Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property

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Abstract: The role of ethical rules and codes of conduct in the field of art law and international protection of cultural property, together with the adoption of the relevant international conventions, has constantly increased in the last decades. This article considers the main codes of conduct drafted by international organizations as well as international, national, public, and private institutions, federations, and associations. The focus is on their influence on international trade as instruments of art market regulation. Specific attention is paid to the interaction with the private international law approach and to a survey of both direct and indirect effects of these rules on the international circulation of cultural property.

THE ROLE OF ETHICAL RULES AND CODES OF HONOR

In the last 60 years, we have witnessed an unprecedented proliferation of multilateral international conventions on the circulation of cultural property. The principal aim of such conventions is to create concrete standards of international cooperation in the domain of cultural property, in times of peace as well as armed conflict. These conventions provide a definition of the property in need of protection, they impose on contracting state obligations concerning the treatment of the property and they set international rules governing its circula-

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tion, including its return and restitution, in compliance with its legal regime as determined by the applicable national law.

In this regard the following contribute to the creation of an articulated system of specific legal rules: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; the Paris 2001 Convention on the Protection of the Underwater Cultural Heritage; the 2003 UNESCO convention to safeguard intangible cultural heritage; and the 2005 UNESCO convention on the protection and promotion of the diversity of cultural expressions. One could also add the 1992 to 1993 directives and community regulations. These rules combine themselves with national applicable statutes on the subject matter; and to a great extent they influence the content, condition, and applicability of said national statutes.

In addition to this proliferation of norms, which can be equally ascertained in other areas of social relations, we witness a parallel production of rules of conduct that, albeit lacking the coercive nature of legal norms, determine binding effects on certain categories of subjects or significantly influence market regulation. Broadly speaking, the task of defining the significance of ethical or unethical behavior is obviously different from—and cannot be confused with—the investigation concerning the definition of legal or illegal conduct. In this regard, and by way of a general clarification, note that the codes of ethics are obviously aimed at purporting ethical and not legal standards; moreover, as discussed later in the article, they only address themselves to professionals in general. Accordingly, it appears that they lack the binding effect of law as well as another typical characteristic of the legal rules: their general effect, as the rules set forth by codes of ethics are necessarily addressed to a limited universe of addressees. Broadly summarized, law is a general source of binding obligations, whereas ethical codes are a particular source of nonbinding invitations. However, this is an imprecise and restrictive definition that evokes the role of moral suasion, which is usually attributed to the aforementioned instruments and recalls the hortative effect common to most recommendations of intergovernmental organizations in the international practice.

Conversely, particularly in the field of art law, ethical standards may be much more detailed and even stricter than legal standards. Thus, the two standards provide a set of rules that complement one another and aim to create a complete, if not homogeneous, regulation.

Start with the first experiences like the 1931 Athens Charter for the Restoration of Historic Monuments or the Venice Charter for the Conservation and Restoration of Monuments and Sites. In the concerned domain these rules, which can be generally classified as ethical, are spontaneously or quasi-spontaneously formed. Indeed, usually instead of heterogeneous formation, on the basis of a vertical division of relations between those who govern and those who are governed, they are horizontally conceived, elaborated, and oriented, like the self-regulation in-
struments of people associated or affiliated to the interested category. In other words, as observed with reference to the lex mercatoria in the context of international trade, these norms proceed from the same subjects to which they are addressed, who are obliged to abide by them, especially given the compliance required within the relevant professional category.

After all, this aspect distinguishes the compliance of an ethical rule from the compliance with a legal norm, almost as if it were a code of honor. But ethical codes require something more. One should recognize that they have the capability of imposing contractual obligations on the associates; and being continuously used as a benchmark in the usual domain of operations of the relevant categories, they can become uses comparable to those belonging to international trade.

Besides, this phenomenon is well known in relation to typical sources of international law. For example, one of the most important conventions on the subject matter, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, provides a specific obligation on contracting states to set up cultural property protection services consisting of qualified personnel to establish “for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules.”9 Although both legal theory and case law often point out that the convention is non–self-executing, one cannot deny said norm’s function as a legal basis—and therefore as a strong pressure instrument—with reference to the establishment of ethical codes aimed at creating rules of conduct open to completion by the interested categories.10

Concerning the issue of the origin (and therefore of the identification of the production sources), it is interesting to note that the aforementioned ethical rules have been created in completely different milieux, such as international organizations, specialized institutes, national and international trade associations and institutions, or private or public entities. One can illustrate using the following examples:

- CINOA (International Confederation of Art and Antiques Dealers).11
- EEA (European Association of Archaeologists) adopted the EEA Code of Practice (1997).14

On the contrary, the addressees of the ethical rules are bound to correspond to those belonging to categories respectively taken into account by the interested institutions. It is better to point out that these are some of the most important and qualified players of the art market, especially institutions that run museums and commercial dealers specialized in the same field. As discussed later in the article, this implies the need to verify whether the rules are compatible, complementary, or conflicting.

**THE MAIN CONTENTS OF THE REGULATION**

This section briefly compares the principal sources to verify if the ethical rules are capable of creating a sufficiently complete and homogeneous regulation. Thus, in most sources one can find ethical rules concerning essential aspects already specifically governed by important international conventions. Such is the case, particularly, for acquisitions and transfer of collections, the origin of collections, the professional conduct of the members, and sanctions in the event of noncompliance of the rules.

**Acquisition and Transfer of Items and Collections**

This is one of the most controversial aspects in international practice, albeit (or, according to the circumstances, because) the legal rules provided by the national law and/or by international law should apply, exhaustively regulating the subject matter. In this regard, the fundamental idea inspiring the ethical code of the International Council of Museums (ICOM) is that museums maintaining collections preserve them for the benefit of society. Thus, in each museum the governing body must adopt and publish a written collections policy that addresses acquisition, care, and collections use. The policy should clarify the position of any objects that will not be cataloged, conserved, or exhibited.

Article 2.2 (Valid Title) provides, “No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title.” Article 2.3 (Provenance and Due Diligence) provides the following:

Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item from discovery or production.
At the same time, article 5 of CINOA’s ethical code of conduct states that professional antique dealers and traders in works of art “cannot under any circumstance participate in transactions which to the best of their knowledge can result in money-laundering operations” and, pursuant to article 3, “agree to comply with the laws on the protection of endangered species. They therefore agree not to trade in objects manufactured from materials that are protected under the Convention on International Trade in Endangered Species.”16

The (revised) Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art issued on June 3, 2008 by the AAMD, seems to go significantly further. It recognizes the 1970 UNESCO convention as providing the threshold date or the application of more rigorous standards to the museums’ acquisitions, helping create a uniform set of expectations for museums as well as sellers and donors. Moreover, it provides a specific framework for members to evaluate the circumstances under which a work having an incomplete ownership history dating to 1970 may be considered for acquisition.17

The concern to protect the integrity of collections is strong in UNESCO’s International Code of Ethics for Dealers in Cultural Property. Article 6 reads, “Traders in cultural property will not dismember or sell separately parts of one complete item of cultural property.”18

Finally, with reference to U.S. museums, AAM’s code of ethics articulates that “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials.”

**Origin of Items and Collections**

First, it must be emphasized that these rules concern the classic problem of return and restitution of cultural property. From this standpoint it is useful to underscore that lately the distinction between the case of goods stolen from the owner, which implies restitution, and that of illicit transfer (or exportation) from the country of origin, which determines return, is usually accepted even under international law.19 In this regard, with reference to the rules of conduct, article 6.1 of ICOM’s code of ethics first of all provides, “Museums should promote the sharing of knowledge, documentation and collections with museums and cultural organisations in the countries and communities of origin. The possibility of developing partnerships with museums in countries or areas that have lost a significant part of their heritage should be explored.” It is also interesting to note that the code correctly refers to the notions of return and restitution already employed by the UNIDROIT convention.

Actually, article 6.2 (Return of Cultural Property) states the following:

Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and
humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level.

However, article 6.3 (Restitution of Cultural Property) asserts the following:

When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country’s or people’s cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return.

Finally, article 6.4 of the mentioned code (Cultural Objects From an Occupied Country) refers itself to the international norms of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict by maintaining, “Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respect fully all laws and conventions that regulate the import, export and transfer of cultural or natural materials.”

It must also be stressed that the Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era states the following in article 4:

It is the position of AAM that museums should address claims of ownership asserted in connection with objects in their custody openly, seriously, responsibly, and with respect for the dignity of all parties involved. Each claim should be considered on its own merits.

Museums should review promptly and thoroughly a claim that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution.

In addition to conducting their own research, museums should request evidence of ownership from the claimant in order to assist in determining the provenance of the object.

If a museum determines that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner.

Furthermore CINOA’s Ethical Code of Conduct asserts that if affiliated members possess an object likely illegally imported, and the country of origin demands its return within a reasonable amount of time, pursuant to article 2 they must “do everything that is possible to them according to the current laws to cooperate in returning the object to its country of origin. In the case of a purchase in good faith by the antique dealer, an amicable refund may be agreed to.” However, it is understandable that no provision is instead provided for in the codes of conduct referring to “safe-conduct” for works of art that have been loaned on the occasion of expositions, especially with respect to seizure. 20

Finally, the code of ethics for archivists, in a vague and particularly flexible provision of article 2, states, “Archivists should appraise, select and maintain archival material in its historical, legal and administrative context, thus retaining the prin-
principle of provenance, preserving and making evident the original relationships of documents.”

**Professional Conduct**

Professional conduct is addressed in ICOM’s code of conduct at article 1.16, concerning the ethical conflict: “The governing body should never require museum personnel to act in a way that could be considered to conflict with the provisions of this Code of Ethics, or any national law or specialist code of ethics.” More specifically, article 7.1. (National and Local Legislation) maintains, “Museums should conform to all national and local laws and respect the legislation of other states as they affect their operation”; and article 7.2 (International Legislation) states the following:

Museum policy should acknowledge the following international legislation which is taken as a standard in interpreting the ICOM Code of Ethics:

- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970);
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973);
- UN Convention on Biological Diversity (1992);
- UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (1995);
- UNESCO Convention on the protection of the Underwater Cultural Heritage (2001);

Again, ICOM’s code of ethics (article 8) provides that museums operate in a professional manner and that members of the museum profession should observe accepted standards and laws and uphold the dignity and honor of their profession. They should safeguard the public against illegal or unethical professional conduct. Every opportunity should be used to inform and educate the public about the aims, purposes, and aspirations of the profession to develop a better public understanding of the museum’s societal contributions.

Besides, the professional conduct is explicitly taken into account by article 8, which provides for an almost complete regulation, stating the following:

8.1 Familiarity with Relevant Legislation

Every member of the museum profession should be conversant with relevant international, national and local legislation and the conditions of their employment. They should avoid situations that could be construed as improper conduct.
8.2 Professional Responsibility
Members of the museum profession have an obligation to follow the policies and procedures of their employing institution. However, they may properly object to practices that are perceived to be damaging to a museum or the profession and matters of professional ethics.

8.3 Professional Conduct
Loyalty to colleagues and to the employing museum is an important professional responsibility and must be based on allegiance to fundamental ethical principles applicable to the profession as a whole. They should comply with the terms of the ICOM Code of Ethics and be aware of any other codes or policies relevant to museum work.

8.4 Academic and Scientific Responsibilities
Members of the museum profession should promote the investigation, preservation, and use of information inherent in the collections. They should, therefore, refrain from any activity or circumstance that might result in the loss of such academic and scientific data.

8.5 The Illicit Market
Members of the museum profession should not support the illicit traffic or market in natural and cultural property, directly or indirectly.

One must point out that the provision of article 8.1 appears to envisage an excessively strict obligation for the members of the museum profession. It provides for a presumption of knowledge of international, national, and local legislation concerning the protection and legal regime of cultural property as well as the “conditions of their employment,” an expression that seems to specifically evoke the knowledge of the case law.

It is also interesting to note that sometimes the codes maintain a distinction between rules of conduct addressed to society and those concerning professional conduct, with reference to those that must be complied with when relating to other professionals. In particular, the European Association of Archaeologists Code of Practice includes in the former the reference to the provisions provided by the 1970 UNESCO convention regarding any form of activity relating to the trade of objects of archaeological interest or antiquities; in the latter it includes research requirements and employment standards recognized by their professional peers. At the risk of appearing pleonastic, on behalf of the members, the concern is to guarantee the respect of the internal provisions concerning the prohibition of any form of discrimination, on behalf of the members, and, more generally, the conditions of employment. Clearly, this inspires articles 2.9 to 2.10 of the same code.

Therefore it is possible that the codes of conduct aim to guarantee standard models of conduct and assure a function as a reminder of certain international and even national norms that could not be applied in a specific case.

Finally, articles 3, 4, and 5 in CINOA’s code of conduct provide specific rules concerning the affiliated members’ conduct regarding compliance with the laws
protecting endangered species and prohibiting participation in transactions that can result in money laundering operations. Article 6 requires affiliated members to check the authenticity of the objects they possess, as also provided, mutatis mutandis, by article 3 of the Archivists Code of Conduct. Seldom do codes provide for types of responsibility, regarding living and nonliving species with whom members work, which are purely ethical and must accounted for on a solely meta-juridical level.

Sanctions

Given the peculiarities of the subject matter involved, it would be a vain and useless effort to evaluate the effectiveness of the codes of conduct based on sanctions provided in case of noncompliance. Sanctions are seldom provided for the suspension of the association or the loss of an affiliated member’s status, but even the procedures for verifying the existence of violations are rarely indicated.

UNESCO’s code of ethics is among the documents that are less vague on this issue. Article 8 asserts the following:

Violations of this Code of Ethics will be rigorously investigated by (a body to be nominated by participating dealers). A person aggrieved by the failure of a trader to adhere to the principles of this Code of Ethics may lay a complaint before that body, which shall investigate that complaint before that body, which shall investigate that complaint. Results of the complaint and the principles applied will be made public.

Regarding ICOM’s code of conduct, refer to ICOM’s statute, specifically article 9 concerning termination of membership:

The membership of an Individual or Institutional Member shall cease if any of the following circumstances apply:

(a) the member resigns in writing;
(b) the member having been notified by regular post of the annual subscription payable, fails to pay the subscription within one year of the due date;
(c) the member has ceased to be qualified for membership of ICOM by virtue of a change in professional status;
(d) the Executive Council, acting on a recommendation of a National Committee or in exceptional circumstances on its own initiative, terminates the membership of a member for serious reasons relating to professional ethics or to actions which are substantially inconsistent with the objectives of ICOM.

Must one conclude, like certain commentators, that the primary function of the codes of conduct is essentially, if not exclusively, pedagogic?
After dealing with the sources, areas involved, and aspects concerned by the ethical rules, it is time to briefly discuss the roles that said rules can have as art market regulation instruments. First, should the rules contained in the ethical codes or guidelines (the difference between these two kinds of instruments being nonetheless substantial) influence how international commercial transactions pertaining to the subject matter are carried out? Bearing in mind that these norms concern the self-regulation of those to whom they are addressed, it is possible to put forward two kinds of remarks. First, the weight carried by these rules must not be underestimated, given that we are discussing about rules that must be complied with by those belonging to the category to whom the rules are addressed; they are binding on the affiliated members, at least when codes create a bond between the consequences of their violation and specific statutory norms, by making the violations of the former equal to the violation of the latter.

This last remark implies a second one regarding incomplete nature of these ethical rules. They address only those who carry out activities and act as professionals of the field, represented, in this instance, by private and public institutions that run museums and/or traders like antique dealers, art merchants, and so forth. We shall shortly return to this aspect.

Considering a second issue, it is best to question how these rules influence the function of the aforementioned commercial transactions. As already discussed, the subject matter of the ethical rules is sufficiently wide, because it concerns the acquisition/transfer of goods, the origin of collections, the professional conduct of the affiliated members, and the sanctions in the event of noncompliance.

Thus, examining the contents of the rules reveals that they are largely drawn on the norms of the most important international conventions that in the last decades have introduced rules of conduct with reference to the circulation of cultural property. Often they are identical. For example, the norms provided by articles 3 and 5 of the UNIDROIT convention on the restitution and return of cultural objects as well as the ethical rules of article 6 of ICOM’s ethical code concern the origin, return, and restitution of collections.

What appears as a weak point intrinsic to ethical rules may transform itself into an effective strong point. Again, these rules are addressed to the sole associates and/or structures belonging to the category in question. Nevertheless, remember that cases are common in which international conventions create norms capable of influencing market function and encounter significant obstacles to their effectiveness because of state behavior. In this regard, the UNIDROIT case is particularly significant. This convention encounters numerous difficulties caused by the lack of enthusiasm by important states within the art market that have not yet ratified the convention. This seems to be a recognized result of the mistrust caused by certain norms of the convention, specifically concerning giving up the rule possession vaut titre (granting ownership to bona fide possessors) regarding the cir-
calculation of cultural objects; the inversion of the burden of proof regarding the good faith possession of goods; and the obligation to return to the legitimate owner, notwithstanding the buyer’s good faith.

In the cases mentioned, a code of self-regulation addressed to the field’s professional dealers and containing clear norms, sufficiently transparent and provided with sanctions for the event in which they are not complied with, can turn out to have a positive influence. The code can supplement or substitute binding norms contained in international conventions that certain states do not want to, or cannot, ratify or punctually execute.

Indeed, the lack of effective display of sanctions is described as one of the actual weaknesses of the system. Besides, one must not forget the indirect effect that can be yielded by the ethical rules. In this regard, specifically referring to the circulation of antiquities, note that with illegal excavations, the doubtful origin of the objects can only be proved with great difficulty, lacking concrete proof of the provenance, excavation date, and/or sale or illicit exportation. In such a context, the failure of a lawsuit aimed at obtaining restitution is almost certain.

A purely private international law approach would obviously focus on the choice of the law applicable to the title and/or to the contractual obligations of the parties. Nevertheless, remember that international case law, specifically concerning recovery of objects illegally stolen or exported, clearly illustrates that the outcome of a claim for recovery or restitution is often unpredictable and uncertain. Also bear in mind that there are different interpretations and applications of the lex rei sitae criterion that a priori appears to be neutral and unequivocal.

With reference to the a non domino acquisition, for example, judges coming from common law countries have sometimes given very different solutions to analogous cases. In the leading case Winckworth v. Christie, Manson & Woods, the English judge offered protection to a good faith buyer of objects belonging to a collection of Japanese art stolen in England, exported, and then bought in Italy and subsequently sent to London to be sold at Christie’s.

The application of Italian law (lex situs of the objects at the time of the artwork acquisition by the Italian buyer), and especially of article 1153 of the civil code (which acknowledges the principle that when it comes to moveables possession is equivalent to title), has determined the rejection of the recovery claim filed by the deprived legitimate owner.26 On the contrary, Kunstsammlungen zu Weimar v. Eli- cofon concerns Dürer artwork stolen in Germany during the World War II, moved to the United States, and here bought by an American citizen. In first and second degree of adjudication, American judges allowed the recovery claim of the owner, by applying New York State law, lex situs of the artwork at the time of the execution of the sale.27

Quite recently, the Queen’s Bench Division’s judgement of the February 1, 2007, Islamic Republic of Iran v. Berend, concerned a relief fragment of the fifth century bc from the ancient palace of Persepolis. The fragment was sent to London to be sold at Christie’s. But the Queen’s Bench Division rejected the recovery claim
brought by the Asian state against the good faith buyer. In October 1974 the defendant bought the fragment in New York; it was delivered in Paris the following month and then to London where it remained until December 2005 to be sold at an auction. Note that the English judge ruled the case based on French law, the *lex situs* in November 1974 when the defendant had acquired through possession the object’s title, and cites article 2279 of the French civil code on good faith possession.

Furthermore, note that the application of the *lex rei sitae* criterion is no less contradictory if we consider the case law of civil law countries. In 1982 the Tribunal of Turin, in the matter of *République of Ecuador v. Danusso*, allowed the recovery claim of the South American state concerning the objects of archaeological interest brought into Ecuador by an Italian citizen who had illicitly exported them to Italy. The tribunal decided that the lawsuit pertained to the title on which the ownership was based and, specifically, the legal facts that enabled to give rise to property on the objects. Therefore, the applicable *lex situs* in the given case was the law of Ecuador (i.e., the law of the place where the property title was acquired).

Conversely, concerning *French Minister of Culture v. Italian Ministry of Culture and De Contessini*, the judgement of the 1987 Tribunal of Rome, confirmed by the Court of Appeal of Rome in 1992 and by the Supreme Court in 1995, has rejected the recovery claim lodged by the French State to obtain the restitution of tapestries of the School of Amiens. The tapestries were stolen in the Court of Justice of Riom and subsequently bought by good faith owners in Italy.

The aforementioned judgements are based on the application of the *lex rei sitae* selected by the Italian conflict of law rules as the *lex situs* at the time of the sale and, as a consequence, deemed as the law competent to govern the creation of the property title. It must be stressed that the Italian judges, in re *De Contessini*, had also established that at international level no obligation would have justified the restitution to France of the stolen goods. Bear in mind that articles 7 and 13 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property are not self-executing. However, the indirect applicability of the UNESCO 1970 convention is widely acknowledged by the legal theory as well as case law. In more recent French case law for example, in an April 5, 2004, judgement concerning Nigeria’s request to return African statuettes of Nok origin, the Paris Court of Appeal based on the same reasoning rejected the African state’s recovery claim, and was confirmed by the Supreme Court on September 20, 2006.

Eventually, the restitution of cultural objects claimed by a state is often prevented by the reluctance to give recognition and enforcement to titles obtained under the law of the country of origin. It is noteworthy that the English Court of Appeal recently reversed the traditional refusal of recognizing the ownership declarations based on foreign law “penal and public in character,” by granting a claim in conversion filed by a foreign state. The case of *Islamic Republic of Iran v. Barakat* concerned some carved jars, bowls, and cups made from chlorite, originating...
from recent excavations allegedly unlicensed and unlawful under the law of Iran. In its decision of December 21, 2007, the Court of Appeal stressed the patrimonial nature of the claim, stating that Iran was declaring itself the owner of all undiscovered antiquities; but more significantly, as far as the sum of these rights would amount to ownership under English law, Iran would have a viable claim.\textsuperscript{34}

As authoritatively suggested by some legal scholars and with a different approach by the Institut de Droit International\textsuperscript{35}, the departure from the \textit{lex rei sitae} tactic and the possible application of a different law—namely the \textit{national} law of the object (\textit{lex originis})—could provide a more reasonable chance of success when the controversial issue of restitution of cultural property to the \textit{country of origin} is at stake. But even admitting that such a proposal could be accepted by the states’ practice as a positive special conflict of laws rule, the task of determining the “closest connection” with a specific country\textsuperscript{36} would often prove difficult. Moreover, a rigid application of the \textit{lex originis} would not automatically assure the recovery of the object, as shown by the \textit{Kunstsammlungen zu Weimar} case discussed earlier.

\textbf{CONCLUSION}

Even in disputes pertaining to recovery claims, or controversies on loans of artworks or objects of archaeological, historical, or artistic interest, the evidence of the respect or violation of the ethical rules involved in favor or, respectively, at the expense of the professional trader involved in such transactions, can actually play an important role. At least, this is the case with respect to the judicial authority’s appraisal of good faith and, generally speaking, the parties’ conduct. It is indeed true that, almost by definition, one party is affiliated to a professional category; and his or her conduct can be appraised from the perspective of the rules provided by the codes of conduct of the professional categories involved. To this extent one can put it in terms of \textit{direct effect} (i.e., the relevant and usual effect of the rules consisting of the negative consequences borne by the member in case of serious breach) in all circumstances in which the code or statute of the association/institute concerned provides sanctions that can lead to the loss of membership in the category in question.

Practically, this direct effect should exist, at least in cases where the codes of conduct comprising the ethical rules must be respected by the affiliated members and governing bodies and applied by the same in a punctual manner. Add to this the \textit{indirect effect} that should take place each time said rules of conduct are referred to, or that the abidance by the same rules is taken into account, as a factual element to evaluate the conduct of the subjects concerned.

For example, the UNIDROIT convention (article 6, § 2) offers that to determine whether the possessor knew or reasonably ought to have known that the cultural object had been illegally exported, “regard shall be had to the circumstances of the acquisition.” It is therefore possible that by applying the convention...
rules, the national judge may take into account the professional traders’ conduct with reference to rules provided by the ethical codes. It is noteworthy that often said ethical codes include more detailed and sometimes stricter rules of conduct regarding the required diligence than those provided by the law. However, the rules are not always observed. Besides, the Guidelines on Loans of Antiquities and Ancient Art drafted by the AAMD specifically imposes on its associates, regarding acquisition of objects, a level of transparency often higher than that provided for by a number of national laws. Nonetheless, the code lacks sanctions for breaches of its norms. It is to be stressed that recently some American museums adopted stricter acquisition guidelines, likely under the pressure of the aforementioned international and national codes.\textsuperscript{37}

Finally, the ethical rules constitute, by definition, the expression of the interests that they represent and therefore are neither neutral nor necessarily conceived to safeguard a general interest. It is therefore possible that the professional milieux involved, whose relevant associations have adopted ethical codes for its associates, end up expressing vastly different yet fully coherent opinions about the interests they represent. This may well happen with disputes settled by a judicial authority, especially in judicial systems that allow a third party with a relevant, albeit abstract, interest to safeguard or intervene in the case either to give the court an opinion or endorse the position of a party.

Quite recently in the United States a lawsuit was filed between the Federal state and an important Manhattan antique dealer concerning the appraisal of the dealer’s importing objects of archaeological interest and the application of the special federal law (National Stolen Property). The Court of Appeals for the Second Circuit was lodged with three amicus curiae briefs: with one by certain private associations endorsing the defendant’s position (National Association of Dealers in Ancient Art, International Association of Professional Numismatists, Art Dealers Association of America, Antique Tribal Art Dealers Association, etc.), with one by other associations endorsing the state’s position (Archaeological Institute of America, Society for American Archaeology, Society for Historical Archaeology, United States Committee for the International Council on Monuments and Sites) all of them representing conflicting interests.\textsuperscript{38} At this pace we could easily envisage a conflict between codes of conduct and ask ourselves to determine the criteria aimed at choosing, between the conflicting interests, the one most worthy of being safeguarded. But this is yet another issue.

ENDNOTES

2. See Paris Convention, November 14, 1970, on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, in force since April 24, 1972, between 115 states (updated June 2008), including the recent ratification of Germany (November 30, 2007).


6. The Paris Convention of October 20, 2005, on the protection and promotion of the diversity of cultural expressions. It is in force as of March 18, 2007, between 83 states plus the European Community (accession on December 18, 2006).


10. On the indirect applicability within the legal system of the contracting states, see the judgement of the Court of Appeal of Paris of April 5, 2004 (2002/09897), the application of article 13 c. of the convention by Nigeria who claimed the property of nine African statuettes of Nok origin for sale in Paris. See also the judgement by the Italian Supreme Court n. 12166 of November 24, 1995 (FI, 1996, I, p. 907), concerning the recovery claim of the French state aimed at obtaining the restitution of tapestries stolen in the Court of Justice of Riom and bought in Italy by good faith buyers. In both cases the restitution claims were rejected, because of the lack of convention application norms in the law ratifying the 1970 UNESCO convention.


16. See the text of the code of the CINOA at www.cinoa.org (accessed March 10, 2009).

17. See the text of the Report issued on June 3, 2008, at www.aamd.org (accessed March 10, 2009). According to Section E of the draft,

Member museums normally should not acquire a work unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery. The museum should promptly publish acquisitions of archaeological materials and ancient art, in print or electronic form, including in these publications an image of the work (or representative images in the case of groups
of objects) and its provenance, thus making this information readily available to all interested parties.

Pursuant to the last paragraph of Section F, “The museum must prominently post on the AAMD website, to be established, an image and the information about the work as described in Section E above, and all facts relevant to the decision to acquire it, including its known provenance.”


19. This well-known distinction is in the UNIDROIT convention where article 3 (which includes the notion of theft and therefore of an object eligible for restitution: “a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained”) deals with restitution and article 5 deals with return.

20. Many national laws by now provide for norms that exempt loaned artworks from judicial seizures and other precautionary measures that cannot naturally be governed by codes of conduct. See Jayme, “L’immunité des oeuvres d’art prêtées.” 175 ss; Weller, “Immunity for Artworks on Loan?” 97 ff.

21. The 1997 EEA Code of Practice at articles 1.1 to 1.8 deal with “Archaeologists and Society” and articles 2.1 to 2.10 with “Archaeologists and Profession.” See article 1.6:

Archaeologists will not engage in, or allow their names to be associated with, any form of activity relating to the illicit trade in antiquities and works of art, covered by the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export, and transfer of ownership of cultural property.

Article 2.1 states, “Archaeologists will carry out their work to the highest standards recognised by their professional peers.”

22. Article 2.9 provides that “In recruiting staff for projects, archaeologists shall not practise any form of discrimination based on sex, religion, age, race, disability, or sexual orientation,” and article 2.10 “The management of all projects must respect national standards relating to conditions of employment and safety.”

23. See the CINOA code of ethics, article 3 “The affiliated members of CINOA agree to comply with the laws on the protection of endangered species. They therefore agree not to trade in objects manufactured from materials that are protected under the Convention on International Trade in Endangered Species”: Article 4 “The members will have to take all the necessary measures to detect stolen objects and refer, among others, to registers that are published to this effect and to use these judiciously”; Article 5 “The members cannot under any circumstance participate in transactions which to the best of their knowledge can result in money-laundering operations”; Article 6 “It is the duty of each one of the members to check the authenticity of the objects they possess.” The code of Ethics for Archivists provides at article 3 that “Archivists should protect the authenticity of documents during archival processing, preservation and use.”

24. See for example, the American Anthropological Association Code of Ethics of June 1998 at www.aaanet.org (accessed March 10, 2009); its article IIIA “Responsibility to people and animals with whom anthropological researchers work and whose lives and cultures they study” states, “Anthropological researchers have primary ethical obligation to the people, species and materials they study and to the people with whom they work.”


27. See the judgments of the Eastern District Court of New York of June 12, 1981, 20 ILM (1981), 1122, and of the Court of Appeals for the Second District, 678 Federal Reporter, 2d Series, 1150, 2d Cir. 1982. Note that had the German law been applied—place of original situation—the request would have been dismissed because the right of the legitimate owner would have been subject to the statute of limitations.

32. See Tribunal of Rome, June 27, 1987, and Frigo, La circolazione internazionale, 132. Pursuant to article 7. b. (i), state parties undertake

   to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.

According to article 13 c. the states parties to this convention also undertake, consistent with the laws of each state “(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.”

34. See Court of Appeals December 21, 2007, Islamic Republic of Iran v. Barakat [2007] England and Wales Court of Appeal 1374. The court noted the following:

   [I]t 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 right 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.

35. See Jayme, Neue Anknüpfungsmaximen für den Kulturgüterschutz, 35 ff; and Armbrüster, La revendication de biens culturels, 723 ff. From a standpoint closer to the UNIDROIT convention approach, see also the resolution adopted on September 3, 1991, at its Basel session, by the Institut de Droit International, La vente internationale d’objets d’art sous l’angle de la protection du patrimoine culturel, (http://idi-iil.org, accessed March 10, 2009) stating the following at article 4 § 1:

   If under the law of the country of origin there has been no change in title to the property, the country of origin may claim, within a reasonable time, that the property be returned to its territory, provided that it proves that the absence of such property would significantly affect its cultural heritage.

36. Pursuant to article 1, § b of the Institut de Droit International’s resolution of 1991 the country of origin is “the country with which the property concerned is most closely linked from the cultural point of view.”

37. See the example of the Getty Museum of Los Angeles in Nafziger, “The Principles for Cooperation,” 147 ff., at 152.

38. See United States v. F. Schultz, 333 F3d 393 (2d Cir. 2003); see also the comments of Brodie, “An Archaeologist’s View of the Trade,” 52 ff, who wonders “what standard of provenance should be regarded as acceptable for a museum intending to acquire a cultural object? (62). See also I. P. de Angelis, How much Provenance is Enough? Post-Schultz Guidelines for Art museum Acquisition of Archaeological Materials and Ancient Art, ibidem, 398.

BIBLIOGRAPHY


