

New Swiss Law on Cultural Property

Marc Weber*

Abstract: On June 1, 2005, the Swiss Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act [CPTA]) and the regulations thereof became effective. The CPTA implements the minimal standards of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The CPTA fills a gap, because Switzerland is not a member state of the Convention of June 24, 1995, on Stolen or Illegally Exported Cultural Objects (Unidroit Convention 1995). In addition, as a nonmember state of the European Union (EU) and the European Economic Community (EEC), the Council Directive 93/7/EEC of March 15, 1993, on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State is not applicable. The CPTA enforces foreign export bans in Switzerland. However, claims in Switzerland for return of foreign, illegally exported cultural property are only successful when there is an agreement on the import and return of cultural property between Switzerland and the claiming foreign state. Like Switzerland, the claiming state must be a member state of the UNESCO Convention of 1970.

INTRODUCTION

Countries that have a rich cultural property heritage, the so-called source countries¹ such as those in the mediterranean, Latin America, and Asia, suffer from the plunder of temples and archaeological sites.² In addition, the cultural heritage of Central Africa is jeopardized by the theft of burial objects.³ These items are often smuggled into Switzerland where, until recently, there were no specific federal regulations on the transfer of cultural property. Switzerland is even said to be a convenient marketplace for illegal transactions of art.⁴ And finally, Switzerland is the fifth largest international art market worldwide.⁵

*Beglinger Holenstein, Attorneys-at-Law, Zürich. E-mail: mweber@beghol.ch

On June 1, 2005, the Swiss Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA)⁶ and the decree⁷ to this act became effective. The CPTA implements the minimal standards of the UNESCO Convention of November 14, 1970, on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,⁸ to which Switzerland became a signatory on March 10, 2003. The CPTA fills a gap, because Switzerland is not a member state of the Convention of June 24, 1995, on Stolen or Illegally Exported Cultural Objects (Unidroit Convention 1995).⁹ Furthermore, as a nonmember state of the European Union (EU) and the European Economic Community (EEC),¹⁰ the Council Directive 93/7/EEC of March 15, 1993, on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State¹¹ is not applicable.

Because foreign export bans are public law, they are not enforceable before Swiss domestic courts.¹² This situation changed in 1993 only among member states of the EU by the Council Directive 93/7/EEC.¹³ Today foreign export regulations are recognized and enforceable reciprocally among the 25 EU member states. Cultural property that was illegally removed from an EU member state and located in another EU member state must be returned. A sale of illegally exported objects in another EU member state does not prevent the requesting state's claim for the return of the cultural property. If the buyer was in good faith, the buyer must be compensated by the state claiming the return.

The claim of a foreign state or a private person for the return of stolen cultural property often fails because the object was acquired abroad in good faith.¹⁴ This also goes for goods that are inalienable under the law of the state from which they were stolen.¹⁵ The transaction is governed by the law of the state where the object was located at the moment of the transaction. This rule (*lex rei sitae* or situs rule) is an established principle of private international law and is known in almost all countries. Today, among the 27 contracting states of the aforementioned Unidroit Convention of 1995,¹⁶ illegally removed and stolen cultural property must be returned independently of a good faith purchase. The possessor who obtained the property in good faith may claim a *reasonable compensation*.

The Swiss Federal Act on the CPTA¹⁷ implements the non-self-executing UNESCO Convention of 1970, which supports the protection of cultural property in different countries and works to protect and maintain the common cultural heritage of mankind by cooperation of all the member states. The member states are required to take legislative and administrative means to prevent the illegal trade in cultural property. These means concern the import, export, return, and repatriation of cultural property and focus not only on the art trade but also on museums.

There are two different approaches for the implementation of the UNESCO convention. First, the Canadian approach does not need to conclude bilateral agreements with other signatories of the UNESCO convention. Hence, every object that was illegally exported from another UNESCO state and brought to Canada will be

returned to that state.¹⁸ Alternatively, the United States uses a second approach.¹⁹ The repatriation of cultural property requires an agreement between the United States and the requesting contracting state of the UNESCO convention. The agreement provides regulation on the import and return of cultural property. The United States already concluded seven bilateral agreements based on the UNESCO convention, most recently in 2001 with Italy.²⁰ Generally, the protected items are described in different categories listed in the agreement. Concerning the agreement between the United States and Italy, for example, the import of artifacts is only restricted if they were created between the ninth century B.C. and the fourth century A.D.²¹ The cultural property included by the agreement is the result of the negotiations between the parties.

Switzerland follows the U.S. approach. That means that Switzerland must conclude bilateral agreements with other member states of the UNESCO convention.²²

The CPTA is not only the legal base for the bilateral agreements; but furthermore, it amends provisions of the Civil Code when it comes to good faith purchases, prescription, and ownership of archaeological objects. The CPTA has four main objectives:

1. Protection of Swiss cultural property against theft and illegal export
2. Repatriation of illegally imported foreign cultural property
3. Return guarantee of artworks loaned from abroad
4. Duty of care in trade with art

In addition, the CPTA includes regulations on financial assistance, the administrative law of culture, and criminal sanctions (which are not discussed in this paper and belong to another forum).

Pursuant to CPTA article 2(1), cultural property is defined as significant property from a religious or universal standpoint for archaeology, prehistory, history, literature, arts, or sciences belonging to the categories under article 1 of the UNESCO Convention of 1970.²³ It does not matter whether cultural property is registered in a state or whether the object underlies any export control or is protected in a particular way. The CPTA is applicable to private and public cultural property.

FOREIGN CULTURAL PROPERTY IN SWITZERLAND

Smuggled Goods

Under former law, foreign states were unable to claim the repatriation of illegally exported cultural property in Swiss courts, because foreign export as public law was 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 art.²⁴ This situation may be changed by the CPTA only for a limited number of cases. A successful claim of a foreign state in Switzerland for the repatriation of illegally exported cultural property is only possible if

- The removal of the cultural property out of the claiming state's territory was illegal;
- Switzerland had forbidden its import;
- The claiming state is a contracting state of the UNESCO convention; and
- Between the claiming state and Switzerland, there must have been concluded an agreement on the import²⁵ and return of cultural property, according to articles 7 and 9 CPTA.

The following prerequisites must be fulfilled:

- a. the object of the agreement must be cultural property of significant importance for the cultural heritage of the relevant contracting state;
- 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. (article 7, para 2, lit. a–c CPTA)

Notice that if Switzerland renounced the U.S. approach (conclusion of bilateral agreements), Switzerland would have to return any piece of art that was illegally exported from another member contracting state of the UNESCO convention.

Claims for repatriation are subject to a statute of limitations of 1 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).²⁶

Stolen Goods

Bona Fide Purchase

The good faith purchaser who is forced to repatriate the cultural object has to be compensated by the claiming state. The compensation is based on the purchase price and on the necessary and useful efforts to safeguard and preserve the cultural property (article 9, para 5 CPTA).²⁷

Ownership of Swiss cultural property can be lost by prescription or a good faith purchase abroad pursuant to foreign law. The CPTA is silent as to the question of whether such a purchase is recognized in Swiss courts. However, autonomous private international law gives an answer concerning vested rights. According to article 100, paragraph 1 of the Swiss Private International Law Act,²⁸ 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 acquisitions are not contrary to domestic public policy (*ordre public*).²⁹

Prescription

Under former Swiss law, foreign and domestic stolen cultural property was treated like every other chattel. There were no special rules on the good faith purchase of stolen cultural property. The claim for the return of every chattel (and therefore also cultural property) 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 only may be claimed by paying the same price the former possessor has paid (article 934, para 2 Civil Code).

The CPTA changed the legal situation in different ways. First, registered cultural property of the confederation cannot be acquired by prescription or in good faith (article 3, para 2, lit. a CPTA).³⁰ Second, the statute of limitations for prescription of all other cultural property is 30 years (article 728, para 1^{bis} Civil Code, amended by article 32 CPTA). Third, the CPTA extends the claim for the return of cultural property (other than those who belong to the Confederation) lost against the will of the owner; it is subject to a statute of limitations of 1 year after the owner discovers the location and the the ownership of the cultural property, not to 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 [states]
- Any private cultural property owned by persons in Switzerland or persons domiciled abroad
- Foreign cultural property located in Switzerland and may be acquired by prescription pursuant to the Swiss situs rule (article 100, para 1 Federal Act of Private International Law)

In my opinion the preclusion of a good faith purchase applies not only for stolen objects but also for entrusted objects that belong to the Confederation. Therefore, the same rule must apply for artloans of the Federal State.

Statute of Limitations

The enforceable repatriation of smuggled art objects is—without giving up the ownership—a guarantee of rights. Hence, an art dealer who sells smuggled artwork is liable to the buyer, whose claim must be made 1 year after discovering the fault—not to exceed 30 years after conclusion of the contract (article 210, para 1^{bis} Code of Obligations, amended by article 32 CPTA). This is only new with regard to the 30-year statute of limitations. Under former Swiss private law, the

claim expired 1 year after the discovery of the fault and still does when it comes to other items than cultural property (article 210, para 1 Code of Obligations).

Goods on Loan

Another issue that may have an effect on art dealers, museums, and collectors are the new rules on artloans from abroad that are exhibited in Switzerland. Only recently, private persons have brought actions before courts against museums claiming ownership of loaned artworks.³¹ The issue arises whether art loans from abroad are immune against legal actions that are raised during the exhibition. In France and Germany the return guarantee for foreign artloans was already amended in 1994 and in 1998, respectively.³² In Switzerland the CPTA now regulates the return guarantee for artloans 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). However, the return guarantee is no duty that is foreseen by the UNESCO convention of 1970 and has to be implemented into national law.

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

- It is the loaning institution in Switzerland (museum or cultural institution) requesting the return guarantee (article 10 CPTA).
- The institution³³ loaning the artwork must have its seat in a member state of the UNESCO Convention of 1970 (article 10 CPTA).
- The request is published in the Federal Bulletin (article 11, para 1 CPTA).
- There is no objection (article 11, para 3 CPTA).

These rules are only considered for artworks that are loaned temporarily. 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).

In the first 8 months after the enactment of the CPTA, only two return guarantees were applied for, and both were issued.³⁴ Finally, the guarantee of the return of loans regulated by the CPTA shall prevent the battle on the immunity of foreign public cultural property. The Swiss case of November 2005 on the paintings loaned from the Pushkin Museum and exhibited in Switzerland will, therefore, remain unique.³⁵

A guarantee for the return of loaned artworks from abroad will not be issued if the cultural property was imported in Switzerland for commercial exhibitions in galleries, art fairs or auction houses.³⁶

Export Prohibitions?

To simplify controls at the borders the Cantons [states], which regulate the export of cultural property within their territories,³⁷ may connect their lists to the federal database (article 4, para 1, lit. a CPTA).³⁸ The contents of the cantonal registers will not be integrated into the federal register, however. The connection to the federal register will be made through an electronic link (article 2, para 1 Cultural Property Transfer Regulation [CPTR]).³⁹ The cantons will decide which objects owned by the cantons and their public institutions will be listed on the cantonal registers. Thus the federal state is not allowed to ban the definitive export of private cultural property out of Switzerland⁴⁰ or require an export licence for a temporarily export.

Cultural property owned by the federal state (Confederation) of significant importance for the cultural heritage is listed in the federal register (article 3, para 1 CPTA).⁴¹ The definitive export of such cultural property out of Switzerland is prohibited (article 3, para 2, lit. c CPTA). The export on a temporarily basis requires authorization of the specialized body and is only granted for reasons, such as for research, conservation, or exhibition (article 5 CPTA).

The private owners of art may decide whether they want to put their collections on a cantonal register; but no canton is allowed to register privately owned cultural property on a cantonal register without the consent of the owner (article 4, para 1, lit. b CPTA). However, the canton may declare that cultural property in their registries, including publicly owned cultural property (canton, municipality, and public institutions such as public foundations) and privately owned cultural property, may neither be acquired through adverse possession nor in good faith; and they may declare that the claim of return is not subject to a statute of limitations (article 4, para 2 CPTA).

Archaeological Objects and State Property

Under former law it was disputable in what moment the canton [state] became 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.⁴² Pursuant to the predominant opinion, however, the canton became the owner already in the moment of the discovery of the object.⁴³

The CPTA follows the predominant doctrine and now states in the revised article 724, para 1 Civil Code, amended by article 32 CPTA:

Derelict natural bodies or antiquities of scientific value are the property of the Canton where the items are found.

Another improvement having influence on the art trade concerns the trade in archaeological objects discovered in Switzerland. According to article 724, para 1^{bis} Civil Code, amended by article 32 CPTA, antiquities are inalienable and nobody can acquire ownership of such items (*res extra commercium*):

Such items may not be sold without the permission of the competent cantonal authorities. They can neither be acquired by adverse possession nor acquired in good faith. The claim for return is not subject to a statute of limitation.

Art Trade in Switzerland

Pursuant to article 16, para 1, lit. a–b CPTA

In the art trade and auctioning business, cultural property may only be transferred when the person transferring the property may assume, under the circumstances, that the cultural property,

- a. was not stolen, not lost against the will of the owner, and not illegally excavated.
- b. not illicitly imported.

In addition, according to article 16, para 2 CPTA,

Persons active in the art trade and auctioning business are obliged,

- a. to establish the identity of the supplier or seller and require a written declaration from the same of his or her right to dispose of the cultural property;
- b. to inform their customers about existing import and export regulations of the contracting states;
- c. to maintain written records on the acquisition of cultural property by specifically recording the origin of the cultural property, to the extent known, and the name and address of the supplier or seller, a description as well as the sales price of the cultural property;
- d. to provide to the specialized body all necessary information on fulfilling this duty of diligence.

The duties of care apply to any person active in the art trade and auction business. Pursuant to article 1, para CPTR (Regulation to the CPTA), only a narrow category of persons must follow the aforementioned legal duties, particularly the first duty listed:

- Natural persons domiciled in Switzerland and corporations with its seat in Switzerland, and which
 - are obliged to register in the trade register, and
 - acquire cultural property for purposes of resale on their own account, or procure trade in cultural property for the account of others (article 1, para e, no. 1 CPTR); and
- Natural persons domiciled abroad and corporations with its seat abroad, and
 - carry out more than 10 transactions with cultural property, and

- achieve gross revenues of more than CHF 100,000 (which corresponds at about to \$125,000,000), and
- acquire cultural property for purposes of resale on their own account, or procure trade in cultural property for the account of others (article 1, para e, no. 2 CPTR).

This high demand on the good faith and due diligence, respectively, for the acquisition of cultural property is only required by law if the piece of art has a value of CHF 5,000 (which corresponds at about to \$4,000) or more (article 16, para 2 CPTR).

The legal duties that have to be followed by certain persons can be understood as an institutional increase of the codes of ethics that were initialized by the art trade in the past. Members of professional associations, such as the Swiss Association of Dealers in Antiques and Art (SADAA), must check the identity of the seller and clarify whether the object has been stolen or illegally exported.⁴⁴ A duty for the art dealers to notify any offer for sale of artworks having a suspicious origin has not been codified, however. On the contrary, since December 28, 2001, in the member states of the EU, the Directive 93/308/EEC on money laundering is also effective for art dealers and auction houses if the work of art has a value more than EUR 15,000.⁴⁵

Similar regulations exist for museums.⁴⁶ Not only private institutions have imposed the codes of ethics; Swiss courts have also imposed duties of diligence for the trade in art. The Swiss Federal Supreme Court created some rules for the serious art trade and requires a high demand on the good faith purchase (see article 3, para 2 Civil Code) in concrete terms.⁴⁷ From my point of view, any purchaser shall be obliged to counsel the authoritative databases on stolen artworks, such as the Art Loss Register,⁴⁸ to satisfy the high demand on good faith. Finally, it must be mentioned that people trading in art and working in the auction industry must store records and receipts for 30 years (article 16, para 3 CPTA).

The Federal Department of Culture has a powerful competence concerning the control of galleries. The specialized authority has access to business rooms and storage areas of persons active in the art trade and auctioning business (article 17, para 1 CPTA). In my opinion the federal authorities are not empowered to seize any cultural objects, because the authorities will file a complaint with the competent criminal prosecution authorities if they have reasonable suspicion of criminal activity (article 17, para 2 CPTA).

SUMMARY

The effects of the CPTA and the amended regulations of the Civil Code on the art trade are substantial. Art dealers, collectors, and museums should know about the following issues:

- The CPTA enforces foreign export bans in Switzerland. It does not matter whether the illegal exported object is stolen. Objects that are *only* stolen abroad but not smuggled are not affected by the bilateral agreements that will be concluded between Switzerland and other signatories of the UNESCO convention.
- Claims in Switzerland for return of foreign illegally exported cultural property or claims before foreign courts for the return of illegally removed cultural property to Switzerland are only successful when there is an agreement (on the import and return of cultural property) between the forum state and the claiming foreign state. The agreement must be performed before the illegal export and illegal import occurred. Like Switzerland, the claiming state must be a member state of the UNESCO Convention of 1970.
- The CPTA does not change the duty of diligence for the art trade. It only codifies the preexisting rules that were created by case law and also stated in not binding self-regulations of public museums and private institutions such as art dealer associations. The demand on good faith is substantially high when it comes to the purchase of cultural property. The duties stipulated by the CPTA and CPTR only apply to certain categories of persons and, furthermore, only when the traded piece of art has a value of at least CHF 5,000.
- Derelict objects or antiquities of scientific value are the property of the canton where the items are found. Under current law it is undoubtful that the cantons [states] become the owner of archaeological objects in the moment of the discovery of the items.
- Registered cultural property that belongs to the Federal State and archaeological objects, which belong to the canton by law, can neither be acquired by prescription nor acquired in good faith. The claim for return is not subject to a statute of limitations. They are so-called *res extra commercium*.
- The claim for return of stolen cultural property is subject to a statute of limitations of 30 years after the property is lost.
- The return guarantee for foreign art loans may be issued if the object comes from both public and private institutions. The same is considered for artworks borrowed from private collections. As long as the artloan is located in Switzerland, no private party or authority may make legal claims to the cultural property.

ENDNOTES

1. For an overview on the different methods of the protection of cultural property, see Prott, "Cultural Heritage Law," 333–42.
2. For China, see Murphy, "Republic of China," 227–42.
3. For a discussion of the plunder of tombs in Mali, see Brent, "Rape of Mali," 26.
4. See "Botschaft über die UNESCO Konvention 1970 und das Bundesgesetz über den internationalen Kulturgütertransfer (KGTG)." *Bundesblatt* (2002): 545.
5. In 2001 in Switzerland, more than \$806,450,000 worth in art changed hands. That corresponds to 2.3% of the world market; see The European Fine Art Foundation, *Artmarket*, 31.

6. “Federal Act on the International Transfer of Cultural Property of 20 June 2003 (CPTA).” *Systematische Rechtsammlung* no. 444.1; *Bundesblatt* (2003): 4475. For a discussion of the CPTA, see Siehr, “Sachenrecht,” 127–40; Weber, “Bundesgesetz,” 495–525; Siegfried, *Internationaler Kulturgüterschutz*, 1 *et seq.*; Raschèr, *Cultural Property Transfer*, 27–67.

7. “Regulation on the International Transfer of Cultural Property (Cultural Property Transfer Regulation, CPTR).” *Systematische Rechtsammlung* no. 444.11.

8. 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 as its Sixteenth Session, Paris, November 14, 1970, 823 *United Nations Treaty Series* 231; *International Legal Materials* 10 (1971): 289. To this convention see, e.g., O’Keefe, *Commentary*, 1 *et seq.* On March 28, 2006, the convention was in force in 109 states. See www.unesco.org (accessed March 28, 2006).

9. *International Legal Materials* 34 (1995): 1330; reprinted in *International Journal of Cultural Property* 5 (1996): 155. To that convention see, e.g., Bergé, “La Convention,” 215–62; and most recently Calvo Caravaca, “Private International Law,” 87–104.

10. Today only the Republic of Iceland, the Principality of Liechtenstein, and the Kingdom of Norway are member states of the EEC.

11. Official Journal L 74/74 of 27/3/1993; reprinted in Merryman and Elsen, *Ethics*, 1255 *et seq.* All states that became member states of the EU before May 1, 2004—with the exception of Portugal—and the EEC member states (*supra* n. 10) have implemented the Council Directive into national law.

12. See, e.g., *Attorney General of New Zealand v. Ortiz*, [1982] 2 Weekly Law Reports 10 (Queen’s Bench Division): the claim for return of Maori carvings that were smuggled out of New Zealand and brought to England. The objects already passed the border of New Zealand when they were forfeited by seizure. As a result, the claim of the Attorney General of New Zealand was dismissed.

13. See *supra* n. 11.

14. See, e.g., *Winkworth v. Christie, Manson & Woods Ltd.*, [1950] 1 All E.R. 1121, [1950] 2 W.L.R. 937 (Chancery Division): Theft of Japanese artworks in England that were sold in Italy to a collector who was in good faith. Later on the objects were sent back to England to be auctioned in London. The original owner lost title of ownership because the artworks were sold in Italy, and Italian law accepts a good faith purchase of stolen property. For a discussion of this case, see Siehr, “International Art Trade,” no. 50.

15. See Corte di cassazione November 24, 1995, n. 12166, *Governo di Francia c. De Contessini e altri*, *Foro italiano* (1996, I, 1): 907; *Rivista di diritto internazionale* 80 (1997): 515. Tapestries that were inalienable pursuant to French law and stolen from a public building in France were brought to Italy where they were purchased in good faith. Because Italian law grants an immediate good faith purchase of stolen goods, France’s claim was dismissed. For a discussion, see Nanetti and Squillante, “Restituzione,” 396–420.

16. See *supra*, n. 9. On June 1, 2006, the Unidroit Convention of 1995 will be effective in following 27 contracting states: Afghanistan, Argentina, Aserbaidshjan, Bolivia, Brazil, China, Ecuador, El Salvador, Finland, Gabon, Guatemala, Iran, Italy, Cambodia, Croatia, Lithuania, Nigeria, Norway, Portugal, Rumania, Paraguay, Peru, Slovakia, Slovenia, Spain, Hungary, and Cyprus. See www.unidroit.org (accessed March 28, 2006).

17. See, *supra*, n. 6.

18. Cultural Property Export and Import Act (chapter C-51).

19. See Cultural Property Implementation Act, codified as 19 United States Code §§ 2601 *et seq.* (1988 and Supplement 2004); reprinted in part in Merryman and Elsen, *Ethics*, 139–54.

20. Besides Italy, the United States concluded agreements with El Salvador, Guatemala, Canada, Mali, Nicaragua, and Peru. See Weber, “Archäologische Objekte.” 238.

21. See Agreement Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, of January 19, 2001, Federal Register 23/1/2001, 66(15): 7399. This agreement has been recently prolonged for another 5 years.

22. According to the information of the Department of Culture in Berne of January 16, 2006, Switzerland will focus on agreements with Mexico and other source states from Central and South America, with priority.

23. The following objects, among others, are enumerated in the categories of article 1 of the UNESCO Convention of 1970 (supra n. 8):

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (g) property of artistic interest, such as (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand), (ii) original works of statuary art and sculpture in any material, (iii) original engravings, prints and lithographs, (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections.

24. See *Attorney General of New Zealand v. Ortiz*, supra n. 12; see also *Kingdom of Spain v. Christie, Manson & Woods Ltd.*, [1986] 1 Weekly Law Reports 1120 (Chancery Division); [1986] 3 All England Law Reports 28: 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 claimed the official statement that the painting was illegally exported.

25. The storage of cultural property is considered import in terms of article 19(3) CPTA.

26. Because this claim is based on public law, the new provision on jurisdiction amended in the Swiss Federal Act on Private International Law of December 18, 1987, *Systematische Rechtssammlung* no. 291 (PILA, article 98a), should have been inserted in the CPTA and not in the PILA.

27. Whether the smuggled good has been stolen, as well, is not significant for the application of the CPTA and therefore for the determination of the amount of compensation.

28. See n. 26, supra. For an English translation see *American Journal of Comparative Law* 37 (1989): 193; and Karrer, *Private International law*, 31.

29. In *Winkworth v. Christie, Manson & Woods Ltd.*, supra n. 14, the acquisition of the stolen Japanese artworks in Italy (and therefore under Italian law) was not contrary to English public policy.

30. The classification to inalienable chattels (*res extra commercium*) is not new to Swiss law. Since 1998 Swiss Federal law has known the inalienability of federal archives. See article 20 of the Federal Act on Archiving of June 26, 1998, *Systematische Rechtssammlung* no. 152.1.

31. Two paintings by the Austrian expressionist Egon Schiele (1890–1918) were seized in New York City after the heirs of the former owner alleged that they were the rightful owners of the artworks. See *United States of America v. Portrait of Wally, a Painting by Egon Schiele, Defendant in Rem [Wally I]*, 105 F. Supp. 2nd 288 (S.D.N.Y. 2000). For a detailed presentation, see Lufkin, “Why Nazi Loot,” 305–17; and Lufkin, “Whistling,” 207–30. For the legislation see § 12.03 New York Arts and Cultural Affairs Law, reprinted in McKinney’s *Consolidated Laws of New York Annotated, Book 3B*, St. Paul, Minnesota (1984): 28 *et seq.*, and 2004 *Cumulative Annual Pocket Part*, 33 *et seq.*: “No process of attachment . . . or any kind of seizure shall be served or levied on any work of fine art while the same is en route to or from, on while exhibition . . . nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause.”

32. For France, see Act no. 94–679 of August 8, 1994, Official Journal 10/08/1994, 11668; and, e.g., *Arrêté* of December 16, 2005, *relatif à l’insaisissabilité de biens culturels*, Official Journal no. 156 of 07/07/2004, 12274: Three paintings from the Museum of Modern Art, New York, for the exhibition *Picasso et Dora Maar*, from February 14, 2006, until May 23, 2006, Musée national Picasso, Paris. For Germany see § 20 Act of August 6, 1955, *Bundesgesetzblatt* (1955 I): 501, amended by

article 2(3) Act of October 15, 1998, *Bundesgesetzblatt* (1998 I): 3162; and Act of July 8, 1999, *Bundesgesetzblatt* (1999 I): 1754, at 1757; reproduced in *Kunstrecht und Urheberrecht* (1999): 282. Furthermore, in Belgium, a return guarantee was enacted in 2004: Act of June 14, 2004, *Loi modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique*, *Moniteur Belge* of 29/06/2004.

33. Not only private or public institutions may be loaners, but also natural persons. Cf. article, para 1, lit. d CPTR.

34. *Bundesblatt* (2005): 6963: application of 23/11/2005 concerning engravings and long case clocks from the Musée Pierre Le Grand and the Musée d'anthropologie et d'ethnographie (Kunstkamera) de l'Académie des sciences de Russie, St. Petersburg, for an exhibition at the Musée historique, Lausanne; *Bundesblatt* (2005): 7509: application of 29/11/2005 concerning five paintings by Max Beckmann (1884–1950) loaned from the Saint Louis Art Museum, St. Louis, Missouri, USA, for an exhibition at the Zentrum Paul Klee, Bern, Switzerland.

35. The 55 paintings from the Pushkin Museum were shown at the exhibition "La peinture Française" between June 17 and November 13, 2005, at the Foundation of Pierre Giannada, Martigny, Switzerland. The paintings were seized at the demand of a Swiss company, which is a creditor of the Russian Federation. On November 16, 2005, the judicial seizure was abolished by the Swiss Government, and the artworks were transported back to Russia. The decision was based on article 184, para 3 of the Swiss Constitution, which holds that the government "may decree in the interest of the country." This decision might be correct in the light of the international exchange of cultural property but might be false when it comes to the law. To this case see *Neue Zürcher Zeitung* November 17, 2005, 13; and November 18, 2005, 15; Weller, "Freies Geleit," 25. To the immunity of state cultural property see Candrian, *L'immunité*, 249 *et seq.*

36. For example., in December 2004, a judicial prohibition prevented the auction of an autograph of Sergei Rachmaninov (1873–1943) that was found in Switzerland and should have been sold at Sotheby's in London; cp. Huscher, "The Lost Manuscript," 50A.

37. Only in eight cantons (Bern, Basel-Landschaft, Freiburg, Graubünden, Jura, Schwyz, St. Gallen, and Tessin) a permission for the export of registered cultural property is required. See Weber, *Unveräußerliches Kulturgut*, 232–34.

38. To the cantonal cultural property registers see Weber, *Unveräußerliches Kulturgut*, 19–28.

39. See Weber, *Unveräußerliches Kulturgut*, 19–28.

40. The cantonal regulations apply not only for the intercantonal legal commerce but also for the trade with foreign countries. Accordingly, the federal state is competent to regulate customs, a canton may not prevent a protected cultural property from leaving the Swiss state border; see Raschèr, *Kulturgütertransfer*, 12, 112.

41. Presently, it remains unclear what cultural property in (federal) state property will be registered. Since most of the federal artworks are located in public buildings, and since its number is small in comparison to private cultural property, in my opinion the significance of the registration in the federal list must not be overrated.

42. For this minor doctrine see Liver, "Art. 724 ZGB," 367, footnote 4.

43. For the predominant doctrine see, e.g., Ammann, *Fundrecht*, 92; Schwander, "Art. 724 ZGB," 3; Rey, *Grundlagen*, no. 1881a.

44. See article III.1 Code of Ethics of May 27, 2000, of the Swiss Association of Dealers in Antiques & Art (SADAA); http://www.vsak.org/english/frameseite_1_e.htm (only in German; accessed March 28, 2006). See also article 12 of the Code of Ethics and Practice of July 4, 1993, of the International Association of Dealers in Ancient Art (IADAA); reprinted in *The Art Newspaper*, October 1994, 20. See also article 1 of the [UNESCO] International Code of Ethics for Dealers in Cultural Property (of November 1999); reprinted in *Art Antiquity and Law* 5 (2000): 383.

45. Cp. article 2a no. 6 Council Directive 91/308/EEC of June 10, 1991, on prevention of the use of the financial system for the purpose of money laundering, Official Journal L 166/77 of 28/06/1991, amended by article 1 Directive 2001/97/EC of the European Parliament and of the Council of December 4, 2001, amending Council Directive 91/308/EEC on prevention of the use of the finan-

cial system for the purpose of money laundering, L 344/76 of 28/12/200: Member states shall ensure that the obligations laid down in this directive are imposed on the following institutions: “dealers in high-value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of EUR 15,000 or more.”

46. See Code of Ethics of the International Council of Museums (ICOM) of November 4, 1986, revised in 2004, article 2.3 reads as follows:

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.

See http://icom.museum/code2004_eng.pdf (accessed March 28, 2006).

47. The concretization concern article 934, para 2 Civil Code. In general, the standard for due diligence is significantly high when it comes to the trade in used objects. See Swiss Supreme Court 24 September 1987, *Entscheidungen des Schweizerischen Bundesgerichts* 113 II 397, at 399–400, reference 2b. This law was applied to the trade in antiques, see Swiss Supreme Court March 5, 1996, *Entscheidungen des Schweizerischen Bundesgerichts* 122 III 1, at 4, reference 2: Sale of an antique collection of arms. Finally, the Swiss Federal Supreme Court confirmed the higher demand on the duty of diligence for purchase of art, see decision of April 1, 1997, *Entscheidungen des Schweizerischen Bundesgerichts* 123 II 134, at 142, reference 6d = *La Semaine judiciaire* 119 (1997): 529, at 536–37: In the particular case, the purchaser could not prove his good faith concerning the purchase of a painting by Alexandre-François Desportes (1661–1743) which was stolen in France.

48. See also www.artloss.com (accessed March 28).

BIBLIOGRAPHY

Ammann, Renato. *Das Fundrecht des Schweizerischen Zivilgesetzbuches* (dissertation). Zürich, Switzerland, 1960.

Bergé, Jean-Sylvestre. “La Convention d’Unidroit sur les biens culturels.” *Journal du droit international* 127 (2000): 215–62.

Brent, Michel. “The Rape of Mali.” *Archaeology* (May/June 1994): 26.

Calvo Caravaca, Alfonso-Luis. “Private International Law and the Unidroit Convention of 24th June 1995 on Stolen or Illegally Exported Cultural Objects.” In *Festschrift für Erik Jayme, Vol. 1*, edited by Heinz-Peter Mansel *et al.*, 87–104, Berlin, Germany: Sellier European Law Publishers, 2004.

Candrian, Jérôme. *L’immunité des Etats Face aux Droits de L’homme et à la Protection des Biens Culturels*. Zürich, Switzerland: Schulthess, 2005.

Huscher, Phillip. “The Lost Manuscript.” In *Program booklet Season 2005–06 [of the Chicago Symphony Orchestra]*, 50A.

Karrer, Pierre A., Karl. W. Arnold, and Paolo Michele Patocchi. *Switzerland’s Private International law*, 2nd ed. Zürich, Switzerland: Schulthess, 1994.

Liver, Peter. “Art. 724 ZGB.” In *Schweizerisches Privatrecht*, edited by Arthur Meier-Hayoz, Vol. 5/1. Basel/Stuttgart, Switzerland: Helbing & Lichtenhahn, 1977.

Lufkin, Martha. "Why Nazi Loot Ceased Being 'Stolen' when U.S. Forces Seized It in Austria: The Federal 'Schiele' Case." *Art Antiquity and Law* 5 (2000): 305–17.

———. "Whistling Past the Graveyard Isn't Enough: U.S. May Seek to Confiscate Painting Lent by Austrian Museum which Allegedly Knew it was Nazi Loot." *Art Antiquity and Law* 7 (2002): 207–30.

Merryman, John Henry, and Albert E. Elsen. *Law, Ethics and the Visual Arts*, 4th ed., London: Kluwer Law International, 2002.

Murphy, J. David. "The People's Republic of China and the Illicit Trade in Cultural Property." *International Journal of Cultural Property* 3 (1994): 227–42.

Nanetti, Francesco, and Francesca Squillante. "In tema di restituzione di beni culturali illecitamente trasferiti." *Rivista di diritto internazionale* 80 (1997): 396–420.

O'Keefe, Patrick J. *Commentary on the UNESCO 1970 Convention on Illicit Traffic*. Leicester: Institute of Art and Law, 2000.

Prott, Lyndel V. "Cultural Heritage Law: The Perspective of the Source Nations." *Art Antiquity and Law* 5 (2000): 333–42.

Raschèr, Andrea F. G. *Kulturgütertransfer und Globalisierung*. Zürich, Switzerland/Baden-Baden, Germany: Schulthess/Nomos, 2000.

Raschèr, Andrea F. G., March Bauen, Yves Fischer, and Marie-Noëlle Zen-Ruffinen. *Cultural Property Transfer. Transfert des biens culturels. Trasferimento dei beni culturali. Kulturgütertransfer*. Zürich, Switzerland/Bruxelles, Belgium: Schulthess/Bruylant 2005.

Rey, Heinz. *Die Grundlagen des Sachenrechts und das Eigentum*, 2nd ed. Bern, Switzerland: Stämpfli, 2000.

Schwander, Ivo. "Art. 724 ZGB." In *Kommentar zum Schweizerischen Privatrecht, Schweizerisches Zivilgesetzbuch II*, edited by Heinrich Honsell, Nedim Peter Vogt, and Thomas Geiser. Basel, Switzerland: Helbing & Lichtenhahn, 1998.

Siegfried, Felix. H. *Internationaler Kulturgüterschutz in der Schweiz. Das Bundesgesetz über den internationalen Kulturgütertransfer (Kulturgütertransfergesetz, KGTG)*. Bern, Switzerland: Lang, 2006.

Siehr, Kurt. "International Art Trade and the Law." *Recueil des Cours* 243 (1993-VI): 9–292.

———. "Das Sachenrecht der Kulturgüter. Kulturgütertransfergesetz und das schweizerische Sachenrecht." In *Festschrift für Heinz Rey zum 60. Geburtstag*, edited by Heinrich Honsell et al. Zürich, Switzerland: Schulthess, 2003, 127–40.

The European Fine Art Foundation. *The European Artmarket in 2002*. Helvoirt, The Netherlands: TEFAF, 2002.

Weber, Marc. "Archäologische Objekte vor US-amerikanischen Gerichten." In *Liber discipulorum et amicorum. Festschrift für Prof. Dr. Kurt Siehr zum 65. Geburtstag*, edited by Peter Johannes Weber et al. Zürich, Switzerland: Schulthess, 2001, 225–64.

———. *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*. Berlin, Germany/New York, United States: deGruyter, 2002.

———. "Bundesgesetz über den internationalen Kulturgütertransfer." In *Zeitschrift für Schweizerisches Recht* 123 (2004): 495–525.

Weller, Matthias. "Freies Geleit für die Kunst." *Frankfurter Allgemeine Zeitung* 25 November 2005, 35.