Case Notes

The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects

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Introduction

Today's tremendous increase in the number of thefts and illegal exports of cultural objects has raised new concern regarding the conditions under which such property may be recovered by the original dispossessed owners. Consequently, there has developed a body of national and international law specifically tailored to regulate this question. For example, there is the well-known 1970 UNESCO 'Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property', which has been implemented by the adoption of detailed statutes in countries such as Canada and the United States.[1] Another international organization, UNIDROIT, is currently working on a 'Preliminary draft convention on stolen or illegally exported cultural objects' (hereinafter the 'UNIDROIT draft convention'), which is being designed to complement the sometimes too general rules contained in the foregoing UNESCO treaty with respect to the conditions of acquisition and restitution of stolen or illegally exported cultural objects.[2] These rules are, in turn, only a follow-up to already existing particular statutes and international treaties providing a special regime for the restitution of cultural objects stolen or illegally exported in time of war, such as the 1954 Hague Convention and protocol for the protection of cultural property in the event of armed conflict.[3]

That said, the specifically tailored rules presently in force have not yet been widely applied, owing in particular to the belated ratification and implementation of the 1970 UNESCO Convention.[4] Consequently, while awaiting the adoption of an international set of rules which may better balance the sometimes contradictory but legitimate interests of both free trade in and restitution of cultural objects, national courts may seek reasonable solutions within the scope of their common law.

It is from this point of view that the judgments recently handed down in the *Goldberg* case[5] are very interesting. Indeed, the courts' analysis of both Indiana and Swiss common law[6] applying to the acquisition of stolen property demonstrates that, intelligently construed, the general rules of two quite different legal systems can

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provide adequate solutions for the need to protect dispossessed owners of stolen cultural objects, ie despite the absence of specifically tailored rules.

Moreover, the judgments in *Goldberg* are worthy of attention because of the questions raised and solutions proposed regarding the standing to sue for the restitution of a stolen cultural object, and the determination of which conflict-of-law rules should apply in establishing who is the rightful owner of such stolen property.

1 The facts

(a) The value of the cultural objects

In the case in question, one very striking aspect is the cultural and historical importance of the objects claimed. It involves a dispute over the ownership of four pieces of a Byzantine mosaic. These mosaics represented figures of Jesus and the Virgin Mary bordered on each side by two Archangels, and had been affixed to the apse of the church of the Panagia Kanakaria in the village of Lythrankomi, Cyprus, in 530 AD. According to the court, 'the original Kanakaria Mosaic is one of only six or seven Byzantine mosaics to survive the ravages of iconoclasm and the passage of time',[7] and between 1959 and 1967 was cleaned and restored under the sponsorship of the Department of Antiquities of the Republic of Cyprus, the Church of Cyprus and Harvard University's Dumbarton Oaks Centre for Byzantine Studies, the latter having thereafter published an authoritative volume on the Kanakaria Church and its art.

(b) The circumstances surrounding the theft of the mosaics and Cyprus' efforts to recover them

When the Turkish Military Forces invaded Cyprus in 1974, the north of the island, where the church is situated, was rapidly occupied and remains so today. The local population was soon obliged to leave certain regions, with the result that by the end of 1976, all the inhabitants of Lythrankomi, including the priest, had fled. From that date on, the Greek Orthodox Church of Cyprus (hereinafter the 'Church of Cyprus') had no further access to the north of the island occupied by the Turkish forces. The Church of Cyprus first heard of the mosaics' disappearance in 1979 from an authorized visitor who had notified the Department of Antiquities. Therefore, it was some time between 1976 and 1979 that the interior of the Kanakaria Church was vandalized and the mosaics forcibly removed at the cost of severe damage.

Upon learning that the mosaics were missing, the Republic of Cyprus (hereinafter 'Cyprus') immediately undertook to seek their recovery. Cyprus notified numerous institutions which it believed could assist in disseminating information about the missing mosaics, such as UNESCO, the International Council of Museums and Europa Nostra, and individually informed museum curators in Europe

and the United States, as well as the directors of large auction houses. In particular, the Department of Antiquities went to the trouble of writing to colleagues and specialists worldwide, as well as addressing symposia, congresses and other such meetings in an effort to publicize the disappearance. The Embassy of Cyprus in Washington also acted accordingly by establishing a mailing list containing several hundred names and sending out press-releases on a routine basis concerning the loss of Cypriot cultural property in general and the missing mosaics in particular. Throughout all these efforts, special attention was paid to the need to inform the experts and scholars who might be involved in any ultimate sale of the mosaics. This tactic proved to be well chosen, since, in the end, Cyprus finally discovered the whereabouts of the mosaics through Dr Marion True of the Getty Museum in California, who had developed a working relationship with the Director of the Cyprus Department of Antiquities.

(c) The circumstances surrounding Goldberg's purchase and attempted resale of the mosaics

It was not before July 1988, approximately ten years after their disappearance, that the mosaics surfaced on the market. The defendant and art-dealer Peg Goldberg (President and majority shareholder of 'Goldberg and Feldman Fine Arts Inc' which apparently specialized in nineteenth- and twentieth-century paintings), had travelled to Amsterdam to inspect and possibly purchase a painting by Modigliani, which had been brought to her attention by Robert Fitzgerald, an art-dealer from Indianapolis. On 1 July, following Goldberg's decision not to buy, Fitzgerald mentioned the mosaics for the first time. They were being offered on sale through a Dutch art-dealer named Michael van Rijn. The same day, Goldberg met van Rijn and his American attorney, Ronald Faulk, in Amsterdam, and was shown photographs of the Byzantine mosaics. She declared that she had immediately fallen in love with the mosaics, which were being offered for a price of US$ 3 million.

During this meeting and the following days, these intermediaries explained to Goldberg that the seller was a man named Aydin Dikman, a Turkish antiques dealer, who had found the mosaics in the rubble of an unused church in northern Cyprus while serving as an archaeologist from Turkey assigned to that part of the island. According to van Rijn, the seller had been granted permission by the Turkish Cypriot Authorities to retain the mosaics and, in the late 1970s, to export them to Munich. Van Rijn further explained that Dikman was in a hurry to sell because he had recently become quite ill and had a cash problem. Goldberg did not personally know Dikman or van Rijn, but was informed that the latter had once been convicted in France for forging Chagall's signature and had been sued by an art gallery for failure to pay monies.

On the basis of the photographs and these explanations, Goldberg asked Faulk to travel to Munich to inform the seller of her interest in purchasing the mosaics. When Faulk returned to Amsterdam, on 2 July, he reported to Goldberg that, in his opinion, the export documents he had seen appeared to be in order. On 3 and 4 July, while still in Amsterdam, an agreement was prepared and signed by Goldberg, Fitzgerald, van Rijn and Faulk providing that the mosaics would be acquired for a purchase price of US$ 1,080,000, and that the parties would split in various proportions the profits made on any future resale.

Thereafter, Goldberg and Fitzgerald left for Geneva to inspect another Modigliani, whilst Dikman arranged for the shipping of the mosaics from Munich to Geneva, by plane, on 5 July. The mosaics never passed through the Swiss customs, but remained in the free-port area of the Geneva airport until their shipment to the United States on 8 July, when Goldberg returned to Indiana with the mosaics, their sale and transfer having been finalized. After arriving in Geneva, Goldberg met Dikman only once, briefly, at the free-port area, during her inspection of the mosaics. In order to pay the purchase price, Goldberg had secured financing with a bank in Indiana, which agreed to transfer the necessary funds to Geneva on 5 July. Consequently, after her arrival in Geneva, Goldberg signed a promissory note binding herself individually and 'Goldberg and Feldman Fine Arts Inc' to the loan, as well as an agreement offering the mosaics as security. It was finally on 7 July, in Geneva, that the sum of US$ 1,080,000 was handed over in 100 dollar bills to Fitzgerald and Faulk, acting on behalf of the seller Dikman. The same day, Dikman signed a general bill of sale, thus enabling Goldberg immediately to travel back to the United States in possession of the mosaics.

At this stage the attempted resale of the mosaics within the United States began. In the autumn of 1988, having offered a percentage interest in the resale profits to further persons in Indiana, Goldberg began a serious attempt to market and sell the mosaics, in particular through two art-dealer acquaintances of hers. Unfortunately for Goldberg, these two art-dealers both contacted the Getty Museum in California, in October 1988 and January 1989, regarding a possible purchase of the mosaics. Indeed, Marion True, of the Getty Museum, was perfectly familiar with the efforts of Cyprus to recover the mosaics. Consequently, she informed the Department of Antiquities of Cyprus and the plaintiffs' Washington law firm of these contacts, which enabled the latter quite quickly to determine the location and possessor of the mosaics. Confronted with Golderg's refusal to return the mosaics, the plaintiffs brought an 'action in replevin' in Indiana in March 1989, which proceedings resulted in the two judgments examined herein.

Before trial, the issue of money damages was separated from the case. Thus, the only issue examined by the court in these initial

proceedings was the question of who was entitled to possession of the mosaics.

The District Court's judgment was made on 3 August 1989, and the appeal judgment on 24 October 1990. Where the 'Court' is referred to hereunder without any further indications, it implies that the Court of Appeals simply affirmed the District Court's discussion or decision on the point in question. Conversely, the District Court and Court of Appeals are named in full whenever the content of the judgment discussed differs.

2 The application of Indiana conflict-of-law rules and substantive law

(a) The right of the Republic of Cyprus to recover

When the party claiming restitution of illegally exported or stolen cultural property is a foreign State, one of the obstacles which has hindered retrieval in past cases is closely related to the question of standing. Indeed, it has been held that a sovereign State should have no right to sue for the recovery of cultural property in a foreign court when asserting its claim on the basis of its own public law, for example on a protective domestic statute attributing title or other rights on the cultural property to the claimant State.[8]

Such objection is usually justified by an old rule according to which a court may recognize but not enforce a foreign penal, revenue or public law. This rule is deemed to prevent a State from exercising its sovereignty within the jurisdiction of another when applying for relief in front of a foreign court on the basis of a public law to which the claimant State has not managed to give effect itself. With respect to public laws protecting national cultural property, this rule would typically be asserted where a State claimed title to a cultural object which it had never actually possessed, for example to an illegally excavated and exported artefact considered to be State property under the public law of the claimant State.

In the present case, the foregoing question could have been raised by the Court since, formally speaking, there were two claimants of which one was a sovereign State: the Church of Cyprus and the Republic of Cyprus. Despite this fact, neither Court directly examined the question.

The District Court simply points out in a footnote that the claim of Cyprus to 'a recognized and legally cognizable interest in the four Kanakaria mosaics, and in protecting and preserving them as invaluable expressions of the cultural, religious and artistic heritage of Cyprus ... is sufficient to confer standing'.[9] In other words, the District Court does not specifically examine on what legislative basis Cyprus is relying as a party to the replevin action before the American Courts. One might wonder whether the District Court consciously decided to do away with any particular requirement as to the standing of Cyprus as a foreign sovereign State. In fact, it

seems more likely that the District Court viewed Cyprus as a form of intervening party, acting as 'guardian' of its national cultural patrimony, next to the Church of Cyprus actually claiming possession and restitution of the mosaics. This impression is based on the District Court's analysis of the merits of the claim, where only the Church of Cyprus' right to possession and property rights are examined, and on a final remark made in the foregoing footnote, where the District Court states: 'both the Republic and the Church of Cyprus request that the mosaics be returned to the Church of Cyprus. The Court has concluded that the Church of Cyprus is entitled to possession of the mosaics. The Court need not address further the Republic of Cyprus' standing'.[10] That said, the District Court's approach provides some indication that it sees no particular difficulty in recognizing the standing of a foreign sovereign State claiming cultural property on the basis of its domestic public laws protecting such property.

(b) The Church of Cyprus's standing to sue and capacity to hold property

When a cultural object is stolen or illegally exported from its State of origin and sold abroad, the initial possessor may for example have been an individual, a private or State museum, or a church. This possessor may not, however, have been the legal owner or sole holder of rights and interest in the cultural object. The question therefore arises of who should be entitled to claim for the restitution of such cultural property, ie who has standing to sue.

We have just seen how the District Court resolved the question of Cyprus' standing in a pragmatic way, by linking the State's interest in the mosaics with the Church of Cyprus' good title to them.

Regarding the Church of Cyprus' standing to sue, it appeared self-evident since the provenance of the mosaics from the Kanakaria Church was not disputed.

Accordingly, the District Court affirmed the Church of Cyprus' standing without any particular discussion.

However, the related question of the Church of Cyprus legal capacity to hold property as an independent juristic person remained. This question of the existence of legal capacity is normally determined by the law of the place of domicile of the entity or person concerned, which in the present case would be Cypriot law. The District Court did not expressly address this question of legal capacity. It simply stated in its discussion of the Church of Cyprus' title that the latter could be deemed owner of the mosaics, given the witness statements and documents produced which were sufficient evidence of the fact that the Kanakaria Church had belonged to the Church of Cyprus. This implicit admission of the Church of Cyprus' legal capacity stands out as having been the correct answer in the light of the appeal judgment. Indeed, based on a relatively detailed

analysis of Cypriot laws, the Court of Appeals concludes that 'The Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity',[11] after having in particular cited the constitution of Cyprus as recognizing the existence of the Greek Orthodox Church of Cyprus and granting it the 'exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter'.[12] Although the Court of Appeals actually discussed this question in relation to an objection to its jurisdiction (based on diversity of citizenship), its conclusions clearly demonstrate the Church of Cyprus' legal capacity to own and therefore claim restitution of the mosaics.

(c) The choice of substantive law

In order to determine whether Goldberg had acquired good title which would prevent restitution, the Court had first to establish which substantive law was applicable to this question.

The District Court did this by comparing Indiana and Swiss choice-of-law rules, and concluding that they both pointed to the application of Indiana substantive law. In particular, the Court reached this conclusion on the basis of an Indiana choice-of-law rule commanding that the substantive law which has the 'most significant relationship' with the cause of action be applied. Relying on this rule, it considered Indiana to have more significant contacts than Switzerland with the transaction conducted by Goldberg to acquire the mosaics. However, in reaching this solution, the Court also pointed out that the 'most significant relationship' analysis constitutes a modification of Indiana's traditional choice-of-law rule normally applied in what it characterized here to be a tort case. According to this traditional rule, the law of the place where, the wrong was committed ('lex loci delicti commissi') should apply, which in this case the Court had deemed to be the law of Switzerland, where 'Goldberg, took possession of and control over the mosaics'.[13]

In other words, the Court concluded that precedence must be given to Indiana substantive law, because of its more 'significant relationship' with the transaction, over Swiss law which it would otherwise have considered applicable as the law of 'the place where the wrong was committed'.[14]

As will be shown, the Court's choice-of-law approach summarized above was quite different from that which would probably have been adopted by many European courts in the same circumstances. The reasoning of the Court in *Goldberg* regarding choice of law is also somewhat different from that followed in a similar case recently judged in the United States, ie by the New York Courts in *Kunst-sammlungen zu Weimar* v *Elicofon* ('*Elicofon*').[15]

First of all, the District Court operated in a relatively uncommon fashion when deciding which State's choice-of-law rules should be relied on to determine the applicable substantive law. Indeed, instead

of simply applying the forum's conflict-of-law rules, ie those of Indiana, Judge Noland went to the trouble of also considering Swiss choice-of-law rules, apparently to convince himself further regarding the proper choice of substantive law. Thus he introduces a paragraph on Swiss choice-of-law rules by saying 'The conclusion that Indiana substantive law applies in this case is bolstered by Swiss choice-of-law principles'.[16] This way of cumulatively taking into consideration the choice-of-law rules of several States closely connected with the transaction, an approach which was not adopted by the Court of Appeals, is beyond criticism, but remains quite rare except under the practice of arbitral tribunals.

Secondly, when applying Indiana choice-of-law rules, the Court chose the applicable substantive law on the basis of a characterization of the facts which is open to debate. The Court chose to consider the replevin action as a question of tort, to which the 'lex loci' rule traditionally applies, rather than as an action related to the transfer of ownership which would normally be decided according to the 'lex situs' rule (ie the law of the State where the object is situated at the time of the alleged transfer). In this respect, the Court of Appeals underlined its agreement with the District Court's characterization, and even pointed out that the characterization might very well have been different in front of a Swiss court: 'We note that Goldberg claims error in Judge Noland's decision similarly to look to tort principles, and expends a great deal of effort arguing conflict of laws principles used in actions involving the transfer of chattels, which is apparently how this action would be characterized under Swiss law. As to the application of Indiana law and principles, Goldberg's argument entirely misses the mark'.[17]

This characterization of the replevin action as a matter of tort is somewhat surprising for several reasons: first of all, because when examining the claim on the merits, the Court concentrated solely on determining whether or not Goldberg had acquired good title to the mosaics; secondly, because in the District Court's judgment it is specifically stated that 'before trial, the issue of money damages was separated from this case. Thus, the only issue presently before court is who is entitled to possession of the mosaics'.[18] Accordingly, it is legitimate to wonder why the Court chose to characterize the action as a question of tort. The only explanation offered by the Court is that 'conversion, a cause of action very similar to replevin, is a tort'.[19] In this relation, it is interesting to note that in '*Elicofon*', which involved a replevin action but in this case filed by an East German Museum in an attempt to recover two works by Dürer which were stolen at the end of the war, for the final benefit and possession of a New York lawyer, the New York Courts characterized the action as a question of ownership, rather than tort. It was stated in particular that 'New York's choice-of-law dictates that questions relating to the validity of a transfer of personal property

are governed by the law of the State where the property is located at the time of the alleged transfer'.[20]

The way in which the Court considered the place of occurrence of the tort is also different from the solution adopted in '*Elicofon*'. The Court did not look to the place of the theft, ie Cyprus, but to the place where Goldberg took possession of the mosaics, ie Switzerland. Here again, this approach was probably dictated by the analogy drawn between Goldberg's purchase and an act of conversion. In '*Elicofon*', the only possible exception to the lex situs rule examined by the New York Court was the possibility of applying the substantive law of Germany, ie the law of the country where the theft had taken place rather than the law of New York where Elicofon had purchased the Dürers.

Regarding the Court's final choice of Indiana substantive law, as the law having 'the most significant contact' with Goldberg's acquisition, we are not entirely convinced. Once more, it is apparently the Court's perception of the nature of the transaction in question that led to this solution. Indeed, in order to justify its application of Indiana's substantive law instead of Swiss law, the Court insists *inter alia* on all the contacts existing between Indiana and Goldberg's acts in relation to the envisaged resale of the mosaics. In other words, instead of examining which country had the closest connection with Goldberg's actual purchase of the mosaics (which quite clearly would have been Switzerland), the Court based its choice on all the circumstances surrounding the transaction in a much larger sense, ie between the time the sellers were initially contacted in the Netherlands and Goldberg's attempt to resell the mosaics in the United States.

In view of the foregoing, one cannot help but feel that the Court's approach stemmed from a 'homeward trend', probably triggered in this case by its desire to apply a more familiar substantive law which would undoubtedly allow the replevin action to succeed.

Finally, it may be pointed out that the Court made no formal reference to Cypriot law when examining the merits of the claim, despite the fact that in theory Cypriot law was applicable to the question of the Church of Cyprus' title to claim restitution. In practice, however, the Court had no need to refer to Cypriot law in this respect, because it was sufficient to rely on the fact that the Church of Cyprus' previous legitimate possession was uncontested. The Court of Appeals added that certain nationalization decrees adopted by the Turkish Authority in northern Cyprus were confiscatory and contrary to the United States' public policy, and thus unable to affect the Church of Cyprus' good title or right to possession.

(d) The application of Indiana substantive law

As pointed out above, the Court decided that Indiana's substantive law was in principle applicable to the question of the validity of Goldberg's acquisition.

Under Indiana law, the basic rule is that 'One who obtains stolen items from a thief never obtains title to or right to possession of the items',[21] unless the original owner is time-barred by Indiana's six-year statute of limitations. Goldberg, of course, argued that the Church of Cyprus' cause of action first accrued in 1979 (when the church was vandalized) and that, because the complaint was not filed within six years thereof (ie until 1989), the plaintiffs' cause of action was time-barred.

Unfortunately for Goldberg, it so happens that the common law of Indiana, similarly to that of other states, contains various principles which protect the original owner from an overly strict and mechanical application of the statute of limitations. There exists in particular the 'doctrine of fraudulent concealment' allowing that as a general rule 'where the chattel is fraudulently concealed... the statute is tolled'[22] and the 'rule of discovery' according to which the statute of limitations does not begin to run 'where a plaintiff, using due diligence, cannot bring suit because he is unable to determine a cause of action'.[23]

The Court rightly decided that, in view of the circumstances, both these principles should apply. Indeed, there is no doubt that the Church of Cyprus, with the help of Cyprus, had diligently, but without success until 1988, done all it could to recover possession of the mosaics. Moreover, Dikman had concealed them, or at least kept the mosaics off the open market throughout his possession. The Court therefore concluded that the six-year statute of limitations only began to run in 1988, and that the mosaics must be returned to their previous possessor and owner, the Church of Cyprus.

Beyond the result, which, given the circumstances, brooks no criticism, it is the appropriateness of the common-law rules applied which deserve attention. Indeed, it is often pointed out that the possibility of concealing a precious work of art during the statute of limitations period, together with the gradual 'laundering' effect of multiple transactions across international borders, is an effective method for eliminating the original owner's right to claim restitution. Accordingly, the foregoing solutions adopted by the Indiana Courts regarding when a cause of action accrues, represent an efficient response to this real problem: in order to exclude the risk of a claim for restitution, dishonest or negligent possessors cannot simply rely on moving artefacts from concealment to bank-vaults. The solutions adopted further help to account for the interest that cultural objects not be stored forever in museum basements, since a museum that wishes to legitimize its possession of an object has a duty to show it. On the other hand, properly construed, the principles applied in this case should not unduly favour dispossessed owners, because they have the duty diligently and continuously to seek out the stolen cultural property.

Finally, it is interesting to note that the solutions reached by the Court, relying on Indiana common-law, are quite similar to those

embodied in various rules specially tailored for the issue of restitution raised by illegal trafficking in cultural objects. For example, the UNIDROIT draft convention provides under its Article 3 that 'any claim for the restitution of a stolen cultural object shall be brought within a period of 3 years from the time when the claimant knew or ought reasonably to have known the location or the identity of the possessor of the object',[24] and the recently enacted United States' 'Convention on cultural property implementation Act' provides for statutes of limitations of variable lengths, which apply according to the means and degree of publicity through which the purchaser in good faith of stolen cultural objects reveals his acquisition and possession.[25]

3 The application of Swiss conflict-of-law rules and substantive law

(a) The analysis of Swiss conflict-of-law rules

As briefly pointed out earlier, the District Court tried to reinforce its argumentation by referring not only to the forum's choice-of-law rules (ie Indiana's) , but also to those of the place where a large part of the transaction took place, ie Switzerland. Although this approach is, in itself, perfectly acceptable, not to say desirable in certain circumstances, we are not entirely convinced by the Court's conclusions regarding the content of the relevant Swiss rules.

The District Court's reasoning is nevertheless interesting because it raises an important question which often appears in the context of illegal trafficking in cultural objects: where an artefact is in the process of being transported through several countries at the moment of its sale, should one admit an exception to the basic rule according to which transfer of ownership is governed by the law of the state where the object is situated at the time of the alleged transfer, ie to the 'lex situs' rule?[26]

It is uncontested in Switzerland, as in many other countries, that if an object is 'in transit', the law of the place of destination exceptionally applies instead of the law of the situs.[27] Accordingly, the real difficulty and controversy on this subject stems from the determination of when an object may be deemed to be in transit. It is on this point that the District Court's reasoning is open to criticism.

The District Court relies essentially on testimonial evidence from Professor A von Mehren, to argue that the mosaics must be characterized as 'in transit' from a Swiss point of view, considering the circumstances surrounding their transport through Switzerland. In this relation, the District Court stresses in particular that 'upon their arrival in Geneva, the mosaics were placed in storage in the free-port area of the Geneva airport; there they remained in storage for four days until being shipped to Indianapolis. The mosaics never passed through Swiss customs. The mosaics never entered the Swiss

stream of commerce. Their presence in Switzerland was temporary, as was intended. Those involved with the transaction intended that if the sale was consummated, the mosaics were to be shipped to Indiana; if not, the mosaics were to be returned to Germany'.[28]

The District Court's foregoing presentation of the facts does not sufficiently account for one of the main purposes of an exception to the 'lex situs' rule where goods are 'in transit'. This purpose is to enable the determination of an applicable law even though the precise location of the object at the time of the transaction is unknown.[29] In the present case, the mosaics remained in Switzerland throughout the sales operation, ie in particular during their inspection, the payment, the drafting of the bill-of-sale and the transfer of possession, all these acts having moreover been performed entirely in Switzerland. The placing of the mosaics in storage in the free-port area during this operation is not in itself a deciding factor, since the non-passage of the customs does not as such prevent the existence of Swiss jurisdiction over the mosaics, in the country where they were physically situated after crossing its territorial borders. Consequently, even if the links between Switzerland and the transaction on the mosaics were relatively transitory, they were at the same time quite intense and certainly not truly fortuitous. It is therefore our opinion that the District Court's characterization of the mosaics as having been 'in transit' at the time of the sale was somewhat hasty.

One may understand the District Court's feeling that Switzerland's legal system was not particularly concerned by a transaction between a Turkish seller and an American buyer, the latter intending above all to return to the United States with the mosaics. Nevertheless, if such was the District Court's impression, it should not have reasoned in terms of goods 'in transit', but rather have applied the statutory rule according to which the normally applicable law may be disregarded 'if, under the entire circumstances, it is obvious that the facts only have a remote connection to that law and a much closer connection to another law'.[30] Even on this basis, it is improbable that the substantive law of Indiana should have been applied in lieu of Swiss substantive law, since as far as the purchase of the mosaics by Goldberg is concerned (ie independently of her desire to resell the mosaics in the United States), it appears that Switzerland was the more likely 'centre of gravity' of that transaction.

(b) The application of Swiss substantive law

As already mentioned, in order to overcome any possible criticism of its choice of Indiana substantive law, the District Court also analyzed the dispute under Swiss substantive law 'assuming, arguendo, that Indiana's substantive law does not apply'.[31]

The District Court again relied primarily on testimonial evidence from Professor A von Mehren regarding the content of Swiss law. This evidence summarized the conditions under which good title to

stolen objects could be obtained, ie in particular the requirement of good faith and the existence of a legal presumption of good faith.

What is most interesting in von Mehren's testimony, as well as in the District Court's analysis, is their insistence on the importance of the entire circumstances surrounding the transaction for the determination of good faith, and the higher standard of diligence which must be expected from a purchaser of cultural objects of great value.

Both von Mehren, and the District Court through him, reason in accordance with the Swiss Supreme Court's precedents holding that 'whenever the circumstances raise doubts as to the quality of the seller, the purchaser may no longer content himself with the mere appearance constituted by possession; the purchaser must enquire into the seller's capacity to convey property right'.[32]

In this relation, von Mehren and the District Court rightly insist on the particular diligence with which a purchaser must proceed when clearly extremely valuable cultural objects are involved. They state: 'the very nature of the items for sale warranted that a potential purchaser should proceed with caution... these objects are not ordinary commercial objects. They are objects that have religious and cultural significance. They are the kind of objects that do not ordinarily enter into commerce, and here they are in commerce, or being offered for sale. A careful and honest purchaser would have to understand and explain why... these mosaics should now be offered on the market'.[33]

The District Court then proceeds to detail the numerous facts which should have made Goldberg suspicious, including particularly the initially immovable nature of the mosaics, the very low purchase price, the lack of information regarding the seller Dikman whom Goldberg met only once, the lack of any documents establishing Dikman's good title, the dubious reputation of various intermediaries, as well as the extreme speed with which the whole transaction took place. The District Court concludes in this respect that 'the Court cannot improve on Dr. Vican's summary of the suspicious circumstances surrounding this sale: 'all the red flags are up, all the red lights are on, all the sirens are blaring...'.'[34]

The District Court points out that in such circumstances, Goldberg could not content herself with the appearance of peaceful possession by Dikman, but, on the contrary, should have indulged in a serious enquiry regarding the history of the mosaics. In this connection, the District Court refers to the fact that Goldberg did not consult any experts on Byzantine Art and never contacted the Cypriot authorities, and insists further that Goldberg showed no good evidence that she had consulted institutions such as IFAR or INTERPOL which keep stolen-art registers. Goldberg's claim to good faith is therefore rejected by the District Court, and her acquisition of good title on the basis of Article 934 of the Swiss Civil Code excluded.

The foregoing argumentation of the District Court is important in two respects. First of all, it demonstrates that a proper application of the general rules of Swiss law relating to acquisition in good faith leaves room for the need to provide special protection for dispossessed owners of stolen cultural objects of great value. One may note that the appropriateness of Swiss law in this respect was also recently remarked on by a leading commentator in this field of art law, Mr A L Droz, according to whom 'it seems that the principle which prevails in certain law systems whereby good faith is always presumed is excessive where the purchase of works of art is involved, which, by their very nature, should trigger a specially diligent approach. Without, of course, going so far as to presume a purchaser's bad faith, it would appear necessary to systematically rely on the rule provided, for example, under Article 3 Paragraph 2 of the Swiss Civil Code which states that 'no person can plead bona fides in any case where he has failed to exercise the degree of care required by the circumstances'.[35]

Secondly, in demonstrating the adequacy of Swiss law, the District Court highlights the necessity that the purchaser pay special attention, considering the artistic, cultural and often economic value of the objects in question, which require more diligence and expert knowledge from the buyer. Here again, one may quote Mr Droz's view that 'it will have to be generally recognized one day that, with respect to the circulation of works of art and cultural objects, the persons involved will need to respect rules of conduct to be established, and that it shall be normal to require that they prove they have respected such rules. The more value a work of art or cultural object has, whether it is economic, artistic, historical, religious, etc, the more these rules of conduct should be stringent. We consider that the character of the purchaser must be taken into consideration, and that it is normal to expect more from professionals, antique dealers or museum curators. One can be in good faith, but nevertheless responsible for not having taken the necessary precautions (requirement of certificates of origin, export licences, etc), and this negligence must, in certain cases, result in the obligation to return the object without indemnity'.[36]

The latter part of Mr Droz's remark is also very important, because he stresses the idea that it is not so much the honesty of dealers in such objects which is at stake, but simply their capacity to act more diligently. This concern echoes that of the Court of Appeals, which states, in this relation, that 'unfortunately, when these mosaics surfaced, they were in the hands not of the most guilty parties but of Peg Goldberg and her gallery... Lest the results seem too harsh, we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more

than make a few last-minute phone calls... In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like. Had Goldberg pursued such methods, perhaps she would have discovered in time what she now has discovered too late: the Church of Cyprus has a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it'.[37]

This passage of the judgment is further noteworthy because it underlines the existence of stolen art registers, as well as the negative incidence which their non-consultation can have on the purchaser's proof of diligence. The importance of these registers was not overlooked by the experts having prepared the UNIDROIT draft convention, since its Article 4, Paragraph 2, expressly establishes the consultation of specialized registers as one criterion of appreciation of the purchaser's good faith in the following terms: 'in determining whether the possessor exercised such diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted any accessible register of stolen cultural objects which it could have consulted'.[38]

This duty of consultation is all the more meaningful given the recent constitution of several comprehensive art-theft computer registers, ie databases which are being loaded with information regarding stolen and illegally exported works of art and cultural objects.[39] These registers are in the process of becoming operational and allow dealers, museums and private owners to register their possessions or consult the database according to their needs. The existence of these registers should, however, not only give rise to a duty of consultation whenever the circumstances surrounding a purchase are suspicious, but also to a reciprocal duty for dispossessed owners, whenever possible, diligently to publicize their loss.

Conclusion

It has become commonplace to state that, with respect to trade in cultural objects of great value, there are many conflicting but legitimate interests which need to be accommodated when determining whether an illegally exported or stolen object must remain in the hands of a good-faith purchaser or be returned to the dispossessed owner. The complex pattern of interests involved often makes such choice difficult and has given rise to a passionate controversy over the past decades between those defending the preservation of national cultural patrimonies and those defending the free circulation of cultural objects.

Within the context of this controversy, the circumstances of the *Goldberg* case are interesting because they probably represent a

situation where a large majority would agree that restitution was the right solution, i.e where a stolen, very valuable and originally immovable cultural object is involved. In particular, the *Goldberg* decision demonstrates that, even under common law, good title to such objects may practically never be acquired, except where the original owner shows no interest in retrieving his property or an extremely long period of time has elapsed. The Court in *Goldberg* has the great merit of making this clear by examining in much detail all the circumstances surrounding the theft and purchase of the mosaics, and by stating its opinion without circumspection regarding the particular duties a buyer of valuable cultural objects is bound to respect.

Notes

1 Regarding this Convention, its history and implementation, see for example P Bator, An Essay on the International Trade in Art, *Stanford Law Review* 34 (1982), p 275; Q Byrne-Sutton, *Le trafic international des biens culturels sous l'angle de leur revendication par l'Etat d'origine* (aspects de droit international privé), Zürich 1988, pp 201–21; R Fraoua, *Le trafic illicite des biens culturels et leur restitution*, Fribourg 1985, pp 136–9; M Frigo, *La Protezione dei beni culturali nel diritto internazionale*, Milano 1986, 202–35; P J O'Keefe & L V Prott, *Law and the Cultural Heritage*, Volume 3 (*Movement*), London 1989, pp 726–802; J H Merryman, A Elsen, *Law, Ethics and the Visual Arts*, Volume 1, New York 1979, pp 2–169 – 2–207; S A Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study*, New York 1978, pp 178–91; and the numerous references contained therein.

2 UNIDROIT (the 'International Institute for the Unification of Private Law') is a reputed inter-governmental international organization funded by contributions from its fifty-three member States. The draft convention is the result of a study which UNESCO suggested be undertaken by UNIDROIT, in relation with the possible modification of the provisions regarding the restitution of cultural property (in particular of Article 7(b)) contained in UNESCO's 1970 Convention. The study was begun by G Reichelt, who set the foundations for the work continued by a study group (cromprising prominent experts on the question of restitution), that led to the draft convention of 26 January 1990 cited herein. These studies are published by UNIDROIT and may be obtained from its secretariat.

3 Regarding this Convention and its Protocol and certain particular statutes, see for example Q Byrne-Sutton, op cit, pp 195–201 and 223–26; R Fraoua, op cit, pp 134–35; M Frigo, op cit, pp 95–107; W Kowalski, *Restytucja dziel sztuki w prawie miedzynarodowym (The restitution of works of art in international law)*, Katowice 1988 (Uniwersytet Slaski); P J O'Keefe & L V Prott, op cit, Vol 3, p 713 and Vol 2; J H Merryman/A Elsen, op cit, pp 1–106; S Nahlik, *La protection internationale des biens culturels en cas de conflit armé*, RCADI 120 (1967 I), pp 135–8; ibid, 'International Law and the Protection of Cultural Property in Armed Conflicts, *Hastings Law Journal*, Vol 27, No 5, May 1976, pp 1082–3; ibid, 'On Some Deficiencies of the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict', *Annuaire de l'A A A*, Vol 44 (1974), pp 105–7.

4 The 1970 UNESCO Convention and the Protocol (on restitution) of the 1954 Hague Convention remain to be ratified by many of the world's major art-importing countries. The United States Cultural Property Implementation Act of the 1970 UNESCO Convention was, for example, only enacted in 1983, and is nevertheless one of the pioneering legislations.

5 This note is a commentary of *Autocephalous Greek-Orthodox Church of Cyprus* v *Goldberg*, in 771 F Supp 1374 (5 D Ind 1989), hereinafter cited 'District Court', and the transcript of the appeal judgement No 89–2809 by the United States Court of Appeals (for the Seventh Circuit), hereinafter cited 'Court of Appeals'.

6 Common law is used here in a general sense, by comparison with rules specifically tailored to the needs of regulating the restitution of stolen cultural objects.

7 District Court, p 1377.

8 See for example Q Byrne-Sutton, op cit, pp 173–84; P J O'Keefe/L V Prott, op cit, Vol 2, pp 652–6.

9 District Court, p 1377, note 1.

10 Ibid.

11 Court of Appeals, p 14.

12 Ibid.

13 District Court, p 1393.

14 Ibid.

15 687 F 2d 1150 (2d Cir 1982), in: ILM 21 (1982/4), p 773; 536 F Supp 829 (EDNY 1981), in: ILM 20 (1981/5), p 1122. For a commentary of these decisions, see for example, Q Byrne-Sutton, 'Who is the Rightful Owner of a Stolen Work of Art? A source of Conflict in International Trade', in *International Sales of Works of Art*, ICC publication No 436, pp 493–5; U Drobnig, *Amerikanische Gerichte zum Internationalen Sachenrecht auf dem Hintergrund der Teilung Deutschlands*, IPRax (1984/2), p 61; K Killelea, 'Property law: International Stolen Art', *Harvard International Law Journal* 23 (Winter 1983), p 466; J Ostenberg, 'International Law in Domestic Forums: The State of the Art', *Brooklyn Journal of International Law* 9 (Winter 1983), p 179; R Strahl, 'The Retention and Retrieval of Art and Antiquities Through International and National Means: The Tug of War Over Cultural Property', *Brooklyn Journal of International Law* 5–6 (1970–80), p 103.

16 District Court, p 1394.

17 Court of Appeals, p 16, note 10.

18 District Court, p 1377.

19 District Court, p 1393, note 13. See also Court of Appeals, p 16, note 10.

20 ILM 20 (1981/5), p 1142.

21 District Court, p 1398.

22 District Court p 1391.

23 District Court p 1389.

24 Regarding the UNIDROIT draft convention, see above note 2.

25 Regarding this Act, see the references above, note 1.

26 See for example Article 100 of the Swiss Federal Act on Private International Law ('PILact'). Regarding the aplication of this rule to the acquisition of stolen cultural objects see for example Q Byrne-Sutton, *Le trafic*... op cit, pp 107–65; Ibid, *Who is the Rightful Owner* ..., op cit, pp 489–99; P J O'Keefe/L V Prott, op cit, pp 638–48, and the references therein.

27 See for the example Article 101 of the Swiss PILact.

28 District Court, p 1395.

29 See for example H Batiffol/P Lagarde, *Droit international privé*, tome II, Paris 1983, No 59; G Kegel, *Internationales Privatrecht*, München, 4th ed, 1977, p 286; P Lalive, *The Transfer of Chattels in the Conflict of Laws*, Oxford 1955, pp 188–9; H Stoll, 'Internationales Privatrecht', in *Staudingers Kommentar zum BGB* Band I, Lieferung 5, Berlin, 1976, Nos 470–471; G C Venturini, 'Property', in *International Encyclopaedia of Comparative Law*, Private International Law, Vol III, chapter 21, p 7.

30 See section 15 of the Swiss PILact.

31 District Court, p 1400.

32 See the Swiss Supreme Court decision reported, in ATF 70 II 103 = JdT 1944 I 437/439.

33 District Court, p 1401.

34 District Court, p 1402.

35 G A L Droz, in a commentary of the case '*Fondation Abegg et Ville de Genève c Mme Ribes et autres*', in *Revue Critique de droit international privé*, 78 (1989), pp 110–111 (our translation from French).

36 Ibid, p 111.

37 Court of Appeals, pp 30–31.

38 Regarding the UNIDROIT draft convention, see above, note 2.

39 One may mention in particular the 'International Art and Antiques Loss Register' set up by various institutions in partnership with the United Kingdom's Art Trade Liaison Committee, which among others is currently being loaded with 5,000 items from the files of Scotland Yard, together with over 32,000 items from the International Foundation for Art Research in New York. Initially, the register will be based in London and New York. Other 'competitor' registers are also being launched.