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In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications

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Abstract: Most private international laws do not address cultural property specifically but, instead, apply the general *lex rei sitae* rule also to artifacts. Legal scholarship has revealed the flaws of the rigid application of the *lex rei sitae* principle to cultural goods and has proposed alternative connecting factors, such as the *lex originis* principle, to prevent forum and law shopping in this field. Reacting to the criticisms, some of the more recent private international law codifications have decided on the adoption of specific rules on stolen and illegally exported cultural goods that combine the *lex rei sitae* and the *lex originis* rules and provide room for the parties' autonomy. This article draws the conclusion that these more recent legislative solutions do not necessarily promote legal certainty and predictability with regard to the governing law and are far from being a Holy Grail for the conflict of laws of cultural property, whether on a national level or within the European Union.

INTRODUCTION

An overarching objective set by the conflict-of-law regulations of the European Union (EU) is legal certainty and predictability regarding the governing law, irrespective of the court of which member state is seized,[1] in order to prevent forum and law shopping. No doubt, it would be desirable to observe the same goals when the object of the commercial transactions is peculiar and different from ordinary

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[1]See Council Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations, [2008] OJ L177, 6–16, paras. 6 and 16 (Rome I Regulation); Council Regulation (EC) 864/2007 on the Law Applicable to Non-Contractual Obligations, [2007] OJ L199, 40–49, para. 6 (Rome II Regulation).

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goods—namely, cultural property. The question is whether the above objectives may be appropriately achieved by the existing conflict-of-law regime of the EU member states and the recent proposal advanced by the European Parliament for EU-level conflict-of-law rules on cultural property.[2]

In relation to the conflict of laws of cultural property, private international law scholarship typically discusses two main questions: first, the determination of the law applicable to ownership claims regarding stolen cultural objects—in particular, in the relationship between the original owner and a good faith purchaser, and, second, the application of foreign export restrictions having a public law nature. The two questions are often intertwined because it is not uncommon for a state to claim the return of a cultural object, not only due to the violation of its export law but also to claim restitution as the owner of the artifact concerned.

These problems are not new, and the cases on stolen and illegally exported cultural property that have raised private international law questions have been widely discussed in the legal literature. Courts in Europe usually have decided the restitution claims of owners by adhering to the application of the *lex rei sitae* principle, while claims of the source states for the enforcement of their export restrictions before foreign courts often have been turned down due to the operation of the principle of the non-application of foreign public law. Thus, efforts to claim back cultural property have rarely been successful due to the operation of these two principles. As far as the conflict-of-law rules of the EU member states are concerned, the commonplace application of the *lex rei sitae* principle governing ownership claims over ordinary things is in many cases insufficient if the subject is cultural property. Similarly, the principle of the non-application of foreign public law also has been widely contested. Due to these criticisms, several alternative conflict-of-law rules have been proposed in legal literature.

Scholarly debates have centered mostly on the choice between *lex rei sitae*, which is accepted by most legal systems, and *lex originis*, which is a potential alternative to the traditional *lex rei sitae* rule; accordingly, it has to be either one or the other. Recently, the private international law legislation of some countries has specifically addressed stolen or illegally exported cultural property. Their approach, however, points to a methodological change in determining the law applicable to cultural property. Their construction is characterized by specificity and a compromise based on a non-exclusive use of the two connecting factors, both for stolen and illegally exported cultural property, relying on the parties' autonomy. This development, however, has received relatively little attention so far. The question posed by this article is whether legal scholarship and the more recent codifications have found the Holy Grail for the determination of the law that is best suited to the accommodation of the interests involved and the adjudication of claims in legal disputes concerning stolen and illegally exported cultural property and whether the rules offered by the more recent private international law codifications and their methodology can serve

[2]European Parliament 2017.

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as a suitable model for a future EU legislative act, as proposed by the European Parliament in the European Added Value Assessment (EAVA) on cross-border restitution claims of looted works of art and cultural goods.[3] It will be demonstrated that replacing the traditional *lex rei sitae* rule with a more flexible rule, based on the autonomy of the parties, does not necessarily promote the predictability of the governing law and the prevention of title laundering at either the national level or in EU private international law.

PRIVATE INTERNATIONAL LAW AND STOLEN PROPERTY

Conflict-of-law rules have paramount importance in this field since the property law regimes of the EU member states largely differ regarding the possibility of acquiring ownership of stolen property. It often happens that a stolen artifact leaves the country where the theft occurred and is put into the stream of commerce. As a result, the object may end up with a purchaser who is not aware of the origin of the object—that is, how and when, and by whom the object was removed and from whom. The question is whether the person obtaining the object in good faith can acquire ownership.

Some of the legal systems protect the original owner, while other legal systems accept the acquisition of ownership, provided that the buyer acquired the goods in good faith. Common law legal systems, such as English law and most US states, give preference to the right of ownership of the original owner.[4] This is due to the application of the *nemo dat quod non habet* principle, not only in the relation between the original owner and the thief but also in the chain of subsequent sellers and purchasers. In opposition to this principle, certain civil law countries tend to recognize the title of the good faith purchaser over the rights of the original owner. Such countries may be considered to be a "congenial place" to buy stolen artifacts.[5] The most well-known example is the Italian Civil Code, which allows for the acquisition of ownership of a stolen property, provided that the purchaser acted in good faith and that there is a legal title that is suitable for transferring ownership (for example, sale or donation).[6] Other codes set a deadline for restitution claims and give a right to compensation for the good faith purchaser: restitution may be claimed only if the original owner reimburses the purchase price.[7]

Ideally, the international unification of substantive property law could address the diversity of legal solutions. The tensions between the divergent national property laws was intended to be resolved by the unification of substantive rules of property through the compromise solution of the 1995 Convention on Stolen or Illegally

[3]European Parliament 2017.

[4]In English law, see the Sale of Goods Act 1979, Art. 21; in the United States, see Uniform Commercial Code, § 2-403, but see Louisiana Civil Code, 2017, Art. 524. See Lee 2009, 724.

[5]Palmer 2015, 11.

[6]Italian Civil Code, 1942, Art. 1153; Magri 2013, 741.

[7]French Civil Code, 2016, Art. 2277; Swiss Civil Code, 2016, Art. 934 (1)–(2).

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Exported Cultural Objects (UNIDROIT Convention).[8] It establishes that "[t]he possessor of a cultural object which has been stolen shall return it," but he is entitled to compensation, "provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."[9] However, the scope of application of the UNIDROIT Convention is constrained, and several market countries (Switzerland, the United Kingdom, and the United States) have failed to ratify it. This also holds for the EU: 15 member states have ratified the UNIDROIT Convention, while many of the member states with a significant art market, such as Germany, France, and the Netherlands, have refrained from doing so. Although the possibility of the EU's accession to the UNIDROIT Convention was also raised, it was not endorsed in the end.[10] For this reason, the reach of the UNIDROIT Convention is limited, and, thus, conflict-of-law rules cannot be neglected.

If the original owner wants to claim restitution, the court has to decide which law to apply: the law of the country of origin of the stolen object, the law of the state of the actual location of the object, or perhaps a different law. The choice is particularly difficult if the law of the country of origin protects the original owner, while the other state prefers the bona fide purchaser. This is in fact a choice between two innocent persons, and it would seem to be impossible to make a just choice.[11] The selection between these competing legal systems is the vocation of conflict-of-law rules. From a historical perspective, private international law has applied the personal law of the owner to moveable property in accordance with the *mobilia sequuntur personam* principle, but this was later replaced by the application of the *lex rei sitae* principle. Traditionally, private international law has not addressed works of art specifically but has treated them together with any other object under the umbrella of the *lex rei sitae* principle.

According to this principle, the acquisition or loss of ownership is governed by the law where the object is located at the time of the emergence of the facts that underlie the acquisition or the loss of title. This connecting factor is an expression of the territoriality principle, which is relevant in both public and private international law and reflects the fact that the country where the object is currently located can exercise power over the object concerned. The advantages of this connecting factor are well known: legal certainty, simplicity, and the fact that a purchaser has to take into consideration only the law of the location of the object at the time of transaction in terms of his acquisition of ownership without the need for examining the rules of jurisdictions where the object was previously located.[12] The *lex rei sitae* principle was applied, *inter alia*, to a claim of restitution by the Lorca Estate concerning a

[8]Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457 (UNIDROIT Convention).
[9]UNIDROIT Convention, Arts. 3(1), 4(1).
[10]Schneider 2016, 160.
[11]Hawkins, Rothman, and Goldstein 1995, 113.
[12]Fincham 2008, 115.

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Lorca manuscript and the related question of prescription;[13] the ownership claim of Germany regarding a Wtewael painting consigned to Sotheby's for sale by a Panamanian company;[14] and the restitution claim of Iran concerning a limestone relief originating from Persepolis in the fifth century BC against the possessor who purchased it at an auction.[15]

In legal literature, this principle has been the subject of many criticisms, as it does not take the special nature of cultural property into account[16] and because "the application of the *lex rei sitae* can have the effect of enhancing the illicit trade of cultural property, and of thwarting the application of protective legislation passed by the source country.'[17] It was also contended that "the rule is of little use in ownership and restitution claims"[18] and that "it disregards the relationship between the owner and the thief."[19] In the case where a choice must be made between a law protecting the original owner and a law that recognizes the acquisition of ownership by the bona fide purchaser, the operation of the traditional *lex rei sitae* rule results in the acquisition of property by the purchaser and essentially deprives the original owner of his property. Although one of the advantages attributed to the *lex rei sitae* principle is the promotion of certainty and predictability, it is simultaneously asserted that its application "can lead to unpredictable, contradictory and arbitrary outcomes."[20] The *lex rei sitae* rule may be abused for the purpose of title laundering, by the thief or a dealer bringing the object to a jurisdiction where a bona fide purchaser can obtain ownership, as well as for evading the potential export restrictions on cultural goods of the country of origin.[21] Famous illustrations include, first, the disregard of a prohibition of alienation stipulated by a private donor, the Constable of Castile, of a ciborium donated to the cathedral of Burgos in Spain by a French court, which essentially applied the *lex rei sitae* rule when the ciborium was purchased by Baron Pichon in good faith in France,[22] and, second, the recognition by an English court of the acquisition of ownership in Italy by a good faith purchaser regarding works of art stolen from a private owner in England, even if the goods were later brought back to England and offered for sale by Christie's.[23]

Due to the contentious nature of the *lex rei sitae* principle, several authors have proposed alternative connecting factors. The deviation from the *lex rei sitae* rule in favor of another connecting factor has been justified by the need for the protection of

[13]Manuel Fernandez-Montesinos Garcia v. Manola Saavedra de Aldama, [2002] EWHC 2087 (Ch).
[14]City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A., [1998] CLY 775.
[15]Islamic Republic of Iran v. Denyse Berend, [2007] EWHC 132 (QB).
[16]Song 2016, 742; Ochoa Jiménez 2019, 451.
[17]Chechi 2018, 277; similarly, Song 2016, 743.
[18]Roodt 2015, 231–32.
[19]Roodt 2015, 236; Roodt and Carey Miller 2013, 6.
[20]Chechi 2018, 276.
[21]Reichelt 1986, 74; Fincham 2008, 122; Roodt 2015, 224–49.
[22]Duc de Frias c. baron Pichon Tribunal civil de la Seine, 1re ch., 17 April 1885; Weidner 2001, 121.
[23]Winkworth v. Christie Manson & Woods Ltd., [1980] Ch. 496.

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the original owner and the special nature of cultural objects. Most notably, the *lex originis* principle has been widely proposed in remarkably different variations. First, the origin of the artifacts has been identified with the nationality of the cultural goods, which is taken as a connecting factor due to the contribution of artifacts to national identity.[24] This was endorsed by the Basel resolution of the Institute of International Law, which established that "[t]he transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country."[25] The "country of origin" is meant here as the country with which the cultural property concerned is most closely linked from a cultural point of view.[26] In a second variation of the *lex originis* principle, the law of the place of theft (*lex furti*) has been applied.[27] Third, the law of the country of exportation has also been suggested as a connecting factor determining the origin of cultural goods.[28] Gerte Reichelt, however, would maintain the *lex rei sitae* principle unless the law of another state "has the closest link to the case."[29] More flexible connecting factors allowing for the balancing of the interests concerned, which are well known from US conflict-of-law practice, have been equally recommended for consideration by European courts and legislatures.[30]

Since the *lex originis* principle has appeared in more proposals and, as we will see, has finally found its way into national legislation in some countries, it is worth examining the merits and flaws of this connecting factor. An advantage of this principle is that it encourages both sellers and buyers to search for the provenance of the cultural object, and, in this sense, it may further the self-policing of the market.[31] The operation of the *lex originis* tends to favor the original owner by applying his or her own law to the legal dispute and restitution. However, as an objective connecting factor, it does not always protect the original owner over a subsequent bona fide possessor and does not automatically result in the restitution of the cultural goods. This is because it may happen that the *lex originis* rule protects a bona fide purchaser, while the actual location of the object does not.[32] A connecting factor simply helps the designation of the governing law, but it does not predetermine the outcome of the case.[33]

Nevertheless, the flaws of this connecting factor have been equally revealed. As suggested earlier, it raises the question about the exact place of origin of the object. This connecting factor requires further concretization. It may mean nationality

[24]Kienle and Weller 2004, 291.
[25]Institute of International Law 1991, Art. 2.
[26]Institute of International Law 1991, Art. 1(b).
[27]Mansel 1988, 271.
[28]Armbrüster 2004, 741–43.
[29]Reichelt 1985, 91, 125–27; Reichelt 1986, 74.
[30]Jefferson 1980, 511.
[31]Fincham 2008, 149.
[32]Kienle and Weller 2004, 291n13.
[33]See Arnold 2015, 8.

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(cultural origin), the place of theft, or the country from which the object was exported. Cultural origin may be difficult to determine. Modern works of art are much more often identified with their creator, who is often connected to more than one country than to a single state or nation.[34] In this sense, identity seems to be much more individual than collective. Moreover, boundaries are changing, and more than one country can consider the goods to be their own. If the place of origin of cultural goods is identified with the place from which they were stolen, the problem is that a theft may take place where the object is only temporarily located (from an exhibition or in transit), but the law of this place is not necessarily more closely connected to the case than the *lex rei sitae*. The law of the place of exportation as a connecting factor may be called into question if the object crosses the borders of several countries and comes into possession of one or more subsequent bona fide purchasers. The law of the country of original location of the cultural object may prohibit the export, but the other countries, along the borders of which were crossed, may not necessarily do so.

In any of these cases, it is problematic if the place of origin of the cultural property is uncertain. This is the case, in particular, if the place where the goods were illegally excavated is unknown or debated. This may be well illustrated by the case of the Seuso treasure, where Hungary, Croatia, and Lebanon equally claimed the ownership of the treasure trove, stemming from the fourth and fifth centuries AD, as countries of origin.[35] Following an agreement between the Hungarian government and the previous possessors of the treasure, in the conclusion of which Norman Palmer played a decisive role,[36] the treasure is now on display in the National Museum in Budapest. Furthermore, in applying either version of the *lex originis* principle, a reference must be made to substantive laws excluding *renvoi* in order to avoid a reference back to the law of the actual location of the cultural goods if the designated law does not recognize the *lex originis* as the connecting factor.[37]

Irrespective of its formulation, in its purest form, the *lex originis* rule tends to ignore the rights of a person who acquired rights in good faith over the property in most cases.[38] This has resulted in more well-balanced proposals. Symeon Symeonides has suggested the application of the *lex originis* rule, as the law of the state where the thing was situated at the time of its removal (*lex furti*), unless the law of another state has a materially closer connection to the case and the application of the latter law is necessary in order to protect a good faith possessor.[39]

All in all, private international law scholarship in the quest for the Holy Grail seems to have struggled with finding the appropriate connecting factor for cultural goods. Taking the pros and cons of alternative theories, it is not surprising that other

[34] Armbrüster 2004, 739–41.
[35] Fincham 2008, 147–48; Vadász 2017, 39.
[36] Tóth 2016.
[37] Kienle and Weller 2004, 292.
[38] Symeonides 2005, 1187.
[39] Symeonides 2005, 1183.

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commentators have found it best to retain the *lex rei sitae* principle as well as the traditional neutrality of the conflict of laws.[40]

PRIVATE INTERNATIONAL LAW AND THE ILLEGAL EXPORT OF CULTURAL PROPERTY

So far, the determination of the law applicable to ownership claims was discussed. However, another issue—namely, the return of illegally exported cultural goods—is also a beloved subject of private international law discourse. Export controls may include the prohibition of export, a state pre-emption right, the obligation of obtaining a license for export or a simple declaration. Export restrictions often concern cultural goods considered to be part of the national cultural heritage. However, this does not necessarily cover just state-owned property; it may equally embrace goods in private ownership. This means that the title to the cultural goods remains unaffected; they may be disposed of within the territory of the state, but their export is subject to limitations.

To ensure the return of illegally exported cultural property, the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention)[41] and the UNIDROIT Convention introduced certain rules. The return of illegally exported cultural objects takes place by way of cooperation between national authorities: seizure and return are effected in accordance with the provisions belonging to the category of public law norms. Under these conventions, a claim for return submitted by a state may concern cultural goods in public ownership or in private ownership, as long as those goods are considered to belong to the national cultural heritage. Their approach does not affect conflict of laws.

In this respect, a distinction must be made between the private law rules on the restitution of stolen cultural objects, where the owner can submit a restitution claim against the possessor, and public law rules on the return of illegally exported cultural objects, on the basis of which only a contracting state, and not private persons, can request the court or other competent authority of another state to order the return of a cultural object. It is a principle of private international law of many states that courts do not apply foreign public law, unless otherwise provided by an international treaty or a legislative provision. This is based on various theoretical and practical considerations. Foreign export laws are considered to be emanations of a foreign sovereign, and their extraterritorial application should be avoided in the territory of the forum state—that is, another sovereign that is not obliged to recognize and enforce foreign public law rules under public international law.

[40]Arnold 2015, 9.
[41]Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (UNESCO Convention).

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Additionally, the vocation of private international law is seen as the accommodation of private interests and, thus, the designation of the applicable private law but not the rules of a public law nature. Accordingly, in *Attorney-General of New Zealand v. Ortiz*, the New Zealand legislation prohibiting the export of historic articles and providing for the recovery of such illegally removed property could not be enforced regarding the Maori carvings illegally exported from that country because the export legislation constituted rules of public law that could not be enforced outside the sovereign's own territory.[42] In another case, the Italian Corte di Cassazione found that an art dealer, Livio De Contessini, could acquire ownership of the tapestries originating from France as a bona fide purchaser, even though the tapestries were inalienable under French law.[43] A similar prohibition on inalienability was also known in Italian law, but it covered only Italian cultural goods.

Most of the time, a claim related to the enforcement of cultural heritage protection legislation, including export restrictions, is connected to the ownership claim of the country, the export law of which was breached.[44] The two claims, however, must be distinguished. An Italian export prohibition, accordingly, was not enforced by an English court despite the request of the Italian government and the Italian king, and the violation of the export prohibition could not constitute an obstacle to selling a part of the Medici archives that was not in the ownership of the Italian state, though it had undoubtedly salient historical significance.[45] It was established that the export prohibition "only applied as long as they remained in Italy." In *Iran v. Barakat*, the English Court of Appeal distinguished patrimonial claims from enforcing foreign public law, such as export prohibitions, and found no obstacle to the claim of Iran for the restitution of illegally excavated and exported antiquities that were almost 5,000 years old, such as jars, bowls, and cups made from chlorite originating from the Jiroft region of Iran, which were in its ownership.[46] The Kammergericht Berlin rejected a claim for restitution requested through a provisional order because the claimant could not demonstrate that it was the owner of the Egyptian antiquities.[47] Under the *lex rei sitae* principle governing Egyptian law, the Egyptian state did not obtain ownership of the antiquities before their export. Though an export prohibition existed, and its violation was sanctioned, the export prohibition itself did not result in the acquisition of ownership by the state.

[42]Attorney-General of New Zealand v. Ortiz and Others, Court of Appeal, 1 April 1982, [1982] 3 WLR. 570. The House of Lords did not address the issue of the principle of non-application of foreign law. Attorney-General of New Zealand Appellant v. Ortiz and Others Respondents, House of Lords, 21 April 1983, [1983] 2 WLR 809.

[43]Corte di cassazione, sezione I civile, sentenza 24 novembre 1995, no. 12166; Frigo 2016, 171.

[44]See Repubblica dell'Ecuador c. Danusso, Tribunale di Torino, sentenza 25 marzo 1982, reprinted in *Diritto internazionale private e processuale* (1982), 625.

[45]King of Italy v. Marquis Cosimo de Medici Tornaquinci, 34 Times LR 623 (Chancery Division 1918).

[46]Government of the Islamic Republic of Iran v. Barakat Galleries Ltd Court of Appeal, 21 December 2007, [2007] EWCA Civ 1374.

[47]KG, Urteil vom 16 October 2006 – 10 U 286/05; Anton 2010, 954.

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The principle of non-application of foreign law was sometimes rigidly applied, even in relation to private law claims. Regarding a claim by the Union of India against Crédit Agricole Indosuez for the restitution of two gold coins from the seventeenth century, which were given as security to the bank by the grandchild of the last Nizam of Hyderabad for a loan granted to two companies, the Swiss Federal Tribunal referred to *Ortiz* and found that an export prohibition of a public law nature cannot gain application outside India and cannot render a contract invalid.[48] In a decision related to the contractual claim by an Austrian carriage museum for the restitution of the purchase price for a 2,000-year-old ceramic carriage sold by an Austrian seller, the Austrian Supreme Court of Justice stated that, as a result of the alleged violation of the Chinese export prohibitions, it could not be generally established that things that have entered international commerce at some time in violation of an export prohibition will therefore be considered as "*extra commercium*" and can no longer be subject to commercial transactions, with the effect that all contracts concluded concerning them would be null and void.[49]

At the same time, in private international law, domestic provisions introducing restrictions on the trade in art objects (for example, export prohibitions) can be applied as overriding mandatory provisions of the forum, and, in some private international laws, foreign restrictions may be equally taken into consideration in private law litigation.[50] Furthermore, the principle of the non-application of foreign public law was attenuated in some countries, such as Germany, by the possibility of giving effect to a foreign export prohibition through the governing substantive contract law. The German Federal Court of Justice established the immorality and thereby the nullity of an insurance contract covering the transport of Nigerian masks illegally exported from Nigeria.[51]

Taking all of the above into consideration, ownership claims and claims based on the violation of cultural property legislation, including export control, having a public law nature must be distinguished. Claims for the return of illegally exported cultural goods belonging to the cultural heritage of a state brought by the state of origin concerned are of a public law nature and do not constitute an issue of private international law.[52] This is because there is no underlying private law claim; such claims do not affect the question of ownership or other private rights. It is another question that, in many cases, the claimant requesting return is a state that invokes not only the breach of its export legislation as a subject of public law but, at the same time, is the owner of the goods and, as such, can bring a simultaneous ownership

[48]Tribunal fédéral 131 III 418, para. 2.4.4.1; Renold 2006, 361.
[49]OGH 9 Ob 76/09 f.
[50]See Swiss Private International Law Act, 18 December 1987, Art. 19; Belgian Private International Law Act, 16 July 2014, Art. 20; Hungarian Private International Law Act, 11 April 2017, Art. 13(2).
[51]BGH, Urteil vom 22 June 1972 – II ZR 113/70, NJW 1972, 1575. See Siehr 2015, 509.
[52]Dutoit 1997, 270.

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claim. However, proceedings where there is no such ownership claim (private law) are outside the realm of private international law and may raise at the most a conflict of public laws.

EU LEGISLATION AND CULTURAL PROPERTY

EU legislation on cultural property is scant. This is less surprising if we consider that the EU has only supportive competence in the field of culture, and it can instead rely on the commercial policy or internal market legal basis, the current Article 207 and Article 114 of the Treaty on the Functioning of the European Union respectively, to regulate trade in artifacts.[53] As far as private international law is concerned, the Brussels I Regulation provides for a special ground of jurisdiction for ownership claims for the recovery of cultural objects;[54] however, at present, EU law does not contain any rule on the determination of the law governing stolen or illegally exported cultural property. Council Regulation (EC) 116/2009 addresses the export of cultural goods falling under the scope of application of the Regulation and renders it subject to an export license.[55] The import of cultural goods from third countries to the EU will be regulated by the recently adopted Council Regulation (EU) 2019/880.[56] As a new type of sanction measures, EU regulations prohibit the export and import of cultural goods removed from Iraq and Syria without the consent of their legitimate owners or when they are in breach of the law of these countries.[57] The above rules concerning the external trade in cultural goods is complemented by Council Directive (EU) 2014/60 on the intra-EU return of cultural objects unlawfully removed from the territory of a member state and found in the territory of another member state based on the cooperation between the authorities of the member states concerned.[58] Removal may include both theft and exporting otherwise illegally.[59] Directive 2014/60 establishes a mechanism of cooperation between the member states and only the member states can bring court proceedings against the possessor or the holder for the return of a cultural object that has been unlawfully removed from its territory, excluding claims by private persons.

[53]Treaty on the Functioning of the European Union, [2012] OJ C326, 47–390.
[54]Council Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, [2012] OJ L351, 1–32, Art. 7 (4); see Gillies 2015, 295.
[55]Council Regulation (EC) 116/2009 on the Export of Cultural Goods, [2009] OJ L39, 1–7.
[56]Council Regulation (EU) 2019/880 on the Introduction and the Import of Cultural Goods, [2019] OJ L151, 1–14; see Urbinati 2018, 59.
[57]Council Regulation (EC) 1210/2003 Concerning Certain Specific Restrictions on Economic and Financial Relations with Iraq and repealing Council Regulation (EC) 2465/96, [2003] OJ L169, 6–23, Art. 3; Council Regulation (EU) 36/2012 Concerning Restrictive Measures in View of the Situation in Syria and repealing Council Regulation (EU) 442/2011, [2012] OJ L16, 1–32, Art. 11c.
[58]Council Directive (EU) 2014/60 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and amending Council Regulation (EU) 1024/2012 (Recast), [2014] OJ L159, 1–10 (Directive 2014/60); see Cornu 2015, 637; Górka 2016, 27.
[59]Roodt 2015, 294.

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It is debated whether Directive 2014/60 addresses conflict of laws.[60] Article 13 of the directive states that ownership of the cultural object after return shall be governed by the law of the requesting member state. This provision is construed by some authors as a conflict-of-law rule that embodies the *lex originis* principle[61] in accordance with the objective of the directive to ensure the object is returned to its country of origin.[62] Others have interpreted it as not affecting national conflict-of-law rules and the possible acquisition of ownership by a good faith purchaser under the *lex rei sitae*.[63] The adjudication of ownership in an international context also raises the question of which law governs ownership. This is determined by the conflict-of-law rules of the court seized. The reference to the law of the requesting member state in Article 13 may be construed as a reference to the conflict-of-law rules of that state. As most states adhere to the *lex rei sitae* principle, this can be seen as nothing other than the confirmation of the applicability of the *lex rei sitae* principle. This provision simply recognizes that the directive does not regulate ownership, and it leaves this question to the law of the requesting member state. In this sense, this norm delimits the scope of application of the directive. It is also telling that the EAVA urged the creation of an EU-level conflict-of-law rule on illegally exported cultural objects, which would not be necessary if a uniform conflict-of-law rule already existed, at least in the relations between the member states.

Due to these uncertainties around the nature of Article 13, member states have implemented this provision in divergent ways, sometimes just repeating the wording of the directive,[64] sometimes preferring the *lex originis* principle,[65] and sometimes doing so without adopting a specific implementing rule,[66] which simply leaves the operation of the pre-existing *lex rei sitae* rule unaffected.[67] Directive 2014/60 addresses state claims for the return of unlawfully removed cultural objects, and Article 16 makes clear that it "shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by

[60]See Weller 2017, 504–5.

[61]Jayme 1994, 25; 2005, 937; Biondi 1997, 1191; Chechi 2018, 285; Ochoa Jiménez 2019, 452.

[62]Biondi 1997, 1191.

[63]Palmer 1994, 237; Siehr 1998, 678; Carruthers 2005, 136; Basedow 2013, 458.

[64]Belgium: Loi relative à la restitution de biens culturels ayant quitté illicitement le territoire de certains Etats étrangers, 28 October 1996, Art. 8; Hungary: 2001. évi LXXX. törvény a jogellenesen kivitt kulturális javak visszaszolgáltatásáról, 22 November 2001, Art. 4 (1); Spain: Ley 1/2017, de 18 de abril, sobre restitución de bienes culturales que hayan salido de forma ilegal del territorio español o de otro Estado miembro de la Unión Europea, por la que se incorpora al ordenamiento español la Directiva 2014/60/UE, del Parlamento Europeo y del Consejo de 15 de mayo de 2014, Art. 12.

[65]Austria: Bundesgesetz über die Rückgabe unrechtmäßig verbrachter Kulturgüter (Kulturgüterrückgabegesetz – KGRG), 13 April 2016, Art. 14.

[66]In the United Kingdom, the Return of Cultural Objects (Amendment) Regulations 2015 and the Return of Cultural Objects Regulations 1994, which implemented Directive 2014/60 and Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, [1993] OJ L74 (Directive 93/7), respectively, did not contain any rule in this regard. These regulations were revoked by the Return of Cultural Objects (Revocation) (EU Exit) Regulations 2018.

[67]Weller 2017, 505.

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the requesting Member State and/or the owner of a cultural object that has been stolen." The directive, therefore, makes a clear distinction between public law and private law claims. The claim for return by the state can be brought even against the owner if he took his property abroad without an export authorization.[68] Therefore, when it is about private property the ownership of which is disputed, there are two separate proceedings to address these claims. In the public law procedure introduced by the directive and in private restitution claims, the applicable rules may be very different.[69] The state claim for return can precede the claim of an owner regarding his title.[70]

Based on this analysis, the conclusion may be drawn that EU law does not currently determine the law governing ownership and other *in rem* rights concerning stolen and illegally exported cultural property. This is left to the private international law of the member states. Private international law codes usually do not address specifically stolen and illegally exported (cultural) property, but some more recent codifications treat this particular category of property separately, providing special rules, as discussed in the next part of this article.

NATIONAL PRIVATE INTERNATIONAL LAW CODIFICATIONS AND CULTURAL PROPERTY

Some more recent private international laws have not remained hesitant and have created specific rules for stolen and illegally exported (cultural) goods. Interestingly, however, none of the scholarly proposals set out earlier have been followed by national legislatures in a pure form. National codifications combine various techniques when addressing stolen and illegally exported (cultural) goods. A general tendency of the evolution of private international law is that conflict-of-law rules become more specific. Another characteristic of modern private international law is the expansion of private autonomy. These trends appear jointly in the recent private international law codifications addressing cultural property.

In treating cultural property specifically by private international law legislation, the 2004 Belgian Private International Law Act may be deemed to be the forerunner, serving as a model for legislation in other European countries.[71] The Belgian Private International Law Act addresses both stolen goods and illegally exported cultural property. Although the conflict-of-law regulation of stolen and illegally exported cultural goods follows a parallel method, the two issues must be treated separately. Therefore, the regulation of stolen property will be discussed first, followed by illegally exported cultural property.

[68]Bortoluzzi 2012, 516.
[69]Bortoluzzi 2012, 514.
[70]Bortoluzzi 2012, 515.
[71]Belgian Private International Law Act.

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Conflict-of-Law Rules on Stolen Property

Some private international law legislation contains more general rules on stolen property, applicable not only to cultural objects but also to any type of moveable goods. The rule applies irrespective of whether the owner is a state or not. Under Article 92 of the Belgian Private International Law Act, the claim for restitution regarding stolen property is governed, at the choice of the original owner, either by the law of the state where the object was located at the time of its disappearance or by the law of the state in the territory of which the property is located at the time when restitution is claimed. However, if the law of the state in the territory of which the object was located at the time of its disappearance does not grant any protection to the good faith possessor, the latter may invoke the protection granted by the law of the state in the territory of which the object is located at the time when restitution is claimed. The Hungarian Private International Law Act contains a parallel rule, with the difference that it speaks about an ownership claim related to things removed from the possession of the original owner illegally, and the relevant time is not the time of claiming restitution but, rather, the adjudication of the ownership claim.[72] The Monegasque Private International Law Act contains a similar provision, however, without granting a choice of law for the current possessor.[73]

These acts allow the application of the *lex originis* instead of the *lex rei sitae* at the choice of the person claiming restitution. The *lex originis* means here the law of the country where the theft took place—that is, the *lex furti*. It must be noted that the Belgian Private International Law Act generally rules out *renvoi*—that is, the reference is made to the substantive law provisions of the designated law both in the case of the application of the conflict-of-law rules on stolen goods and illegally exported cultural property.[74] This results in the application of the *lex originis* excluding at this point a reference to the *lex rei sitae*. However, the potential application of the *lex originis* is compensated by the right of the good faith possessor to invoke protection in accordance with the *lex rei sitae* in Belgian and Hungarian law.

Conflict-of-Law Rules on Illegally Exported Cultural Property

The determination of the law applicable to claims for the return of illegally exported cultural property has been equally addressed by some recent codifications. Pursuant to Article 90 of the Belgian Private International Law Act, if an object belonging to the cultural patrimony of a state leaves the territory of that state illegally under the law of this state at the time of its export, the claim for restitution by this state is governed by the law of the said state in force at that time or, at its request, by the law

[72]Hungarian Private International Law Act, 11 April 2017, Art. 47.
[73]Monegasque Private International Law Act, 28 June 2017, Art. 94.
[74]The same approach is followed by the Hungarian Private International Law Act, Art. 5(1) and the Monegasque Private International Law Act, Art. 24.

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of the state in the territory of which the property is located at the time when restitution is claimed. This rule, which grants a choice of law to the state, is followed by private international law enactments in other countries as well.[75] In its corresponding rule, the Hungarian Private International Law Act speaks of the ownership claim of the state, and, once again, the relevant time is different: it is the moment of the adjudication of the ownership claim.[76] The Bulgarian Private International Law Act stops at this point, recognizing a claim by a state for the return of its cultural heritage and granting a choice of law to the state.[77]

However, the Belgian act as well as some other more recent codifications supplement this with a further rule in order to strike a balance between the interests of the state and a good faith possessor: if the law of the state that considers the object as belonging to its cultural patrimony does not grant any protection to the good faith possessor, the latter may invoke the protection granted by the law of the state in the territory of which the object is located at the time when restitution is claimed.[78]

We find a further solution in the Romanian Civil Code, which mingles ownership claims of stolen goods and the claim for the return of illegally exported goods in a single article.[79] It lays down that a restitution claim concerning a stolen or illegally exported object is governed, at the request of the original owner, either by the law of the state in the territory of which the object was located at the time of theft or exportation or the law of the state in the territory of which the object is located at the time of restitution. A choice in favor of a bona fide possessor is also granted here. The Romanian Civil Code then states that the above provisions equally apply to stolen or illegally exported goods pertaining to the cultural patrimony of the state.

Assessment of the Recent Trends

The Belgian model, specifically providing for conflict-of-law rules on stolen and illegally exported (cultural) property, has been welcomed in the legal literature. Article 90 of the Belgian Private International Law Act has thus been seen as a provision that "embodies the universal ideal of restitution and protection of cultural property and balances the rights of those who acted in good faith."[80] However, the question must be posed whether private international law should address stolen and illegally exported (cultural) property at all and whether the rules enacted along the

[75] Bulgarian Private International Law Act, Art. 70; Montenegrin Private International Law Act, Art. 33; Monegasque Private International Law Act, Art. 95; Draft of the New Private International Law Act of the Republic of Serbia, Art. 132(1).
[76] Hungarian Private International Law Act, Art. 46(1).
[77] Bulgarian Private International Law Act, Art. 70.
[78] Belgian Private International Law Act, Art. 90; Montenegrin Private International Law Act, Art. 33; Hungarian Private International Law Act, Art. 46(2), referring to the time of the adjudication of the claim; Monegasque Private International Law Act, Art. 95; Draft of the New Private International Law Act of the Republic of Serbia, Art. 132(2).
[79] Romanian Civil Code, 2011, Art. 2.615.
[80] Roodt 2015, 243.

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Belgian model are suitable to accommodate the interests involved, designating the applicable law in a predictable way. A further question is whether it is worth following a similar solution at the EU level.

It seems that Belgian private international law and the national codifications following it have created a methodological hybrid regarding stolen and illegally exported (cultural) property. Regarding stolen property, the Belgian and Hungarian private international law acts grant a choice of law to the original owner. However, the Belgian and the Hungarian legislation contain a peculiar methodological solution, in accordance with which the unilateral choice of one of the parties, the original owner, can be overridden by an ensuing unilateral choice by another party, the good faith possessor, regarding the protection of the latter. The reference to good faith brings a substantive element into the rule. In the words of Symeonides, rules like this are conflict-of-law rules that have a substantive law coloration (*règle de conflit à coloration matérielle*).[81] The Belgian and Hungarian codes essentially mirror the substantive law rules found in the UNIDROIT Convention and Directive 2014/60 at the level of conflict-of-law rules, which intend to strike a balance between the interests of the original owner and the good faith possessor by recognizing the ownership of the original owner but providing compensation for a good faith purchaser. Moreover, both Belgian and Hungarian law are among those legal systems that address the protection of a good faith purchaser against a claim of the original owner in the case of purchasing stolen property.[82] It is therefore not a coincidence that these are not pure conflict-of-law provisions, but they do contain a substantive law element referring to the good faith of the possessor.

It is also questionable which law governs the standard of good faith. Logically, it is either the law of the forum or the law of the state where the person whose good faith is under scrutiny acted—that is, where he purchased the object.[83] Although the two places may coincide, the latter is preferred if they differ since the person concerned can expect the application of the rules of the state where he acts, but not necessarily those of a forum that is still unknown at the time of his action. The Belgian and Hungarian legislation complicate this question further because they lay down that a good faith possessor can invoke the protection granted to him by the law of the state in the territory of which the object is situated at the time of the submission or adjudication of the restitution claim. If a cultural object is purchased in good faith in state A and the bona fide buyer obtains ownership according to the law of this state, he cannot invoke this protecting legislation if he later brings the object to another state—state B—which does not grant protection to a good faith possessor and the object is located in this state at the time of the submission or adjudication of the restitution claim. This is so notwithstanding a completed transaction in country A and the fact that the purchaser cannot foresee where the property will be located at

[81]Symeonides 2005, 1197.
[82]Belgian Civil Code, 2007, Arts. 2279–80; Hungarian Civil Code, 2014, Art. 5:39(2).
[83]Symeonides 2005, 1190n38.

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the time of the submission of a claim for restitution. This solution does not help the predictability of the governing law. Therefore, it would be more pertinent to grant to a good faith possessor the possibility to invoke the law of the state where the property was located at the time of the acquisition of the property.

A more serious problem is that title laundering may not necessarily be avoided by these rules.[84] If the object was purchased in a country that recognizes the acquisition of ownership by a bona fide purchaser automatically or after the expiry of a certain period of time, the law of this state may be invoked by the good faith possessor, and the original owner is dispossessed, or, at best, the object can be claimed back at the cost of paying compensation to the good faith possessor. This solution is contrary to the spirit of the UNIDROIT Convention, which always gives preference to the original owners, subject to compensation granted to the good faith purchaser, while the Belgian and Hungarian rules can even be susceptible to securing the acquisition of ownership by the bona fide possessor without compensation. Consequently, whether these provisions strike an appropriate balance between the conflicting interests of the original owner and a good faith possessor is doubtful, and the possibility of choice of law in favor of the more protective law squarely favors the latter.

Even more problematic are the rules on the claims for return of goods belonging to the cultural heritage of a state that left the territory of that state illegally. The interpretation of the hypothesis of the norm (claims for restitution of an object belonging to the cultural patrimony of a state that has left the territory of that state illegally) raises several questions. Goods belonging to the cultural patrimony or heritage of a state may be owned by the state, but this is not necessarily the case, such as under Belgian and Hungarian substantive cultural heritage protection law.[85] It may happen that the state protects its cultural heritage by only prohibiting the export of cultural objects without interfering with the right of ownership of the cultural object. The concept of objects illegally leaving the territory of the state concerned may embrace both stolen and illegally exported property. However, the provisions at issue are limited to the protection of states, and it does not address the applicable law with regard to private owners deprived of their artifacts. If there is no specific conflict-of-law provision on stolen property, which exists in Belgian and Hungarian law but not in Bulgarian or Montenegrin private international law, the *lex rei sitae* remains applicable for the claims of private owners, resulting in a difference in treatment.

If the claim for the return of an illegally exported cultural object is an ownership claim by the state, as the Hungarian legislation makes clear, it seems redundant

[84] Roodt 2015, 243, 249.

[85] In Belgium: Décret relatif aux biens culturels mobiliers et au patrimoine immatériel de la Communauté française, 11 July 2002 and Décret portant protection du patrimoine culturel mobilier présentant un intérêt exceptionnel, 24 January 2003; on the Belgian cultural property regime, see Clippele and Lambrecht 2015, 259. In Hungary: 2001. évi LXIV. törvény a kulturális örökség védelméről.

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because the parallel rule on stolen property would be sufficient. If the norm would be construed as including not only ownership claims but also the direct enforcement of export legislation, the added value of the rule would be that the state could enforce an export prohibition without having to wait for the action of the private owner or even against the owner who brings his artifact abroad in breach of an export prohibition. Although the wording of the Belgian Private International Law Act seems to point primarily towards ownership claims, the legislative history materials do not exclude a broader interpretation, to the extent that they consider Article 90 as not saying anything about who the owner is or how title was acquired.[86] However, the direct enforcement of an export prohibition is a public law claim, and this is clearly illustrated by the UNESCO and the UNIDROIT Conventions as well as by Directive 2014/60, which recognize and provide a legal basis for the direct enforcement of foreign public law claims by states for the return of illegally exported cultural objects.

Such public law claims are typically adjudged by administrative law courts. Public law claims in themselves (without an underlying private law claim) should not be the subject of private international law regulation, the subject of which is private law relations involving a foreign element. The foundations of the principle of the non-application of foreign law may be called into question,[87] in particular because it enables persons to bring cultural objects into a foreign country where the state of origin cannot enforce its export prohibition and where the significance of cultural heritage is ignored. Ideally, this could be prevented by state cooperation in enforcing cultural property legislation mutually. The fact remains, however, that state claims for the return of illegally exported cultural objects are of a public law nature. Beyond these particular problems, most of the criticisms made in relation to conflict-of-law rules on stolen property may be equally repeated concerning the rules on illegally exported cultural property.

A Model for EU Legislation?

After having analyzed the recent trend in the private international law codifications of some European countries, it must be asked whether the existing national regulatory models would be suitable for adoption by EU legislation. In other words, has the EU found the Holy Grail for EU private international law codification? This question is particularly pertinent as the European Parliament considers the regulation of cross-border restitution claims of looted works of art and cultural goods. The EAVA stresses that "a stronger private international law dimension to

[86]Sénat de Belgique, *Proposition de loi portant le Code de droit international privé, Rapport fait au nom de la Commission de la justice par Mme Nyssens et M. Willems*, Doc. 3/27-7, 20 April 2004, 1, 353, https://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=3&NR=27&VOLGNR=7&LANG=fr (accessed 10 September 2020).
[87]Dutta 2006, 716–23; Dutta 2007, 112–17.

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supplement the public international law dimension would be required"[88] and states that differing conflict-of-law rules allow "law 'shopping', by transferring the cultural object in question to the most favourable jurisdiction, and prevent a more effective private enforcement."[89] Therefore, the EAVA and the accompanying study prepared by Matthias Weller propose the unification of conflict-of-law rules of the member states by taking over the Belgian model. Accordingly, an EU legislative action should follow Article 90 of the Belgian Private International Law Act.[90] This proposal would not raise obstacles for the application of foreign (non-EU) cultural property law of a public law nature.[91] By the legislative action, the European Parliament envisages the promotion of legal certainty and private enforcement.[92]

The question is whether these objectives may be attained in this way. The answer seems to be in the negative. The criticisms mentioned in relation to national codifications would equally apply in the case of endorsing the Belgian model at the EU level. Predictability and certainty would not be ensured since the possibility of the invocation of the *lex rei sitae* by a bona fide possessor derogates the expectation of the original owner getting back his property. A flaw in the proposal following Article 90 of the Belgian Private International Law Act is that it exclusively addresses state claims and does not include the adoption of harmonized conflict-of-law rules for the restitution claims by private owners concerning their stolen property. Additionally, EU private international legislation should be clear that it concerns only ownership claims or other private law claims and not purely public law claims, such as the direct enforcement of export restrictions. The pertinence of such a solution is elucidated by Article 7(4) of the Brussels I Regulation, which establishes a special ground of jurisdiction for "a civil claim for the recovery, based on ownership, of a cultural object," thereby delimiting private law and public law claims. It is also worthy of note that the proposal does not solve the problem of divergent rules on adversary possession and limitation periods. Cases of stolen cultural objects often raise these questions in their complexity, and many of these cases turn on the rules on adversary possession and prescription.[93]

ALTERNATIVE SOLUTIONS

Instead of refining conflict-of-law rules, a possible solution could be the unification of substantive private and public law rules on stolen and illegally exported cultural objects. Among the EU member states, a uniform system was created by Council

[88]European Parliament 2017, 5.
[89]European Parliament 2017, 11.
[90]European Parliament 2017, 13, 66–67.
[91]European Parliament 2017, 14.
[92]European Parliament 2017, 15.
[93]See, for example, Manuel Fernandez-Montesinos Garcia v. Manola Saavedra de Aldama, [2002] EWHC 2087 (Ch); DeWeerth v. Baldinger, 38 F.3d 1266 (1994); Autocephalus Greek-Orthodox Church of Cyprus v. Goldberg, 917 F.2d 278, 1990 US App. Decision.

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Directive (EEC) 93/7,[94] which was later replaced by Directive 2014/60. However, the application of Directive 2014/60 is limited to cultural objects that have been unlawfully removed from the territory of the member states.[95] An EU-wide application of rules of global reach could be achieved, for example, by the accession of the EU to the UNIDROIT Convention, but this option was rejected in the course of recasting Directive 93/7.[96] The reality is that conflict-of-law rules remain decisive, and the dominance of the *lex rei sitae* principle has hardly been affected by the recent wave of codifications in Europe and even less at the global level. Nevertheless, private international law itself offers alternatives to the rigid application of the *lex rei sitae* to cultural property.

Even in the absence of specific conflict-of-law rules, private international law is equipped with tools by which the law otherwise applicable based on the *lex rei sitae* may be disregarded in favor of another law. These means primarily include a general escape clause, based on which a court may deviate from the law otherwise applicable if the case is more closely connected to the law of another state.[97] This may be the state where the theft took place or to which the object is culturally the most strongly connected. Interestingly, both the Belgian and Hungarian private international law acts contain such an escape clause, which could allow a court to set aside the *lex rei sitae* in favor of the *lex originis*.[98] However, it must be acknowledged that the application of such clauses is at the discretion of the courts.

A second instrument is the application of foreign export restrictions as overriding mandatory norms. Courts are authorized to apply the overriding mandatory provisions of the forum state, and some pieces of private international law legislation allow foreign overriding mandatory provisions to be applied or given effect equally. Interestingly, both the Belgian and Hungarian private international law acts provide a great deal room for considering even foreign overriding mandatory provisions.[99] Thus, the most essential elements of cultural property protection legislation, such as export restrictions or a rule on inalienability, could be in the principle applied or given effect by the courts, even without a specific conflict-of-law rule on stolen or illegally exported goods belonging to a cultural heritage. If a court has to decide whether ownership was transferred regarding a cultural object, foreign cultural property protection legislation could be applied or given effect.[100] In the context of contractual claims, the case of the Nigerian masks can serve as an illustration.[101]

[94]Directive 93/7, 74–79.
[95]Directive 2014/60, Art. 1.
[96]Schneider 2016, 160.
[97]See Swiss Private International Law Act, Art. 15. Müller-Chen and Renold 2009, 298.
[98]Belgian Private International Law Act, Art. 19; Hungarian Private International Law Act, Art. 10.
[99]Belgian Private International Law Act, Art. 20; Hungarian Private International Law Act, Art. 13(2).
[100]See Swiss Private International Law Act, Art. 19. Müller-Chen and Renold 2009, 298; Martiny 2012, 559.
[101]See the part on private international law and the illegal export of cultural property in this article.

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Nevertheless, it is true that courts are not obliged to apply or give effect to foreign overriding mandatory provisions; they are free to do so or not.

The problem is that EU private international law does not contain a general part embracing such techniques, and, at the moment, it does not provide comprehensive conflict-of-law rules on moveable property giving a possibility for deviating from the well-established *lex rei sitae* principle. A further solution, as proposed by Alessandro Chechi, may be that courts should take into consideration an emerging *lex culturalis*, amalgamating substantive and conflict-of-law elements, which would allow courts to deviate from the *lex rei sitae* rule in favor of another law.[102] Despite the attractiveness of this proposal in taking the specific nature of cultural property into account and some signs in judicial practice to endorse such an approach, its broader acceptance in legal practice is at the moment still questionable.

For stolen property—either generally or specifically for cultural property—the *lex rei sitae* principle could be retained with the possibility of deviation. Following the language of the Rome I and Rome II Regulations, where it is clear from all of the circumstances of the case that it is manifestly more closely connected with a country other than the law of which was designated by the application of *lex rei sitae* principle, the law of that country should be applied.[103] This resonates with Gerte Reichelt's earlier proposal to harmonize it with the wording used by the EU conflict-of-law regulations.[104] This helps to provide a consistent interpretation regarding the requirement of a manifestly closer connection and makes it unequivocal that the deviation from the main rule with respect to a manifestly close connection would be an exceptional possibility only.

At the same time, in my view, there is no need for specific provisions in private international law legislation on claims by states to enforce their cultural trade legislation of a public law nature. If the state steps up as the owner of the cultural object, there is no need for a special rule on the enforcement of export provisions; as the owner of stolen property, the state can claim it back just like any other owner in accordance with the earlier-described rules on stolen cultural property. If the claim by the state is not patrimonial, but the state, for example, aims at merely enforcing a public law restriction, such as an export prohibition, against the owner himself, the enactment of a specific rule of private international law seems out of place since there is no underlying private law claim. It is another question whether trade restrictions may be applied or given effect in relation to a private law transaction as overriding mandatory provisions, and private international law may admit the enforcement of foreign public law in such a case.

[102] Chechi 2014, 244–304; 2018, 290–93.

[103] Rome I Regulation; Rome II Regulation.

[104] See the part on private international law and stolen property in this article.

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CONCLUDING REMARKS

Notwithstanding the fact that the search for an appropriate connecting factor for stolen cultural property is part of an intense European scholarly discourse and that several proposals have been put forward, no EU legislative act has been adopted in this field. Some member states, however, have reacted to the scholarly debate and autonomously adopted conflict-of-law rules on stolen and illegally exported cultural property. However, the question is whether these solutions may be seen as an appropriate answer to the demand for legal certainty and a better accommodation of interests in relation to restitution claims. Have these more recent private international law codifications found the Holy Grail that could serve as an example for future EU legislation? Our findings are somewhat negative.

It does not seem likely that the recent solutions will offer more certainty and predictability than the traditional *lex rei sitae* rule. On the contrary, the possibility of subsequent choices of laws does not render the applicable law more predictable. The rules enacted in the recent codes do not even prevent title laundering since conflict-of-law rules continue to recognize the application of *lex rei sitae* at the request of a bona fide possessor, and, therefore, there is no obstacle to bring an artifact to a country that protects a good faith purchaser over the original owner. The juxtaposition of norms on stolen property and illegally exported property seems to be redundant if the first concerns any ownership claim, while the latter covers ownership claims by states. As a consequence, based on a critical analysis, it seems that the Belgian model, which is intended to be extended to the EU level, fails to meet its target and probably is not the Holy Grail for the conflict of laws of cultural property.

The refinement of the *lex rei sitae* principle may prove indeed necessary in light of the criticisms raised against it concerning cultural property. If a specific conflict-of-law rule was intended to be enacted at the EU level concerning stolen (cultural) property, then the application of the *lex rei sitae* principle should be overridden exceptionally and only if the case reveals a manifestly closer connection to the law of another state.

BIBLIOGRAPHY

Anton, Michael. 2010. *Internationales Kulturgüterprivat- und Zivilverfahrensrecht*. Berlin: Gruyter.

Armbrüster, Christian. 2004. "La revendication de biens culturels du point de vue du droit international privé." *Revue critique de droit international privé 93*, no. 4: 723–44.

Arnold, Stefan. 2015. "Eigentumsschutz und Verkehrsschutz bei Kunstgegenständen im österreichischen Kollisions- und Privatrecht." *Austrian Law Journal 1*: 3–22.

https://doi.org/10.1017/S0940739120000223 Published online by Cambridge University Press

Basedow, Jürgen. 2013. *The Law of Open Societies: Private Ordering and Public Regulation of International Relations. General Course on Private International Law*. Collected Courses of the Hague Academy of International Law, vol. *360*. The Hague: Brill.

Biondi, Andrea. 1997. "The Merchant, the Thief and the Citizen: The Circulation of Works of Art within the European Union." *Common Market Law Review 34*, no. 5: 1173–95.

Bortoluzzi, Chiara. 2012. "La directive 93/7/CEE et la libre circulation des biens culturels à l'intérieur de l'Union européenne : bilan et perspectives après 20 ans de mise en œuvre." *Revue du droit de l'Union européenne 3*: 487–522.

Carruthers, Janeen M. 2005. *The Transfer of Property in the Conflict of Laws*. Oxford: Oxford University Press.

Chechi, Alessandro. 2014. *The Settlement of International Cultural Heritage Disputes*. Oxford: Oxford University Press.

Chechi, Alessandro. 2018. "When Private International Law Meets Cultural Heritage Law." In *Yearbook of Private International Law*, edited by A. Bonomi and G. P. Romano, 269–94. Cologne: Otto Schmidt.

Cornu, Marie. 2015. "Recasting Restitution: Interactions between EU and International Law." *Uniform Law Review 20*, no. 4: 637–46.

Clippele, Marie-Sophie de, and Lucie Lambrecht. 2015. "Art Law and Balances: Increased Protection of Cultural Heritage Law vs. Private Ownership: Towards Clash or Balance?" *International Journal of Cultural Property 22*, no. 2–3: 259–78.

Dutoit, Bernard. 1997. *Commentaire de la loi fédérale du 18 décembre 1987*. Basel: Helbing & Lichtenhahn.

Dutta, Anatol. 2006. "Civil Claims of Foreign Sovereigns for Lost Taxes: The Big Tobacco Cases and the Revenue Rule." *European Business Organization Law Review 7*, no. 3: 697–724.

Dutta, Anatol. 2007. "Vollstreckung in öffentlichrechtlichen Forderungen ausländischer Staaten." *Praxis des Internationalen Privat- und Verfahrensrechts 27*, no. 2: 109–17.

European Parliament. 2017. "*Cross-border Restitution Claims of Looted Works of Art and Cultural Goods: European Added Value Assessment, Accompanying the European Parliament's Legislative Initiative Report*" (Rapporteur: Pavel Svoboda). http://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf (accessed 10 September 2020).

Fincham, Derek. 2008. "How Adopting the Lex Origins Rule Can Impede the Flow of Illicit Cultural Property." *Columbia Journal of Law and the Arts 32*, no. 1: 111–50.

Frigo, Manlio. 2016. *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges*. The Hague: Académie de Droit international de la Haye.

Gillies, Lorna E. 2015. "The Contribution of Jurisdiction as a Technique of Demand Side Regulation in Claims for the Recovery of Cultural Objects." *Journal of Private International Law 11*, no. 2: 295–316.

Górka, Maciej. 2016. "Directive 2014/60/EU: A New Legal Framework for Ensuring the Return of Cultural Objects within the European Union." *Santander Art and Culture Law Review 2*, no. 2: 27–34.

https://doi.org/10.1017/S0940739120000223 Published online by Cambridge University Press

Hawkins, Ashton, Richard A. Rothman, and David B. Goldstein. 1995. "A Tale of Two Innocents: Creating an Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art." *Fordham Law Review 64*, no. 1: 49–96.

Institute of International Law. 1991. *The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage*. Basel: Institute of International Law.

Jayme, Erik. 1994. *Entartete Kunst und internationales Privatrecht*. Heidelberg: Universitätsverlag Winter.

Jayme, Erik. 2005. "Globalization in Art Law: Clash of Interests and International Tendencies." *Vanderbilt Journal of Transnational Law 38*, no. 4: 928–45.

Jefferson, M. 1980. "An Attempt to Evade the Lex Situs Rule for Stolen Goods." *Law Quarterly Review 96*: 508–11.

Kienle, Florian, and Marc-Philippe Weller. 2004. "Die Vindikation gestohlener Kulturgüter im IPR." *Praxis des Internationalen Privat- und Verfahrensrechts 24*, no. 4: 290–94.

Lee, Monique. 2009. "A Choice of Law Dilemma: The Conflict and Reconciliation of Laws Governing Cross-Border Transfers of Stolen Art." *Cardozo Public Law Policy and Ethics Journal 7*, no. 3: 719–55.

Magri, Geo. 2013. "Beni culturali e acquisto *a non domino*." *Rivista di diritto civile 59*, no. 3: 741–66.

Mansel, Heinz-Peter. 1988. "DeWeerth v. Baldinger: Kollisionsrechtliches zum Erwerb gestohlener Kunstwerke." *Praxis des Internationalen Privat- und Verfahrensrechts 8*, no. 5: 268–71.

Martiny, Dieter. 2012. "Beachtung ausländischer kulturgüterrechtlicher Normen im internationalen Schuldvertragsrecht." *Praxis des Internationalen Privat- und Verfahrensrechts 32*, no. 6: 559–69.

Müller-Chen, Markus, and Marc-André Renold. 2009. "Kulturgütertransfer und internationales Privatrecht." In *Kultur, Kunst, Recht: schweizerisches und internationales Recht*, edited by P. Mosimann, M.-A. Renold, and A. F. G. Raschèr, 292–301. Basel: Helbing Lichtenhahn.

Ochoa Jiménez, María Julia. 2019. "Conflict of Laws and the Return of Indigenous People's Cultural Property: A Latin American Perspective." *International Journal of Cultural Property 26*, no. 4: 437–56.

Palmer, Norman. 1994. "Recovering Stolen Art." *Current Legal Problems 47*, 2: 215–54.

Palmer, Norman. 2015. *Art, Adventure and Advocacy*. Builth Wells: Institute of Art and Law.

Reichelt, Gerte. 1985. "International Protection of Cultural Property." *Uniform Law Review 13*, no. 1: 43–153.

Reichelt, Gerte. 1986. "Kulturgüterschutz und internationales Privatrecht." *Praxis des Internationalen Privat- und Verfahrensrechts 6*, no. 2: 73–75.

Renold, Marc-André. 2006. "An Important Swiss Decision on the Giant Antique Mogul Gold Coins." *International Journal of Cultural Property 13*, no. 3: 361–69.

Roodt, Christa. 2015. *Private International Law, Art and Cultural Heritage*. Cheltenham, UK: Edward Elgar.

Roodt, Christa, and David Carey Miller. 2013. "Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law." *Transnational Dispute Management 10*, no. 5: 1–9.

https://doi.org/10.1017/S0940739120000223 Published online by Cambridge University Press

Schneider, Marina. 2016. "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive." *Santander Art and Culture Law Review 2*, no. 2: 149–64.

Siehr, Kurt. 1998. "The Protection of Cultural Property: The 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared." *Uniform Law Review 3*, no. 2–3: 671–83.

Siehr, Kurt. 2015. "Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property." *Uniform Law Review 20*, no. 4: 503–15.

Song, Ho-Young. 2016. "International Legal Instruments and New Judicial Principles for Restitution of Illegally Exported Cultural Properties." *Penn State Journal of Law and International Affairs 4*, no. 2: 718–48.

Symeonides, Symeon C. 2005. "A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property." *Vanderbilt Journal of Transnational Law 38*, no. 4: 1177–98.

Tóth, Sándor. 2016. "Seuso-kincs: amit titkolnak Magyarországon, az angolok közzéteszik." *HVG*, 10 October 2016. https://hvg.hu/kultura/20161010_Seusokincs_amit_titkolnak_Magyarorszagon_az_angolok_kozzeteszik (accessed 10 September 2020).

Urbinati, Sabrina. 2018. "The European Union Legal Framework and the Fight against the Illicit Trafficking of Cultural Property Coming from Situations of Armed Conflict." *Santander Art and Culture Law Review 2*, no. 4: 51–70.

Vadász, Vanda. 2017. "Lessons of Sevso Case: Restitution Challenges of the Illegally Exported Cultural Property." In *Hungarian Yearbook of International and European Law 2016* edited by M. Szabó, P. L. Láncos, and R. Varga, 39–58. The Hague: Eleven.

Weidner, Amalie. 2001. *Kulturgüter als res extra commercium im internationalen Sachenrecht*. Berlin: de Gruyter.

Weller, Matthias. 2017. "Cultural Objects, protection of." In *Encyclopedia of Private International Law*, edited by J. Basedow et al., 498–506. Cheltenham, UK: Edward Elgar.

https://doi.org/10.1017/S0940739120000223 Published online by Cambridge University Press