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# Stolen Art: The Ubiquitous Question of Good Faith<sup>9</sup>

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**A**MONG THE DIFFICULT ISSUES that arise in cases dealing with the restitution of stolen or illegally exported cultural objects, good or bad faith plays a significant role. Quite a number of cases have turned on this issue, and this article deals with some of the more important decisions. It often transpires (at least under civil law) that the issue of good faith is fundamental in the resolution of title disputes, particularly those relating to Nazi-looted art or art stolen under other circumstances.

## 1. The Significance of Good (and Bad) Faith in Comparative Law

There have been a number of comparative law studies on the issue of the acquisition of stolen property in good or bad faith, which have commenced with the thorough research carried out by Professor Gerte Reichelt in the late 1980s at the request of the International Institute for the Unification of Private Law ('UNIDROIT').<sup>10</sup>

It is, however, one of those fields where one sees a relatively clear distinction between the systems of common law and civil law. In most civil law countries,<sup>11</sup> the balance between the interests of the original owner and those of the subsequent purchaser (assuming he is in good faith), is often struck in favour of the good faith purchaser, meaning that a stolen object – in our case a stolen cultural object – can be acquired by a good faith purchaser. Depending on the legal system, there are different additional conditions of proof and of time, as well as the circumstances in which the sale took place. Simply stated, the possibility exists for a good faith purchaser to acquire title to a stolen object.

The common law systems,<sup>12</sup> however, tend to follow the principle of the *nemo dat quod non habet* rule – that no one can transfer title to stolen property. This is clearly expressed in English and American case law.

9 This text is an extract from 'Stolen Art: The Ubiquitous Question of Good Faith' in *Resolution of Cultural Property Disputes* (2004) 251–263, reproduced with permission of Kluwer Law International and the International Bureau of the Permanent Court of Arbitration.

10 See R. Reichelt 'La protection internationale des biens culturels,' 1985 Uniform Law Review 43 1; 'La protection internationale des biens culturels – deuxième étude' 1998 Uniform Law Review 53.

11 Editor's note: These are generally countries whose law is based on a Code greatly influenced by Roman Law and includes all European countries and many others whose legal system is modelled on one or several of them.

12 Editor's note: These are generally countries whose law is derived from the English legal system and includes many countries formerly members of the British Empire.

There are, in both systems, exceptions which make them not seem as opposed as what might appear from a superficial comparison, but clearly the emphasis is different in civil law and in common law countries.

## 2. Defining Good (and Bad) Faith

Defining ‘good faith’ is a relatively difficult task, but some legislators have tried. One example is the *Swiss Civil Code*, which states that good faith can only be claimed if it is compatible ‘with the attention that the person claiming good faith should have shown in the given circumstances’ (Art. 3). This, however, is relatively vague and has had to be defined by case law. I will review some national and international efforts to define good faith.

Swiss case law is quite rich on this topic. In 1996, the Swiss Supreme Court had to decide on the possible good faith acquisition of a gun collection that had been stolen from its first owner, near Geneva.<sup>13</sup> In its decision, the Supreme Court stated that particularly high standards of diligence should be applied to purchasers in sectors of the market where goods of doubtful origin can surface. In previous decisions, the Supreme Court had applied this high standard to sectors such as the trade in second-hand luxury cars, but in this decision it applied the high standard to the general field of second-hand goods, including antiquities. In this case, as the purchaser had not sought information on the provenance of the collection in any serious manner, the court had no difficulty in deciding that he could not be considered in good faith and could therefore not have acquired ownership of the stolen collection.

This case, however, was followed by another one two years later relating to a manuscript of the Marquis de Sade, *Les 120 Journées de Sodome*, which was stolen in France from its owner and acquired by a collector in Switzerland.<sup>14</sup> Though some of the elements of the transaction might have been regarded as suspicious, the Supreme Court refused to consider that the purchaser was not in good faith, and this was mainly because the price paid was relatively high. The court refused to take into account the fact that this manuscript was a national treasure in France and could not have been exported legally from France – a fact that the purchaser, a renowned collector, certainly would have known. So, here we see that although there appears to be a trend towards higher standards in most civil law countries, including Switzerland, there have been some setbacks and this manuscript decision is clearly one example.

Interestingly, legislators are imposing higher standards of care in special laws relating to cultural property. This is the case in Switzerland, where Article 16 of the

13 *Insurance X v. A.M.*, ATF 122 III p. 1, La Semaine judiciaire (1996) 383 (Switzerland) 5 March, 1996

14 *N de N v N et al.*, La Semaine judiciaire (1999) 1, 28 May, 1998 (Switzerland).

recently adopted International Transfer of Cultural Goods Act of 20 June, 2003<sup>15</sup> (Article 3) imposes such standards not only on the actual purchaser of cultural property, but also on the trade as a whole. This section of the Swiss statute states that an art dealer or an auctioneer cannot enter into any transaction regarding cultural property if he has any doubt as to its provenance, so the burden lies not only on the purchaser's shoulders, but also on those of the dealer. This is an interesting evolution that can also be observed in the different branches of the art community which have adopted codes of ethics that, again, place a burden on those in the art trade to check the provenance of the objects with which they are dealing, such as the Guidelines of the Conférence internationale des négociants en oeuvres d'art (CINOA), adopted 1987 and revised 1998.<sup>16</sup>

I will briefly turn to *French case law* and I have selected two very different precedents: a very old decision (1885), and a more recent decision (2001).

The 1885 decision<sup>17</sup> concerned the acquisition in France by the Baron Pichon of a silver vessel, a 'ciborium' used in the Spanish church of Burgos, a *res extra commercium* (object excluded from trade) in Spain which could therefore not be sold. One of the issues was whether the Baron was in good faith; the court had no difficulty in accepting his good faith. The fact that he paid a low price due to an alleged controversy about the ciborium's authenticity and that he had undertaken no research as to provenance were held to be of no significance regarding his good faith.

That decision was taken in 1885, and standards have evolved since then. The 2001 decision, regarding the purchase of a Franz Hals painting by an American art dealer, clearly shows this.<sup>18</sup> The dealer was convicted for having purchased at auction in 1989 the portrait of Pastor Adrianus Tegularius, painted by Franz Hals in the early seventeenth century, part of the famous French Schloss collection which was looted by the Nazis in 1943.

What is interesting from the good faith point of view is that the court refused to accept the dealer's plea of good faith. The court considered that a reputable and specialized dealer, such as he was, must perform a due diligence research on the provenance of the painting. In this case, although the catalogue of the auction at which he purchased the painting did not expressly raise any provenance issue, had he researched the catalogues of the previous sales the dealer would have found express references to the fact that this painting had been 'stolen by the Nazis.'

15 Editor's note: the official text of the Act can be found (in French, German or Italian) at the following link: [gases://www.ch.ch/jf/rs/c444\\_1.html](http://www.ch.ch/jf/rs/c444_1.html)

16 Consider also the UNESCO International Code of Ethics for Dealers in Cultural Property 1999.

17 *Due de Frias c. Baron Pichon*, Tribunal Civil de la Seine, 17 April, 1885, *Clunet* 1886, 599.

18 *Demartini c. Williams*, Tribunal de Grande Instance de Nanterre, 6 July, 2001 (unpublished decision). For a commentary on this decision, see L. Anglade 'The Portrait of Pastor Adrianus Tegularius by Franz Hals – A Landmark Criminal Decision on Looted Art is Finally Handed Down by French Court' 8 *Art Antiquity and Law* (2003) 77; T. Giovannini 'The Holocaust and Looted Art' 7 *Art Antiquity and Law* (2003) 263, 272–73; see also 6 *Art-Law Centre News*, March 2002, 15.

So, here again, one sees an evolution. In 1885, an amateur was not expected to carry out any research on the silver vessel that he acquired. By 2001, an art dealer was obliged to research the provenance of the painting he acquired in order for him to be considered in good faith.

This trend towards stricter standards is also apparent if one looks at international conventions. Good faith is mentioned in several conventions, including the ‘mother’ convention in the field, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. Its Article 7(b)(ii) states in very general terms that the good faith purchaser should be compensated when he is requested to return stolen or illegally exported cultural property.

This provision was given much more flesh in the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995 (‘UNIDROIT Convention’). Two articles of this Convention relate to good faith (Articles 4 and 6). It is worth restating the principle of the UNIDROIT Convention set forth in Article 3(1), that a stolen cultural object must be returned, whether or not the subsequent purchaser was in good faith. So we can note that, in this instance, the Convention has followed the common law principle. However, good faith (or due diligence, as it is called in the Convention) plays an important role in that the restitution of a stolen cultural object, or the return of an illegally exported object, implies payment of fair and reasonable compensation to the *bona fide* purchaser. Most importantly, due diligence is defined in Article 4(4) of the Convention, which lists the elements to be taken into account to determine whether due diligence was exercised: *inter alia*, the circumstances of the acquisition, the character of the parties, the price paid, the consultation of any reasonably accessible register or any other relevant information. On the issue of illicit export, Article 6(2) of the UNIDROIT Convention also lists the presence or absence of an export certificate as an important factor in determining whether or not the purchaser was in good faith.

So, here again we see the standards as to good faith becoming more strict. Of course, the 1995 UNIDROIT Convention is not universal law, but as of today, seventeen states have ratified it<sup>19</sup> – among them several European states, including Italy, Spain and Portugal. Although France is considering ratifying the Convention, most of the ‘art market’ countries, such as the United States, the United Kingdom, Japan, Germany and Switzerland are not currently considering ratification. Nevertheless, the Convention has an indirect influence on the standards adopted by the courts.<sup>20</sup>

19 As at 1 October 2008, there are twenty-nine States Parties.

20 See *L. v. Chambre d'accusation du canton de Genève*, ATF 123II 134. *La Semaine judiciaire* (1997) 529, 1 April 1997 (Switzerland) for an interesting example of such an interaction. In this decision the Swiss Supreme Court took the view that it should take international public interest and policy into consideration as expressed by the 1970 UNESCO and the 1995 UNIDROIT Conventions – though neither were at the time ratified by Switzerland. Editor's note: excerpts of this decision are translated and reproduced later in this Part.

### 3. The Legal Consequences of Good (or Bad) Faith

Good faith in the 1995 UNIDROIT Convention faith has an effect on the compensation due to the purchaser and not on his title. This results from Articles 4(1) and 6(1) of the Convention.

Now what is the effect of bad faith? Clearly, no state accepts that title can be transferred to a bad faith purchaser, which means that even in civil law countries, title to stolen property cannot be transferred to a bad faith purchaser and a claim against him will only be subject to the general statute of limitations rules. One point worth mentioning is that in certain states, such as Switzerland, claims against the bad faith purchaser are subject to no limitation at all. This is why, in the cases linked to art looted by the Nazis, the issue will be one of trying to determine that the present possessor is not in good faith because, in such a case, there will be no limitation on the dispossessed owner's claim.

### 4. The Burden of Proof

One important question regarding good faith is that of the burden of proof. In most jurisdictions where good faith is of legal significance, such good faith is presumed. For example, Article 2268 of the French Civil Code provides that good faith is always presumed and that the person who alleges bad faith must prove it. A similar principle can be found in several other civil law jurisdictions, such as Germany and Switzerland.

However, as was seen earlier, the standards for accepting good faith are becoming stricter and stricter, although courts are still insisting that good faith is presumed. Some commentators are starting to question, in fields such as stolen art, whether the presumption of good faith is really of any significance any more.<sup>21</sup> And recent Conventions and cases show that the presumption of good faith is losing ground.

Article 4(1) of the 1995 UNIDROIT Convention, after much debate at the different levels of the governmental experts and the diplomatic conference, takes the position, specifically with regard to stolen cultural objects, that the presumption of good faith is to be abandoned. The Convention states that it is the current possessor who must establish that he or she followed the due diligence standards set out in Article 4(4) of the Convention.

To conclude, one can say that, from a comparative law point of view, in those countries where good faith is a legal condition to the acquisition of title, the standards are becoming higher and that the 'sacrosanct' principle of the presumption of good faith is losing its ... sanctity.

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21 See P. Lalive 'La convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (du 24 juin 1995)', *Revue suisse de droit international et européen* (1997) 13, 38, 30.