

by Marc Weber

Abstract

Archaeological cultural property is protected by specific laws almost all over the world. The search for such chattels is regulated and trade is limited. In Switzerland, ownerless natural specimens and antiquities of scientific value are the property of the canton where they are found. The finder (and in the case of treasure trove also the owner of the land) is entitled to an appropriate finder's reward. Such objects must not be alienated without the consent of the relevant cantonal authorities. They cannot be purchased in good faith or acquired through adverse possession (res extra commercium). In the European Union, Norway, Iceland and Liechtenstein, smuggled cultural property must be returned. Switzerland must return such property only if the requesting state is a member state of the 1970 UNESCO Convention and Switzerland has concluded a bilateral agreement with it based on the Cultural Property Transfer Act of 2003.

Résumé

Les biens culturels archéologiques sont protégés par des lois spécifiques dans la plupart des pays. La recherche de tels biens est régulée et leur commerce limité. En Suisse, les spécimens naturels qui n'appartiennent à personne et les antiquités qui présentent une valeur scientifique sont la propriété du canton où ils ont été trouvés. Le découvreur (et, dans le cas d'un trésor, le propriétaire du terrain également) a droit à une récompense appropriée. De tels objets ne peuvent pas être aliénés sans l'accord des autorités cantonales compétentes. Il ne peuvent pas non plus être achetés de bonne foi ou acquis par prescription acquisitive (res extra commercium). Dans l'Union européenne, en Norvège, en Islande et au Liechtenstein, un bien culturel acquis de manière illicite doit être restitué. En Suisse, un tel bien ne doit être restitué que si l'Etat requérant est un Etat-membre de la Convention UNESCO de 1970 et si la Suisse a conclu avec celui-ci un accord bilatéral basé sur la loi sur le transfert des biens culturels de 2003.

* In honor of the 95th birthday of John Henry Merryman, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus, and Affiliated Professor in the Department of Art, Emeritus, Stanford University, whose course *Art and the Law* I took during my LL.M. studies at UC Berkeley in 2004–05.

INTRODUCTION

Every archaeologist knows how and why to protect archaeological cultural property. Probably the most essential issue is the geographic and chronological context of the object. Archaeologists also know that there should be more personnel to protect the archaeological sites which are jeopardized by tomb robbers (*tombaroli*)⁴². Yet they are also aware that in most countries and in most cases it is an illusion to completely reach these aims. This paper attempts to answer the question whether and how the law may contribute to the adequate protection of antiquities.

PROBLEMS

The following examples show what kinds of legal issues arise in practice.

In 1988, a Greek citizen who was then living in Germany found a treasure of antique coins while building a house on his own land in Greece. He did not disclose the discovery to the Greek authorities and did not hand it over to the Greek state⁴³ but took it back to Germany. Greece subsequently learned of the treasure trove and commenced a criminal proceeding⁴⁴ that led to the coins being returned to Greece⁴⁵. Greek law⁴⁶ does not provide for any compensation to the finder and/or owner of the land. Because of the huge amount of artifacts discovered, Greece, like other countries, simply cannot afford to pay compensation. If this were so, the finder in our case would have had no incentive not to report the find and take it out of Greece and the context of the objects could have been saved.

In 2009, an English man found a treasure consisting of 1345 gold and silver items dating from the 8th century on farmland in England using a metal detector. According to UK law, half of the treasure trove belongs to the finder, the other half to the landlord, *i.e.*, the owner of the land on which the treasure was found⁴⁷. Therefore, the crown had to purchase half of the treasure trove from the finder before experts could scientifically analyze the items. The value was estimated at more than £ 3 millions (LEAHY *et al.* 2011).

Since 1925 Egypt and Germany have been struggling over possession of a 3300 year old bust, the Nefertiti (SAVOY 2011: 9). Egypt's Minister of Antiquities has repeatedly demanded that the bust, still in Berlin, should be returned to its country of origin. However, there is no legal ground for the return because, according to the then law, an act of 1912⁴⁸, the archaeological finds were divided between the German team — led by Ludwig Borchardt (1863–1938) — and the Egypt state (POKORNY 2011).

In November 2010, Yale University agreed to repatriate a shawl pin and other artifacts from the 1912 excavation in Peru by Yale University professor and explorer Hiram Bingham (1875–1956). Although no one had ever disputed the museum's ownership of the objects, they were repatriated to the requesting source state Peru. The agreement to repatriate the artifacts was based on an "expression of good will" (CEMBAL-EST 2010).

A precious Benin ivory mask was scheduled to be auctioned at Sotheby's in London in February 2011. In December 2010, the object was withdrawn from sale at the request of the consignors, after the Edo state announced that the mask had been stolen. The auction house estimated a market value of £ 3.5–4.5 millions. Experts say that it could have reached a record auction price for an African work of art. The mask is very rare and there are no examples in Nigerian museums. The mask is likely to remain with the owner, the descendants of Sir Henry Lionel Galway (1858–1949). It is therefore expected to remain inaccessible from view and the detailed catalogue entry prepared by Sotheby's specialists will remain unpublished. The withdrawal is also likely to affect the whole market for Benin art. Dealers say that consignors are less likely to go to auction houses, so the market will move away from the more public platform (BAILEY 2011).

42 The revenue of the illegal trade in archaeological cultural property arises to USD 6-8 billions per year; cp. *Neue Zürcher Zeitung*, 12.02.2015, 45.

43 Article 1 of the Greek Regulation No. 5351 of 9/24 August 1932; reprinted in: REVERDINI *et al.* (1992: 271). This Law was abolished only in 2002 by Law No. 3028/2002 on the protection of antiquities and cultural heritage in general.

44 European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, SR 0.351.1; BGBl. 1964 II 1369.

45 Oberlandesgericht Schleswig 10.2.1989, *Neue Juristische Wochenschrift* 1989, 3105 = IPRspr. 1989 No. 75; StEHR (2004: 77–78).

46 Cp. article 7, para. 1 of the Law No. 3028 of 28 June 2002 for the protection of antiquities and the cultural heritage in general, English translation in: *Private International Law Review* 9 (2003) 239 *et seq.*, 247: all archaeological finds are state property. This was already codified in 1834; cp. article 100 of Statute of 10 May 1834 on scientific and artistic collections of the State and the excavation and protection of antiquities and of their use, *Government Gazette* of 1834, No. 22, 176 *et seq.*, and German translation in: VON MAURER (1835: 301) and in: VON WUSSOW (1885: 274).

47 Cp. sect. 4 of the Treasure Act 1996 (1996 c. 24); PUGH-SMITH & SAMUELS (1996: 61–62).

48 Loi n° 14 de 1912 sur les antiquités; reprinted in: KHATER (1960: 286).

INTERNATIONAL LAW

UNESCO Convention of 1970

Preliminary remarks

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁴⁹ contains minimum standard provisions on the prevention of the illegal import, export and transfer of cultural property. It has currently been signed by 127 states (of which 25 are African states), including Switzerland. The Convention is not self-executing, and therefore must be transformed into national law to have legally binding effect on individuals. Like almost any other multilateral agreement it is not retroactive.

According to the Convention, the states parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property. To this end, the states parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and helping to make the necessary reparations (article 2).

Bilateral agreements

Under former law, foreign states were unable to successfully claim the repatriation of illegal exported cultural property in Swiss courts, since foreign export statutes, being a form of public law, were not enforceable in Switzerland. If the claiming state cannot prove ownership of the object because the object was purchased in good faith, for example, the claiming state has no legal remedies to obtain the return of the smuggled piece of art⁵⁰.

This situation may be changed by the Swiss Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act = CPTA)⁵¹, which entered into force as of 1 June 2005, for only a limited number of cases.

In Switzerland, cultural property that has been illegally exported from another member state of the Convention and is located in Switzerland must be returned only if the requesting member state and Switzerland have concluded a bilateral agreement on the return of smuggled cultural property (*cp.* articles 7, 9 CPTA).

Switzerland has now entered into bilateral agreements with Italy⁵², Peru⁵³, Greece⁵⁴, Colombia⁵⁵, Egypt⁵⁶, Cyprus⁵⁷ and China⁵⁸. Others are currently in preparation. The same system of bilateral agreements with member states of the 1970 UNESCO Convention is followed by the US, which enacted enabling legisla-

51 Federal Act on the International Transfer of Cultural Property (CPTA), SR 444.1; Decree on the International Transfer of Cultural Property (CPTR), SR 444.2. To the CPTA in detail, see WEBER 2004, 2006; GABUS & RENOLD 2006; REUTTER (2006: 289–320); SIEGFRIED 2006; for an overview, see WIDMER 2010.

52 Agreement of 20 October 2006 between the Federal Council of the Swiss Confederation and the Republic of Italy on the import, transit and repatriation of cultural property, SR 0.444.145.41; in force as of 27 April 2008.

53 Agreement of 28 December 2006 between the Federal Council of the Swiss Confederation and the Government of the Republic of Peru on the cooperation regarding the prevention of the illicit trade with cultural property; this agreement is not yet in force.

54 Agreement of 15 May 2007 between the Federal Council of the Swiss Confederation and the Government of the Hellenic Republic on the import, transit and repatriation of cultural property, SR 0.444.137.21; in force as of 13 April 2011.

55 Agreement of 1 February 2010 between the Swiss Federal Council and the Government of the Republic of Colombia on the import and repatriation of cultural property, SR 0.444.126.31; in force as of 4 August 2011.

56 Agreement of 14 April 2010 between the Swiss Federal Council and the Government of the Arab Republic of Egypt regarding the illicit import and the transit as well as the recovery of antiquities to their place of origin, SR 0.444.132.11; in force as of 20 February 2011.

57 Agreement of 11 January 2013 between the Swiss Federal Council and the Government of the Republic of Cyprus on the Import and Repatriation of Cultural Property, SR 0.444.125; in force as of 15 February 2014.

58 Agreement of 16 August 2013 between the Federal Council of the Swiss Confederation and the Government of the People's Republic of China on illicit Import and Export and Repatriation of Cultural Property, SR 0.444.124.91; in force as of 8 January 2014.

49 Multilateral Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its Sixteenth Session, Paris, November 14, 1970, 823 United Nations Treaty Series 231; International Legal Materials 10 (1971) 289; SR 0.444.1.

50 See Attorney General of New Zealand v. Ortiz and others, [1987] 1 Appeal Cases 2, 35 (House of Lords). That is why, in a later English case, the attorneys of the Republic of Spain did not claim the return of the illegally exported painting "Marquesa de Santa Cruz" by Francisco Goya (1746–1828) but rather the official statement that the painting which belonged to an individual was illegally exported; see Kingdom of Spain v. Christie, Manson & Woods Ltd., [1986] 1 Weekly Law Reports 1120 (Chancery Division); [1986] 3 All England Law Reports 28.

tion in 1983⁵⁹. So far the US has concluded bilateral agreements with 15 member states, only one of which is an African state, *i.e.*, Mali⁶⁰.

The following prerequisites must be fulfilled (article 7, para. 2, lit. a–c CPTA):

- “a. the object of the agreement must be cultural property of significant importance for the cultural heritage of the relevant contracting state; and
- b. the cultural property must be subject to export provisions in the relevant contracting state for the purpose of protecting cultural heritage; and
- c. the contracting state must grant reciprocal rights.”

The requesting state must prove that the object is of significant importance for its cultural heritage⁶¹ and that it was illegally imported into Switzerland after the bilateral agreement was entered into force (article 9, para. 1 CPTA). It is noteworthy that the foreign state has not to prove the illegal export.

Claims for repatriation are subject to a statute of limitations of one year after the authorities of the claiming state become aware of where and with whom the cultural property is located. However, the claim of the foreign state expires at the latest 30 years after the cultural property has been unlawfully removed (article 9, para. 4 CPTA).

If an art dealer in Switzerland sells smuggled cultural property⁶², and the buyer is sued for the return of the object, the seller is liable to the buyer based on

warranty of title (*Rechtsgewährleistung*)⁶³. The buyer may sue his/her seller within one year after he discovers the fault, and within 30 years after conclusion of the contract (article 210, para. 1^{bis} Code of Obligations, amended by article 32 CPTA)⁶⁴.

UNIDROIT Convention of 1995

The UNIDROIT Convention of June 24, 1995 on Stolen or Illegally Exported Cultural Objects⁶⁵ is currently in force in 34 member states, including France, Italy, Spain, Greece, Peru, Brasil and Columbia and six African states (Burkina Faso, Gabon, Guinea, Nigeria, Senegal, Zambia). Switzerland is still not a member state. The Convention is self-executing, and, therefore, does not require enabling legislation. Like the UNESCO Convention of 1970 it is not retroactive.

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the annex to the Convention.

Restitution of stolen cultural property

UNIDROIT requires the possessor of a stolen cultural object to return it (article 3, para. 1). This is true even if the purchaser did not know that the object was stolen and there were no circumstances based on which he/she must have known that it was stolen. Thus, a *bona fide* purchaser will retain title but lose possession.

In general, archaeological and other types of cultural property are treated in the same way; however, there are differences regarding the statute of limitations. Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of 50 years from the time of the theft (article 3, para. 3). This period of 50 years may be prolonged by another 25 years or longer (article 3, para. 5).

59 Cultural Property Implementation Act, sections. 301–315, Public Law 97–446, title III, 96 Stat. 2329 (1983), amended by Public Law 100–204, 101 Stat. 1331 (1987), codified as 19 U.S.C. §§ 2601–2613 (1988 and Supplement 1994); reprinted in part in: MERRYMAN *et al.* (2007: 188–203).

60 Bolivia, Cambodia, Canada, China, Colombia, Cyprus, El Salvador, Greece, Guatemala, Honduras, Iraq, Italy, Mali, Nicaragua and Peru. To the US American experience of having transformed the UNESCO Convention 1970 into national law, see KOUROUPAS 2010.

61 The ‘significant importance’ is not necessary if it comes to the question of what objects are covered by the CPTA. Cultural property is defined as significant property from a religious or universal standpoint for archaeology, pre-history, history, literature, arts or sciences belonging to the categories under article 1 of the UNESCO Convention of 1970 (article 2, para. 1 CPTA). It does not matter whether the object is particularly registered in the requesting state, it belongs to an individual or to the state or its export is banned or limited; *cp.* WEBER (2011: 330).

62 Switzerland has enacted special laws on stolen and/or smuggled cultural property from Iraq and Syria, according to which, among others, the sale of such chattels is unlawful; *cp.* article 1a Decree on economic measures regarding the Republic of Iraq of 7 August 1990, SR 946.206 and article 9a Decree on the means regarding Syria of 8 June 2012, SR 946.231.172.7.

63 Article 192, para. 1 Code of Obligations reads as follows: “The seller is obliged to transfer the purchased goods to the buyer free from any rights enforceable by third parties against the buyer that already exist at the time the contract is concluded.”

64 For chattels other than cultural property, the claim expires 2 years after the delivery of the object to the buyer.

65 International Legal Materials 34 (1995) 1330; reprinted in: International Journal of Cultural Property 5 (1996) 155. To that Convention see, most recently, SIEHR 2011.

However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, is not subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor (article 3, para. 4). Accordingly, a requesting state claiming the return of a stolen archaeological cultural property of an identified archaeological site is not bound on any term as long as that state does not know anything from the theft.

The possessor of a stolen cultural object required to return it is entitled to payment of a fair and reasonable compensation by the requesting state provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that he/she exercised due diligence when acquiring the object (article 4, para. 1).

Return of smuggled cultural property

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 (article 5, para. 1).

The statutes of limitations are the same governing the return of stolen objects (*cp.* article 5, para. 5).

In addition, the possessor who must return a smuggled cultural property is entitled to fair and reasonable compensation (article 6, para. 1). Instead of compensation, and in agreement with the requesting state, the possessor required to return the cultural object to that State may decide (i) to retain ownership of the object or (ii) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting state who provides the necessary guarantees (article 6, para. 3).

Council of Europe

There are three conventions on archaeological cultural property prepared by the Council of Europe: the European Convention on the Protection of the Archaeological Heritage of 6 May 1969⁶⁶, the European Convention on Offences relating to Cultural Property of 23 June 1985⁶⁷, and the Convention for the Protection

66 European Treaty Series, No. 66, revised on 16 January 1992, European Treaty Series, No. 143, came into force on 25 May 1995; SIEHR (2007: 335).

67 European Treaty Series, No. 119, not yet entered into force.

of the Architectural Heritage of Europe of 3 October 1985⁶⁸. These conventions are not self-executing and have to be implemented by the contracting parties if their domestic law does not already fulfil the requirements set up by the treaties (SIEHR 1993: 101).

European Union

The EU law on cultural property does breach the international principle that domestic public law may not be enforced abroad. According to the European Council Directive No. 93/7 on the return of cultural objects unlawfully removed from the territory of a member state⁶⁹, every member state must return national cultural property (*trésor national*, *tesoro nazionale*, national treasure) which was illegally exported out of one of the 27 member states of the EU or Norway, Iceland and Liechtenstein, after 31 December 1992. The question of what cultural property requires an export licence is governed by Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods⁷⁰.

The Directive No. 93/7 is not self-executing, and, therefore, every member state must transform the regulations into its national laws. It is not retroactive⁷¹. Objects which are stolen but not illegally exported are not subject to the Directive.

Only the member states may claim the return of the cultural object, but not individuals.

Where return of the object is ordered, the competent court in the requested states shall award the possessor a 'fair compensation' according to the circumstances

68 European Treaty Series, No. 121, came into force on 1 December 1987.

69 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, ABl. EG Nr. L 74/74 of 27.3.1993; amended by Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997, ABl. L 60/59 of 1.3.1997; Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001, ABl. L 187/43 of 10.7. 2001.

70 O.J. L 395/1 of 31.12.1992. However, there is cultural property which is treated as cultural property by EU law itself and not by each member state individually. As of 4 May 2006, all mounted antique rhino horns will be classed as "unworked" within the EU and cannot be sold or exported for commercial purposes; *cp.* Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, O.J. L 166/1 of 19.6.2006; LAWES 2011.

71 There is one exception: Greece decided to cover cultural property which was illegally exported before 1 January 1993; *cp.* COM(2000) 325 final, 16.

of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object (article 9, para. 1)⁷².

Criminal law

There are not only civil legal claims for the restitution of stolen cultural property and the return of smuggled cultural property, but also criminal ones.

First, the fraudulent misappropriation of treasure (*Fundunterschlagung*) is penalized in all legal systems⁷³. The *corpus delicti* may be seized by the competent public authority and restituted to the owner, *i.e.*, in most cases to the state.

Secondly, mutual assistance in criminal matters is provided not only for the extradition of criminals out of Switzerland or *vice versa*, but also for the claim of the source state for the restitution of the seized *corpus delicti* which was acquired through criminal actions⁷⁴.

72 In the period 2004–2007, 148 amicable returns of cultural objects were achieved through administrative cooperation between Member States. In eight cases, legal action was initiated for the return of objects; *cp.* Fourth report [of 30 May 2013] on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, COM(2013) 310 final, pp. 10–14. In the period 1999–2003, the European Commission reported that there were only five amicable returns and three cases where legal proceedings were initiated; *cp.* Second report [of 21 December 2005] on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, COM(2005) 675 final, pp. 12–14. In 2014, the Directive shall be amended; *cp.* Proposal [of 30 May 2013] for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State (Recast), COM(2013) 311 final.

73 For Switzerland, see article 137 no. 1 or 2 Swiss Penal Code (“*unrechtmässige Aneignung*” and “*Fundunterschlagung*”, respectively); for Germany, see § 246 German Penal Code (“*Unterschlagung*”); for Italy, see article 624 Codice Civile (“*furto*”) and article 169 Codice dei beni culturali e del paesaggio, Decreto legislativo 22.1.2004, n. 42, G.U. 24.2.2004, n. 45.

74 See article 63, para. 2 lit. d and article 74a of the Swiss Federal Act on International Mutual Assistance in Criminal Matters of 20.3.1981, SR 351.1: handing over of objects or assets with a view to forfeiture or restitution to the entitled person; BGE 101 Ia 163: dismissed request from Italy regarding a sculpture by Michelangelo which was overruled by the Federal Council, Verwaltungspraxis der Bundesbehörden 40 (1976) No. 88; Swiss Federal Supreme Court 16.10.2000, 1A.215/2000: request from Turkey for extradition dismissed regarding traders in antique coins and a tombstone; Swiss Federal Supreme Court 31.1.2003, 1A.211/2002: request from Italy for extradition dismissed regarding traders in Italian artifacts and antique coins; Swiss Federal Supreme Court 16.4.2004, 1A.59/2004: request from Italy for the restitution of more than 900 archaeological objects; Swiss Federal Supreme Court 12.11.2007, 1A.47/2007: partially dismissed request from Italy for the restitution of archaeological objects based on formal grounds; Oberlandesgericht Schleswig 10.2.1989, *supra* n. 3.

SWISS LAW

Like in many other countries, archaeological cultural property discovered in the ground is state property. Swiss law distinguishes between ‘antiquities of scientific value’ (article 724 Civil Code) and ‘treasure trove’ (article 723 Civil Code). These provisions were amended by the CPTA.

Antiquities of scientific value

State property

When it comes to title, the Civil Code follows the predominant doctrine⁷⁵ and now clearly states in article 724, para. 1 (amended by article 32 CPTA) that “ownerless natural specimens and antiquities of scientific value” are the property of the canton on whose territory they are found⁷⁶. Such objects cannot be removed without the consent of the relevant cantonal authorities. In addition, they are *res extra commercium* because they may not be purchased in good faith or acquired through adverse possession⁷⁷, and there is no time limit on the canton’s right to recover them (article 724, para. 1^{bis} Civil Code).

Finder’s reward

The finder, and in the case of treasure trove also the owner of the land, is entitled to an appropriate finder’s reward not exceeding the value of the find (article 724, para. 3 Civil Code).

Treasure trove

Ownership of the land owner

According to article 723, para. 1 Civil Code, if ‘an object of value’ is found⁷⁸ in circumstances indicating with cer-

75 Under former law (before 1 June 2005), it was disputable in what moment the canton becomes the owner of discovered archaeological objects. One opinion required an occupancy of the object, otherwise the canton does not become the owner of the object of scientific value. Pursuant to the predominant opinion, however, the canton became the owner already in the moment of the discovery of the object. To that issue, see WEBER (2002: 176).

76 In Germany, title of ownership is governed not by federal law but by state law (of the *Länder*). Almost all states (*Länder*) know a seigniorage (*Schatzregal*) which ousts the federal provision on treasure trove (§ 984 BGB); *cp.* WEBER (2002: 180).

77 Cultural property may be acquired through adverse possession (*Ersitzung*) in 30 years (article 728, para. 1^{er} Civil Code; amended by article 32 CPTA).

78 Compared to French law, it is not necessary that the find was made occasionally; as to this in detail, see WEBER (2002: 182–187).

tainty that it has lain buried or hidden so long that it is not possible to trace its owner, it is treated as treasure trove. In that case, the owner of the land — not the state — gets title to the find (article 723, para. 2 Civil Code)⁷⁹.

Finder's reward

The finder is entitled to an appropriate finder's reward not exceeding half of the treasure's value (article 723, para. 3 Civil Code).

Statute of limitations

Preliminary remarks

The Cultural Property Transfer Act (CPTA)⁸⁰, as we have seen, implements the minimal standards of the 1970 UNESCO Convention and fills a gap, since Switzerland is not a member state of the UNIDROIT Convention of 1995⁸¹. Furthermore, as a non-member state of the European Union (EU) and the European Economic Community (EEC), Directive 93/7/EEC⁸² is not applicable.

Acquisition of stolen cultural property

Before 1 June 2005, foreign and domestic stolen cultural property was treated like every other chattel. There were no special rules as to the good faith purchase of stolen cultural property.

Cultural property within the meaning of article 2, para. 1 of the CPTA repeats the definition in article 1 of the 1970 UNESCO Convention. It does not matter whether the object was registered in the source state, is subject to export regulations or is protected in a particular manner. It is irrelevant who the owner is — a state or an individual⁸³.

Since Switzerland is not a member of the UNIDROIT Convention of 1995 and the system of the bi-

lateral agreements with the other member states of the UNESCO Convention of 1970 only covers smuggled cultural property, stolen domestic cultural property is treated the same as stolen foreign cultural property. If cultural property is stolen abroad and acquired in Switzerland, it is Swiss law which governs the transfer of ownership⁸⁴.

Ownership of Swiss cultural property can be lost by adverse possession or a good faith purchase. The following categories highlight the differences.

Cultural property of the Federal State

Registered cultural property of the Confederation cannot be acquired by prescription or in good faith, it is *res extra commercium* (article 3, para. 2, lit. a CPTA). In my opinion, the preclusion of a good faith purchase applies not only for stolen objects but also for entrusted objects which belong to the Confederation. Therefore, the same rule must apply for art loans of the Federal State. Stolen domestic cultural property may be acquired abroad in good faith, if the law of that country, according to the *lex rei sitae* acknowledges an acquisition of stolen goods⁸⁵.

84 See article 100, para. 1 of the Federal Act on Private International Law of 18 December 1987, SR 291. According to this provision, acquisition and loss of real rights in movable goods are governed by the law of the country of location at the time of the event giving rise to the acquisition or loss, as long as the acquisition is not contrary to domestic public policy (*ordre public*). Accordingly, cultural property being *res extra commercium* under French law (*domaine public*), for example, may be acquired in good faith in Switzerland, although Swiss law — at least for registered cultural property owned by the Confederation — also knows the qualification as *res extra commercium*. To this issue, see Corte di cassazione 24.11.1995, n. 12166, Governo di Francia c. De Contessini e altri, Foro it. 1996, I, 1, 907, Riv.dir.int. 80 (1997) 515; Riv.dir.int.priv.proc. 33 (1997) 427: a chattel as part of the French *domaine public* was validly sold in Italy although the qualification as *demanio pubblico* is known in Italian law as well. — The resolution of the Institut de Droit international of 1991 has not yet been adopted by the courts. According to this resolution the *lex originis*, i.e., the law of the source state, shall — at least alternatively — be applicable; the relevant articles 2 and 3 are reprinted in: Institut de Droit international (ed.), Annuaire 64 II, 1992 (Session de Bâle 1991) 402, 404–406. See also articles 90 (smuggled cultural property) and 92 (stolen cultural property) of the Belgian Act on Private International Law (Loi portant le Code de droit international privé du 16 juillet 2004, Moniteur belge du 27.7.2004), which alternatively apply the *lex rei sitae* and the *lex originis*; critically to this ambiguous rule, see SIEHR (2009: 889, at § 2.6.b.2). The courts avoid applying the *lex originis* because they do not want to take the other states' incentive to ratify the international conventions; cp. BGE 131 III 418 consid. 3.2.3 at 428 regarding the 1970 UNESCO Convention.

85 For example, according to Italian law, stolen goods may be acquired in good faith with the transfer of the possession; cp. article 1153 Italian *Codice Civile*.

79 The same rule is applied in Italian law (article 932, para. 2 Codice Civile) and French law (article 716, para. 1 Civil Code). However, this is different e.g. in Germany. According to § 984 BGB, the finder of the treasure and the owner of the land or chattel where it was found get title of joint ownership to one half each.

80 See *supra* n. 50.

81 See *supra*, n. 64.

82 See *supra*, n. 68.

83 WEBER (2011: 330).

Other cultural property

The statute of limitations for prescription of all other cultural property is 30 years (article 728, para. 1^{ter} Civil Code, amended by article 32 CPTA). The claim for the return of cultural property (other than those of the Confederation) lost against the will of the owner is subject to a statute of limitations of one year after the owner discovers the location and the ownership of the cultural property, no later than 30 years after the property is lost (article 934, para. 1^{bis} Civil Code, amended by article 32 CPTA). The two latter rules apply for the following ‘categories’ of cultural property:

- Unregistered cultural property owned by the Federal State;
- Any cultural property owned by the cantons;
- Any private cultural property owned by persons in Switzerland or persons domiciled abroad.

Ordinary chattels

The claim for the return of ordinary chattels lost against the will of the owner is subject to a statute of limitations of five years after the property is lost (article 934, para. 1 Civil Code). If the chattel was acquired at public auction or on the market or from a seller who deals with the same kind of objects, the object may be claimed only by paying the same price the former possessor has paid (article 934, para. 2 Civil Code)⁸⁶. If a person has possessed a chattel belonging to another person uninterruptedly and without challenge for five years believing in good faith that he or she owns it, he or she becomes its owner by adverse possession (article 728, para. 1 Civil Code)⁸⁷.

Export regulations

The permanent export of registered cultural property of the Confederation is prohibited (article 3, para. 2, lit. c CPTA). The cantons may regulate the export of cultural property within their territories. They may connect their own registries of their cultural property to the federal database (article 4, para. 1, lit. a CPTA). However, the cantons may not register any cultural property owned by individuals without their approval (article 4, para. 1, lit. b CPTA).

The export of cultural property registered in the Federal registry out of Switzerland requires an authorization of the administration (article 5, para. 1 CPTA).

⁸⁶ In contrast, German law, *e.g.*, does not know a good faith purchase of stolen goods beyond art auction; *cp.* § 935, para. 1 BGB.

⁸⁷ The statute of limitations is longer under German law; *cp.* § 927 BGB.

Authorization will be granted only if the cultural property is exported on a temporary basis and the export occurs for reasons of research, conservation, exhibition or similar reasons (article 5, para. 2 CPTA). The competent authority is led by the Federal Department of Culture (article 22 CPTR).

Due diligence in the art trade

Pursuant to article 16, para. 1 CPTA, “in the art trade and auctioning business”, cultural property may be transferred only when the transferor may assume, under the circumstances, that the cultural property was (i) not stolen⁸⁸, (ii) not lost against the will of the owner, (iii) not illegally excavated and (iv) not illicitly imported⁸⁹. In addition, “persons active in the art trade and auctioning business” are obliged, among others, to establish the identity of the supplier or seller and require a written declaration of his or her right to dispose of the cultural property. They must inform their customers about existing import and export regulations of the contracting states (article 16, para. 2 CPTA).

These legal duties apply to only a narrow category of persons:

- Individuals/companies with domicile/seat in Switzerland achieving gross revenues of more than CHF 100,000;
- Who/which acquire cultural property for purposes of resale on their own account, or procure trade in cultural property for the account of others (*cp.* article 1 CPTR).

This high standard as to good faith and due diligence, respectively, for the acquisition of archaeological cultural property is required in any case, for other than archaeological objects only if its value is at least CHF 5'000 (article 16, para. 2 CPTR). However, there is still no legal duty to notify the authorities of an offer for sale of objects having a suspicious origin⁹⁰.

⁸⁸ As to the good faith purchase of stolen works of art in Swiss and German law, see WEBER 2013.

⁸⁹ The storage of cultural property in toll-free storage rooms is considered as import in terms of article 19, para. 3 CPTA.

⁹⁰ This is different among the EU member states: since 28 December 2001, the Directive no. 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, O.J. L 166/77 of 28.6.1991, is also effective for art dealers and auction houses, if the work of art has a value of at least EUR 15,000; *cp.* Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, L 344/76 of 28.12.2001.

Free haven for loans

In Switzerland, the CPTA regulates the return guarantee for temporary loans with the effect that neither private parties nor authorities may make legal claims to the cultural property as long as the cultural property is located in Switzerland (cp. article 13 CPTA)⁹¹.

The Federal Department of Culture is competent for the issuance of a return guarantee if the following prerequisites are met:

- Cultural property was not imported in Switzerland for commercial exhibitions in galleries or art fairs or auction houses; and
- It is the loaning institution in Switzerland (museum or cultural institution) requesting the return guarantee (article 10 CPTA); and
- The institution⁹² loaning the artwork must have its seat in a member state of the UNESCO convention 1970 (article 10 CPTA); and
- The request is published in the Federal Bulletin (article 11, para.1 CPTA); and
- No objection (article 11, para.3 CPTA).

The guarantee for return may be issued if the following prerequisites are accomplished:

- No person claims ownership to the cultural property through an objection (article 12, para.2, lit. a CPTA);
- The import of the cultural property is not illicit (article 12, para. 2, lit. b CPTA);
- The loan agreement stipulates that the cultural property will be returned to the contracting state of origin following the conclusion of the exhibition (article 12, para. 2, lit. c CPTA).

CONCLUSION

The questions discussed in this paper can thus be summarized as follows:

1. A successful claim of a foreign state in Switzerland for the repatriation of illegally exported cultural property is possible only if (i) the removal

of the cultural property out of the claiming state's territory was illegal, (ii) Switzerland had forbidden its import, (iii) the claiming state is a contracting state of the UNESCO Convention, and (iv) between the claiming state and Switzerland there exists an agreement on the import and return of cultural property.

2. Among the member states of the UNIDROIT Convention 1995, stolen and/or smuggled cultural property must be returned.
3. Within the EU, Norway, Iceland and Liechtenstein smuggled cultural property must be returned.
4. In Switzerland, ownerless natural specimens and antiquities of scientific value are the property of the canton on whose territory they are found. The finder (and in the case of treasure trove also the owner of the land) is entitled to an appropriate finder's reward not exceeding the value of the find. Such objects must not be alienated without the consent of the competent cantonal authorities. They cannot be purchased in good faith or acquired through adverse possession (*res extra commercium*). There is no time limit on the canton's right to recover them.
5. Objects of value which have lain buried or hidden so long that it is not possible to trace their owner are treated as treasure trove. The owner of the land gets title to the find. The finder is entitled to an appropriate finder's reward not exceeding half of the treasure's value.
6. There is an export ban on cultural property owned by the Confederation and listed in the Federal Registry.
7. Persons active in the art trade and auctioning business must be diligent and have a legal duty of care and skill.
8. Return guarantees protect the cultural property from seizure and legal actions by third parties as long as the object is located in Switzerland.

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91 The return guarantee is no duty which is foreseen by the UNESCO Convention of 1970. It is known, among others, also in French law (article 61 Loi n° 94-679 du 8.8.1994, portant diverses dispositions d'ordre économique et financier, J.O. 10.8.1994, 11668) and German law (§ 20 Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung of 6.8.1955, BGBl 1955 I 501, as of the version of 15.10.1998, BGBl 1998 I 3162, and of 8.7.1999, BGBl 1999 I 1754, 1757; reprinted in: *Kunst und Recht* 1999, 282; cp. WEBER (2004: 518–521).

92 Not only private or public institutions may be loan-giving parties but also individuals; cp. article 1, para. 1, lit. d CPTR.

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