second, Article 3(2) seems to work against article 5(3), which provides for a limited right of return of illegally exported objects. Article 3(2) provides:

has been that the distinction between a public or penal law has often been unclear. In the U.S. export restrictions have been declared public laws, and therefore will not be enforced abroad unless pursuant to a treaty or similar agreement as “They do not create ‘ownership’ in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner.” *McClain*, 545 F.2d 1002.

¹⁵³ In fact, Justice Gray in dictum recently challenged the concept of extra-territorial enforcement of national ownership declarations. *See Barakat* [2007] E.W.H.C. 705 (QB) at para. 91.

¹⁵⁴ *See* <http://www.unidroit.org/english/implement/i-95.pdf> (last accessed June 7, 2007).

For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

This provision requires States Party to recognize foreign ownership declarations, but only for those declarations involving antiquities. Why then was the article necessary? John Henry Merryman, a member of the UNIDROIT Study Group which produced the Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects¹⁵⁵ has strongly criticized the provision:

Professional archaeological societies and prominent archaeologists have long agitated for special treatment of archaeological objects, and their voices command respect. The U.S. delegation to the third conference of governmental experts, which included an archaeologist, introduced and procured the adoption of this provision. However, the introduction of Article 3(2) was highly controversial. At least one member of the U.S. delegation opposed it, and the conference vote for its adoption was divided. Several delegates predicted that its inclusion would prevent their governments from becoming parties to the Convention. Opponents of U.S. adherence to the Convention can be expected to make an issue of Article 3(2).¹⁵⁶

Perhaps the most important market state, the U.S., has shown no interest in signing on. The U.K., despite a Select Committee recommendation seems unlikely to sign on as well. The provision seems wholly unnecessary, and provides for return, just as in Article 5(3), but this streamlined return provision is all-encompassing. It applies to sites and objects where there is no threat to objects or archaeological context. It also provides no safeguards. There are very legitimate reasons for not enforcing all foreign ownership declarations. For example if a source nation does nothing to police the antiquities trade itself, has not made its national ownership declaration sufficiently clear or even selectively enforces its provisions.¹⁵⁷

Consider a nation which has an ownership interest in an antiquity but has allowed its export. Under Article 5(3) there is no right of return for the export, but there would be under

¹⁵⁵ UNIDROIT 1990, Study LXX-Doc. 19, approved by the UNIDROIT Study Group at its third session on 26 January 1990.

¹⁵⁶ John Henry Merryman, *the UNIDROIT Convention: Three Significant Departures from the URTEXT*, 5 *Int'l J. of Cult. Prop.* 11, 15 (1996).

¹⁵⁷ *See Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989); *Barakat Galleries Ltd.* [2007] EWHC 705 (QB).

Article 3(2). At the very least the article conflicts with other aspects of the convention, and because no reservations are permitted, it seems unlikely that many more states will want to sign on. As a result the ambitious effort to provide a private law complement to the 1970 UNESCO Convention must be considered a failure, and we are left with a patchwork private international framework which produces inconsistent and conflicting results. In the alternative, courts are left to navigate the confusing policy choices, and they typically resort to the generally applicable rules accorded to movables. As the following section shows, those general rules are often ill-equipped to dealing with pieces of cultural property.

IV. Better Choice of Law Alternatives

As we have seen different jurisdictions favor either the original owner or subsequent good faith possessors. This divergence of policy has undercut the ability of courts and lawmakers to construct sound policy solutions in cultural property dilemmas. This inconsistency frustrates the rich array of legal tools in public international law and criminal law which can – and in some cases have – impacted the trade in stolen and illicitly excavated art or antiquities. Consequently a number of scholars have argued Civilian jurisdictions should amend their choice of law rules to accommodate the Common law view.¹⁵⁸ However such a massive and dramatic reform of principles which are firmly rooted at the heart of the civil law tradition seem unlikely. Rather, we should look at the choice of law analysis which creates the inconsistent outcomes and allows defendants to hide their transactions and shift objects to favorable jurisdictions.¹⁵⁹ By amending the choice of law calculus, we can give

¹⁵⁸ See e.g., Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 Tex. L. Rev. 1431, 1432-33 (1992); Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 Va. J. Int'l. 1 (1990).

¹⁵⁹ Some have even advocated making cultural property *res extra commercium*, meaning essentially it cannot be transacted, Oliver Metzger, *Making the Doctrine of Res Extra Commercium Visible in United States Law*, 74 Tex. L. R. 615 (1996) (arguing considerations of justice “would recommend the application of a de jure doctrine of *res extra commercium* to the enforceability of transfers of movables of great cultural significance. Such a de

added effect to the current body of international law and criminal law. In the U.K. in particular, there are indications that courts in England and Wales may be more inclined to look as a matter of policy at the important position auction houses occupy in the cultural property trade, and may perhaps consider a better-tailored choice of law analysis for art and antiquities disputes.¹⁶⁰

The difficulty in private international law disputes hinges on the ways in which different states have chosen to allocate burdens, rights and responsibilities between two relative innocents: original owners and subsequent purchasers. In a theft and subsequent sale connected with a single jurisdiction, the policy choices of that state should be furthered by the outcome of the dispute. Irrespective of the burdens and policy which may favor the original owner or subsequent purchaser, the intrastate sale will be governed by the laws of that jurisdiction and as a result interested parties can adjust their behavior accordingly. But if a dispute touches multiple jurisdictions a given outcome may further one nation's policy interest, but may undermine almost all policy considerations on a grand scale. Attempts to harmonize private law across jurisdictions have failed. As long as the law varies significantly from jurisdiction to jurisdiction, art and antiquities will flow to jurisdictions which favor subsequent purchasers.

A better solution would remove the possibility of choosing a forum by introducing a better choice of law rule to give private law a better role in the disposition of cultural

jure doctrine would give expression to a common understanding that the buying and selling of certain objects of cultural property leads to injustice.”) *Id.* at 653.

¹⁶⁰ *Rachmaninoff v. Sotheby's* [2005] EWHC 258 (QB). Tugendhat J. noted

There is a dark side to the confidentiality surrounding the identity of an auctioneer's principal. The public and the law have increasingly come to recognise the potential for abuse by criminals of works of art, and of those who deal in them (consciously or unconsciously), for money laundering, and for disposing of the proceeds of crime. The less the legal risks involved in committing a work for auction, the more attractive the market in works of art and manuscripts becomes for criminals. The policy of the law, both in this jurisdiction and elsewhere, is to look more skeptically than would have been thought proper in the past upon those who have very valuable property for which they give no provenance.

Id. at para. 35.

property. An important benefit of this different approach will be a dramatic shift on the part of buying behavior which will for the first time likely produce a massive shift in buying habits which will focus increasingly on where an object came from, why it is for sale, and sellers of cultural property will have to provide such information – if they are unable or unwilling then it will be likely that the object has been stolen or illicitly excavated. In fact, the general shift in choice of law policy has moved away from rigid application of rules, as the *lex situs* and its application to movable objects appears to be. Instead, this article argues, just as the Restatement (Second) of Conflict of Laws, that courts and lawmakers should look to the outcomes and uncertainty which this choice of law analysis has created.¹⁶¹ A necessary predicate for change in the cultural property trade is an understanding that art and antiquities are important pieces of our collective cultural heritage, and the rules governing their transfer must be able to distinguish them from ordinary goods like refrigerators, timber or cars. The current state of private law undermines both international law and criminal law, as the market often masks ownership histories, and find-spots of antiquities. A different choice of law analysis can dramatically improve private law, and can be effectively implemented incrementally, as opposed to harmonization which requires unanimous support. To see how we can examine the two prominent choice of law alternatives.

A. *Renvoi*

Renvoi, meaning to return, is a complicated private legal doctrine which has been used in the cultural property context. It offers a number of advantages over the *lex situs* approach, though it has earned a great deal of criticism, perhaps unwarranted, for the perceived lack of certainty and uniformity which could result. It arises when a court must apply the law of some other jurisdiction and as a result must apply not only the internal law of that forum, but

¹⁶¹ Restatement (Second) of Conflict of Laws s 6 cmt. c. (1971) (arguing the goal is to apply the law of the state with the “most significant relationship” to the disposition.

also its conflict of law rules. The applicable law could be foreign law, that of the forum, or even the law of a third state. Despite a great deal of criticism historically by both scholars and judges, *renvoi* continues to appear in international jurisprudence.¹⁶² In England and Wales the doctrine has been applied to a number of different situations including the validity of wills,¹⁶³ succession on intestacy,¹⁶⁴ validity of marriage,¹⁶⁵ and capacity to marry.¹⁶⁶ The House of Lords has held that it plays no part in the law of contract;¹⁶⁷ and a Scots court excluded it from tort cases.¹⁶⁸

The doctrine seems to have been revived of late though. It was recently used by the High Court of Australia in *Neilson v. Overseas Projects Corporation of Victoria Ltd.*¹⁶⁹ Mrs. Neilson injured herself falling down stairs in her apartment in China. She sued her husband's Australian employer, the Overseas Projects Corporation, arguing they had been negligent. Under Australian choice of law rules, the law of the place of the harm, or *lex loci delicti*, would govern her claim. This would have meant Chinese law would apply, but that claim had been barred by a 1-year statute of limitations. The High Court, however, found in favor of Neilson under the doctrine of *renvoi*. The High Court referred back to the law of Australia, meaning Australia's limitations period applied and Neilson prevailed.

English courts have never applied *renvoi* to a movable. However in *Winkworth* Justice Slade did note that it might be “theoretically possible” for a plaintiff to argue *renvoi* should apply in an art theft context.¹⁷⁰ The Republic of Iran recently had the opportunity to

¹⁶² See Ernest G. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 Colum. L. R. 327 (1910); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. R. 979 (1991).

¹⁶³ *Collier v. Rivaz* (1841) 2 Curt. 855.

¹⁶⁴ *Re O'Keefe* [1940] Ch. 124.

¹⁶⁵ *Taczanowska v. Taczanowski* [1957] P.301 C.A.

¹⁶⁶ *R. v. Brentwood Superintendent Registrar of Marriages, ex parte Arias* [1968] 2 Q.B. 956.

¹⁶⁷ *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] A.C. 50.

¹⁶⁸ *McElroy v. McAllister* (1949) S.C. 110.

¹⁶⁹ [2005] HCA 54.

¹⁷⁰ [1980] 1 Ch. at 512. Kurt Siehr discusses the possibility in his invaluable Hague lectures on International Art Trade and the Law. Kurt Siehr, *International Art Trade and the Law*, 243 Recueil des Cours 9 at 58-59 (1993-VI).

test this possibility before the High Court. *Iran v. Berend*¹⁷¹ concerned a fragment of an Achaemenid limestone relief, carved in the first half of the fifth century B.C.¹⁷² The carving had been buried from the time of the invasion of Alexander the Great until 1932 when it was excavated by Ernst Herzfeld. Some time between 1932 and 1974, the fragment was removed from Persepolis.

In 1974 Denyse Berend, a French citizen, purchased the fragment at an auction in New York through an agent. For 30 years the limestone relief hung in her Paris home. In 2005, the 85-year-old attempted to sell the object at Christie's in London, but on April 19 an injunction was granted in favor of Iran which sought to block the sale temporarily.¹⁷³ Iran sought the return of the object as a part of a national monument, “in accordance with certain legal provisions dating from the first half of the twentieth century.”¹⁷⁴

Preceding the trial, a number of museums and antiquities dealers were wary of the potential impact the decision would have for owners of Persian antiquities. As art dealer Michel van Rijn said, “If the High Court goes the direction of Iran it will send shivers down the spines of art collectors and museums.... It could set a precedent and Iran could claim more pieces worldwide.”¹⁷⁵

Iran argued that the English court should apply French conflict of law rules and use the doctrine of *renvoi*.¹⁷⁶ Those principles may sometimes refer back to the law of a third nation, which was Iran in this case. In introducing *renvoi*, Iran also argued that a French Judge would find an exception to the general *lex situs* rule and apply Iranian law by looking to the policy embodied in a number of international agreements to which France has agreed

¹⁷¹ [2007] E.W.H.C. 132 (Q.B.).

¹⁷² For a case note see Derek Fincham, *Rejecting Renvoi for Movable Cultural Property: The Islamic Republic of Iran v. Denyse Berend*, 14 Int'l J. Cult. Prop. 111 (2007).

¹⁷³ *Berend*, [2007] E.W.H.C. 132 (Q.B.) at para. 3.

¹⁷⁴ *Id.* at para. 2.

¹⁷⁵ Stephanie Condron, *Museums Face Fallout in Fight Over Carving*, The Telegraph, <http://www.telegraph.co.U.K./news/main.jhtml?xml=/news/2007/01/16/nmuseum16.xml> (accessed January 17, 2007).

¹⁷⁶ *Id.* at para. 8.

in recent years, including the 1970 UNESCO Convention, as well as the 1995 UNIDROIT Convention.

France ratified the 1970 UNESCO convention on January 7, 1997, and has signed the 1995 UNIDROIT convention but not formally implemented it. Iran argued that this should lead a French judge to find an exception for the recovery of the object sought in this case.¹⁷⁷ Although neither convention has direct bearing on the fragment, Iran maintained that a French judge would be mindful of the policy implications of the two instruments in applying an exception to the *lex situs* rule. Iran argued that a French judge should apply Iranian law in these circumstances, because the relief was clearly taken from Persepolis some time after 1932.

Although he did acknowledge some potential merits in applying *renvoi* to cultural property, Justice Eady considered such a decision firmly in the province of governments, and not the courts. As he said, “I can think of a number of reasons why it might be desirable to apply generally, in dealing with national treasures or monuments, the law of the state of origin but that is a matter for governments to determine and implement if they see fit.”¹⁷⁸

Here, Iran argued the spirit of French law dictated that the law of a source nation, Iranian law in this case, would lead a French judge to apply the law of the source nation. The vague nature of the relevant international conventions made judicial recognition of them difficult. Justice Eady must have undertaken this policy analysis, but he did not clearly lay out the issues or actually walk through the policy choices. Rather, he relied most heavily on the fact that *renvoi* was never applied to movables in England and Wales. Not only did he not

¹⁷⁷ *Id.* at para. 11. Special reference was made to article 3 of the UNESCO Convention which states, “The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this convention by the States Party thereto, shall be illicit.” Also reference was made to article 5(i) of the UNIDROIT Convention, “A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting state.”

¹⁷⁸ *Berend* at para. 30.

endorse the application of *renvoi* in this case, he seemed to preclude any future application of *renvoi* for movable cultural property:

I see no room either as a matter of policy for its introduction in the context of a tangible object such as that in contention here ... I can find no reason to differ from Millett J. and to hold, for the first time, that public policy requires English law to introduce the notion of *renvoi* into the determination of title to movables.¹⁷⁹

The relevant policy analysis should have looked at whether a French court, in looking at the policies underlying both the UNESCO and UNIDROIT conventions, would have decided that Iranian law should govern the dispute. Justice Eady seemingly attached significance to the fact that although France had ratified the 1970 UNESCO convention in 1997, it had never been expressly incorporated into French law. However, he also seemed unclear about exactly what this incorporation entailed. France was bound by the European Council Directive of March 15, 1993, on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.¹⁸⁰ France then may have not seen legislation specifically implementing the 1970 UNESCO convention as necessary. Justice Eady relied heavily on *Macmillan v. Bishopsgate Investment Trust*, in which Justice Millett outlined a rather confusing rubric for the policy decisions at play in evaluating an application of *renvoi*.¹⁸¹ Because *renvoi* was not applied, all that remained was to apply French Law to the dispute. Justice Eady indicated that the *lex situs*, or location of the object dictated that French

¹⁷⁹ *Id.* at paras. 23-24.

¹⁸⁰ EC Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State. This established a repatriation scheme among European Union member states. It operates for illicit export only, in direct contrast to the UNESCO Convention.

¹⁸¹ [1995] 1 WLR 978, 1008. Justice Millett stated,

The determination of a question of priority between competing claims to property is based on considerations of domestic legal policy.... A decision by an English court, based on English principles of conflict of laws, that the question should be determined by the application of the rules of a foreign law is also based on considerations of legal policy, albeit at a higher level of abstractions. It involves a policy decision, at the higher level, that the policy which has been adopted, at the lower level, by English law should not be applied because the considerations which led to its adoption in the domestic law are not relevant in the particular circumstances of the case; and to a policy decision, at a higher level, that the policy which has been adopted, at the lower level, by the foreign law should be applied in its stead.

domestic law will be applied to the dispute. In this case, because the defendant acted in good faith, she would have obtained title in November 1974 when she took possession of the fragment.¹⁸²

An English judge must interpret French law in its current state and cannot attempt to create new rules. On balance, Justice Eady considered it “highly unlikely” that a French court would apply Iranian law to the dispute. Justice Eady weighed the testimony of the two French law experts on this question, and provided several reasons why he thought a French court would not apply Iranian law.¹⁸³ First, there was no precedent for such an application in France. Second, the failure of the French legislature to incorporate the UNESCO convention into domestic law seemed to indicate that the legislature had, by not acting, strongly indicated its unwillingness to be bound by its provisions. Third, the application of the Iranian law would mean that there are no limitations provisions in the current case. Fourth, there would be no provision allowing for compensation to Berend for her purchase of the relief in good faith. Finally, even though the claimant argued the conventions had been incorporated into French domestic law, Justice Eady stated,

These conventions have been around a long time without being incorporated into the law of France, and [Maître Foussard, the French law expert for the defendant] asked rhetorically why as a matter of judicial policy the hypothetical French court should suppose that the time has become ripe for their implementation in 2007.¹⁸⁴

Renvoi was originally designed to foster consistency across jurisdictions, and as such would appear to be a perfect tool for the art and antiquities trade. *Renvoi* is a seldom-used choice of law principle though it has earned resurgence of late. Judges seem reluctant to adopt it in many cases because they fear a lack of certainty and uniformity. Although he acknowledged the potential benefits of applying *renvoi* to movables which are parts of a “national treasure or monument,” Justice Eady was hesitant to reach into unknown territory

¹⁸² *Berend*, para. 33.

¹⁸³ *Id.* at para. 37.

¹⁸⁴ *Id.* at paras. 36-43, 50.

and apply *renvoi* to a movable. Certainly, he could have recognized the United Kingdom's recent accession to the 1970 UNESCO convention as an indication that the United Kingdom was endorsing this very policy. Though it may lead to some difficult applications, *renvoi* certainly appears a better rule for cultural property than the current *lex situs* rule. However an even better choice of law rule has been advocated.

B. *Lex Originis*

In an ideal world, in a case in which a piece of cultural property has been stolen or illicitly excavated from a source nation, the law of that nation, or *lex originis*, should decide the outcome of any legal action flowing from the theft or removal. If, for example, a mosaic has adorned a church for over 1400 years, and those mosaics are stolen in violation of the law of that jurisdiction, that jurisdiction should surely have the closest connection with the stolen works of art and should have its laws govern the resulting dispute.¹⁸⁵ There has been a growing movement for application of the rule in recent years, particularly in Europe. The *Institut de droit international* advocated adopting the *lex originis* rule at its 1991 session in Basel.¹⁸⁶ It also proposed rules which would govern if the country of origin is unknown.¹⁸⁷

Commentators have urged an adoption of the *lex originis* rule as well. As Symeon Symeonides has argued “the most logical choice [when laws conflict] is the state in which the thing was situated at the time of the critical event, typically the theft or other unauthorized removal.”¹⁸⁸ Also, the 1995 UNIDROIT Convention rests on the premise that the law of the situs of origin is controlling, as it determines whether an object has been stolen or illegally

¹⁸⁵ Autocephalous, 717 F. Supp. at 1393-94.

¹⁸⁶ Institut de droit international, Resolution of September 1999, 81 *Revue Critique de droit international privé* 203 (1992). It urged “The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country.”

¹⁸⁷ Id. (Article 1(1) provides the “‘country of origin’ of a work of art means the country with which the property concerned is most closely linked from the cultural point of view”).

¹⁸⁸ Symeonides, *supra* n. 38 at 1183.

exported.¹⁸⁹ If that is the case, the Convention dictates the return of the object to the source nation.¹⁹⁰ Also, Article 12 of the directive 37/7/EEC concerning the restitution of cultural property favours the *lex originis* as it provides for the return of cultural property from Members of the European Union where the object has been removed from another EU Member state.¹⁹¹

Belgium is the lone jurisdiction to have cast aside the *lex situs* rule and adopted a *lex originis* rule for cultural property. The Belgian Codification of Private International Law of July 27, 2004 provides the recovery of an object which has been illegally removed from the country in whose cultural patrimony the object belongs is governed by the law of that country.¹⁹² The relevant provision is Art. 90 {*Law applicable to cultural property*}:

If an item, which a State considers as being included in its cultural heritage, has left the territory of that State in a way, which is considered to be illegitimate at the time of the exportation by the law of that State, the revindication by the State is governed by the law of that State, as it is applicable at that time, or at the choice of the latter, by the law of the State on the territory of which the item is located at the time of revindication.

Nevertheless, if the law of the State that considers the item part of its cultural heritage does not grant any protection to the possessor in good faith, the latter may invoke the protection that is attributed to him by the law of the State on the territory of which the item is located at the time of revindication.¹⁹³

This Article authorizes the application of the law of the current situs in two circumstances:

(1) at the choice of the claimant country; or (2) at the choice of a good faith purchaser, in those cases in which the law of the situs of origin does not protect good faith purchasers. The passage in question requires the alleged wrongdoing must have been illegitimate at the time of exportation by the law of that State. In addition, a claim may only be brought by a state, as

¹⁸⁹ UNIDROIT Convention art. 3(2) (“[A] cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.”).

¹⁹⁰ UNIDROIT Convention, arts. 3(1), 5(1).

¹⁹¹ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, O.J. EU at No L 74 of 27.3.1993.

¹⁹² Loi du 16 juillet portant le Code de droit international privé, *Moniteur belge* 27.7.2004, at 57344.

¹⁹³ Law of 16 July 2004 Holding the Code of Private International Law.

private persons have no standing to implicate the *lex originis* rule when objects may have been stolen and sold abroad.

However there are potential problems with attempting to invoke the *lex originis*, particularly with respect to objects whose nation of origin is unknown or unknowable – often described orphaned objects. Take for example the beautiful and controversial Sevso treasure. The 14 silver objects have only rarely been displayed. Their location, find spot, and provenance are unknown. The Marquess of Northampton acquired them in the early 1980s, and recently put them on display at Bonham’s Auction House in London in 2006.¹⁹⁴ After a 7 week trial in 1993 in the New York Supreme Court a jury found that neither Croatia nor Hungary had established a valid claim over the objects, and the Marquess of Northampton trust retained possession.¹⁹⁵ In such a case, the *lex originis* may be unknowable. However such a situation presents a difficult problem for any choice-of-law rule. Moreover, there may be a possibility that the potential nations of origin could band together and exercise their collective interest. If for example Croatia and Hungary could have established that one of those two nations was definitively the area where the treasure had come from, they could create a trust to collectively manage and share the treasure.¹⁹⁶

C. How the *lex originis* Can Positively Impact Cultural Property

When an important piece of cultural property is subject to a private international legal dispute, there should be a presumption that the *lex originis* will. The state of origin will have the greatest interest in ensuring its own provisions apply. Courts have been hesitant to bypass

¹⁹⁴ Alan Riding, *14 Roman Treasures, On View and Debated*, N.Y. Times available at <http://select.nytimes.com/search/restricted/article?res=F30A11F93C5B0C768EDDA90994DE404482> (published October 25, 2006).

¹⁹⁵ Republic of Croatia, et al. v. Trustee of the Marquess of Northampton 1987 Settlement, 610 N.Y.S.2d 263 (N.Y. App. Div. 1994).

¹⁹⁶ See Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation* 8 Chi. J. Int’l L. 197 (2007).

the *lex situs* rule in the past. However the singular nature of art and antiquities compel a more careful analysis on the part of courts and lawmakers. The traditional justifications for the *lex situs* rule are inapplicable to art and antiquities disputes, because these are very valuable and precious objects for our collective human history. To allow the law to treat them in the same manner as ordinary goods defeats in many ways the whole animating notion of heritage. To that end, I propose a *lex originis* choice of law rule should be widely adopted. Symeon Symeonides has provided his own proposal for implementing the *lex originis* rule.¹⁹⁷ I think we can set aside the specifics of how such a rule should be implemented. Rather this article attempts to construct a broad policy objective – decreasing the illicit trade in cultural property – and shows how a *lex originis* rule would accomplish this objective. Three important benefits would flow from the adoption of the rule: it would increase the transparency of the cultural property trade, it can be effectively implemented incrementally, and finally it would be far simpler to obtain than a harmonization of all private laws relating to cultural property.

Foremost would be the impact it would have upon the art and antiquities market. Though attitudes are changing, if the sale of an antiquity were governed by the law of its nation of origin, at the time it was removed, this would ensure national laws are recognized

¹⁹⁷ Symeonides' proposal provides:

1. Except as otherwise provided by an applicable treaty or international or interstate agreement, or statute, the rights of parties with regard to a corporeal thing of significant cultural value (hereinafter "thing") are determined as specified below.
 2. A person who is considered the owner of the thing under the law of the state in which the thing was situated at the time of its removal to another state shall be entitled to the protection of the law of the former state (state of origin), except as specified below.
 3. The owner's rights may not be subject to the less protective law of a state other than the state of origin,
 - (a) unless:
 - (i) the other state has a materially closer connection to the case than the state of origin; and
 - (ii) application of that law is necessary in order to protect a party who dealt with the thing in good faith after its removal to that state; and
 - (b) until the owner knew or should have known of facts that would enable a diligent owner to take effective legal action to protect those rights.
- Symeonides *supra* n. 38 at 1183.

by the market itself, and would draw much-needed attention to how and in what manner antiquities are acquired. A similar rule would aid other works of art as well. Why should the netsuke objects at issue in *Winkworth* be effectively laundered in Italy, even though they were stolen in England, and later sold in England. By fundamentally altering the state of the market, buyers and sellers would have to know where an object came from and who the past owners may have been. As one antiquities dealer noted in Simon Mackenzie's outstanding recent criminological study of the antiquities trade, "The [antiquities trade] is just a pastiche of lies, cheating and lack of integrity on all levels by most of the people involved. That's the art market, basically."¹⁹⁸ The single biggest factor perpetuating the illicit trade is the shadow and mystery which routinely surrounds cultural property transactions. The extent of the problem is open to some speculation. We can see though that many of the problems associated with the illicit trade in cultural property can be traced to the nature of the market itself. As a court noted in 1977, "in an industry whose transactions cry out for verification of both title to and authenticity of subject matter, it is deemed a poor practice to probe into either."¹⁹⁹ Adopting a *lex originis* rule would alleviate many of these difficulties, and would, in jurisdictions which adopt such an approach, greatly diminish the illicit trade and importantly would allow the market and trade to police itself. A buyer could refrain from purchasing an antiquity which appeared to be recently excavated, as opposed to the current situation in which sadly many objects have false or misleading title histories. This would even allow good faith purchasers of objects who have lost possession of their object to seek compensation from the sellers and dealers who may have sold those objects, and those who routinely violate the law or are known for selling illicitly excavated material or stolen objects would be more widely known and would soon find themselves without any buyers.

¹⁹⁸ Simon Mackenzie, *Going, Going Gone: Regulating the Market in Illicit Antiquities*, iii (2005).

¹⁹⁹ *Porter v. Wertz*, 56 A.D.2d 570, 392 N.Y.S.2d 10 (1st Dep't 1977).

Another important benefit of adopting a different choice of law rule, as opposed to trying to harmonize private law everywhere in the world, would allow for incremental change, and one that could be effectively implemented in individual jurisdictions. We need not necessarily need every jurisdiction to implement the *lex originis* rule, rather it could be implemented in even one key forum for the rule to have a measurable and immediate impact. The crucial step, and the real test of the rule, would be its potential implementation in a forum which enjoys a vibrant cultural property trade, such as New York or London. This approach would not necessarily require legislative action either, as an individual judge could when confronted with a cultural property dispute apply the important policy considerations discussed here.

V. Conclusion

Simeon Symeonides concluded his proposal for a *lex originis* rule by noting “if it helps stimulate the debate – even by becoming a target of criticism – then this article will have served its purpose.”²⁰⁰ Perhaps he is being too modest with the potential merits of his proposal, and sadly it has not yet generated any real debate about the merits of a different potential choice of law rule. This article is an attempt to show why reform of the default choice of law calculus is so badly needed, and show the benefits of adopting a better more nuanced rule for cultural property such as the *lex originis* rule. The scale of the trade, and the serious problems legal systems have in effectively regulating the market lead to inevitable private legal claims. A convincing and compelling argument can be made that the general *lex situs* rule governing title to movable objects or goods across national boundaries should be limited in some situations, specifically with respect to cultural property. In those instances in particular, the rule invariably produces bad outcomes and leads to forum shopping.

²⁰⁰ Symeonides *supra* n. 38 at 1198.

When public international law offers no remedy, claimants are often forced to seek redress through private law. Of course all nations forbid theft; and every jurisdiction recognizes that a thief cannot possess superior title to the original owner. The classic dispute in cultural property litigation does not involve the original owner and the thief, but rather the original owner and a subsequent purchaser. Both of these parties are relative innocents. The difficulty in private international law disputes hinges on the ways in which different states have chosen to allocate burdens, rights and responsibilities between these two relative innocents.

The majority position still relies on the *lex situs* choice-of-law rule. To effectively implement a *lex originis* rule we must work to support the legitimacy of arts and antiquities transactions. That leaves us with a fundamental question at the root of cultural property policy: is harmony across jurisdictions possible? It may be, but it will surely require a fundamental shift in the way the market operates at present. Such a shift may be within the realm of possibility. Consider Kenneth Burke's epigram "ad bellum purificandum" which belies his desire to "eliminate the whole world of conflict that can be eliminated through understanding."²⁰¹ This article is an attempt to uncover the disastrous consequences the current state of the law has created for our collective cultural heritage. If a workable compromise can be formed in which the *lex originis* or even *renvoi* will apply to transactions, but those transactions can be guaranteed as legitimate, then there may be a good chance of gaining the requisite consensus among the various groups which shape cultural property policy. The status quo harms all the relevant stakeholders. Though courts have almost universally adopted the *lex situs* rule because of certainty and commercial convenience, problems are still widespread, and the extraterritorial suits laid out here are an attempt to solve these global problems. The singular nature of art and antiquities compel a more careful

²⁰¹ Kenneth Burke, *A Rhetoric of Motives* (1945).

analysis. Whether that takes place with new legislation or by judicial reasoning will depend upon the particularities of individual national legal systems. Certainly the traditional justifications for the *lex situs* rule are inapplicable to art and antiquities disputes. As Kurt Siehr rightly points out, if cultural property were treated like other goods we might have to account for the General Agreement on Tariffs and Trade, most-favoured-nation status, embargos, import and export restrictions or other typical agreements which govern the international trade in commodities.²⁰² Import and export restrictions are the only regulations which generally apply to cultural property. In order to perfect the notions of protection and accountability embodied in the relevant public international law agreements, courts and lawmakers will have to move beyond justifying the *lex situs* rule on the basis of commercial convenience.

To effectively implement an alternative such as the *lex originis* as Belgium has done, perhaps policy makers must first work to guarantee legitimacy of arts and antiquities transactions. It seems this will require a fundamental shift in the way the market operates at present. But such a shift is not impossible. The art and antiquities markets would seem to depend upon the certainty of acquisition and ownership. If a workable compromise can be formed in which the *lex originis* will apply to transactions, but those transactions can be guaranteed as legitimate, then works of art and antiquities will be better served by private international law.

²⁰² Kurt Siehr, *International Art Trade and the Law*, 243 Recueil Des Cours, VI, 25 (1993).