

1997

LONDON'S GREY MARKET IN ART

D. Michael Roberts

Follow this and additional works at: [https://digitalcommons.nyls.edu/
journal_of_international_and_comparative_law](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law)



Part of the Law Commons

Recommended Citation

Roberts, D. Michael (1997) "LONDON'S GREY MARKET IN ART," *NYLS Journal of International and Comparative Law*. Vol. 17 : No. 1 , Article 6.

Available at: [https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol17/iss1/
6](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol17/iss1/6)

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

LONDON'S GREY MARKET IN ART

I. INTRODUCTION

In recent years, the theft and smuggling of art works and antiques have come to the forefront among lucrative criminal activities, surpassed only by drug trafficking and arms dealing.¹ The total value of stolen art alone has been estimated at \$4.5 to \$6 billion a year.² While some works are stolen in well planned, surreptitious raids, others are taken in broad daylight in surprisingly amateurish ventures.³ Many of the stolen objects are taken from public collections in institutions such as churches or museums,⁴ and a very large number are now coming from the countries of the former Eastern bloc.⁵ Not all thefts involve masterpieces of high value; quite often smaller items of modest worth are taken because of their easy portability.⁶ Since the chances of getting caught are relatively slight, and even if the thief is arrested, the penalties can be light, the risk is apparently well worth taking.⁷ Yet not all smuggled art is stolen from its original owners. In some cases, the art is smuggled out of the country of origin to contravene stringent export or cultural patrimony laws,⁸ such as those in

1. Alison Roberts, *London is Mecca for Art Smugglers*, TIMES (London), Feb. 24, 1993, at 1.

2. Alan Riding, *Art Theft Is Booming, Bringing an Effort to Respond*, N.Y. TIMES, Nov. 20, 1995, at C11.

3. See, e.g., Francine Cunningham, *The Art Take-Away*, SCOTSMAN, June 22, 1995, at 16. In less than a minute, a visitor to the Louvre stole a Turpin de Crisse landscape by cutting it from its frame. *Id.* Because he did not disturb the frame, no alarm sounded. *Id.* A French student convicted of stealing a Renoir in 1992 reported that it was easier than shoplifting a cassette from a music store. Dalya Alberge, *On Loan to the Connoisseurs of Crime*. . ., INDEPENDENT, Dec. 2, 1993, at 25.

4. Alberge, *supra* note 3. Thieves frequently prey upon these institutions because they can rarely implement stringent security measures for lack of funds. *Id.*

5. Cunningham, *supra* note 3.

6. Anthony Thorncroft, *The Fine Art of Stealing an Old Painting*, FIN. POST, Feb. 4, 1995, at 83. Of the 1.5 billion pounds worth of art and antiques stolen in Britain during 1993, most involved items with an individual value of less than a thousand pounds. *Id.* Smaller items such as jewelry or silver are also easier to get through customs undetected. Alberge, *supra* note 3.

7. Alberge, *supra* note 3.

8. See, e.g., *Kingdom of Spain v. Christie, Manson & Woods, Ltd.*, [1986] 1 W.L.R.

effect in art-rich nations like Greece and Italy, where it is virtually impossible to export works of art.⁹ Not surprisingly, the burgeoning trade in smuggled art has a fairly obvious motive: profit.¹⁰ As one writer wryly stated it, "Anything that finds buyers on the legitimate market will find them on illegitimate market."¹¹

Eventually, a large amount of these stolen works find their way to the galleries and auction blocks of dealers in the United Kingdom.¹² According to a 1993 Interpol report, London had become the center for selling and buying smuggled art.¹³ As many as a quarter of all London dealers have knowingly handled smuggled works of art or antiques.¹⁴ These dealers often escape prosecution because they can easily deny that they knew where an object came from, and rarely is there any proof that they knew.¹⁵ Among the reasons that have been adduced to explain London's high volume of trading stolen or illegally imported art works are Great Britain's lenient import and export laws governing works of art and antiques.¹⁶ Moreover, London's large number of renowned galleries and auction houses ensure many potential buyers so that the work will command the highest possible price.¹⁷ In addition, Great Britain has failed to ratify international accords designed to combat the illicit art trade. Also, the self-regulatory schemes adopted by art dealers have largely proved ineffective. As a result, purveyors of stolen or illegally exported antiques or works of art can easily get the items into Great Britain. They can then have it sold there for the highest price because of the brisk market.

1120 (Ch. Div'l Ct. 1986).

9. Roberts, *supra* note 1.

10. Thorncroft, *supra* note 6. Works of art have also become attractive to drug traffickers either for money-laundering purposes or for collateral on deals. A pair of Turner paintings belonging to the Tate Gallery and stolen in 1994 are believed by the museum's director to have been sold to the drug trade for use as collateral. *Id.* Similarly, "a couple of Colombian drug barons have recently been revealed as having a penchant for the Impressionists, while Caravaggio's *Nativity*, stolen in 1969 from Palermo, is widely rumoured to be on some Mafia godfather's walls." Alberge, *supra* note 3.

11. Alberge, *supra* note 3.

12. Roberts, *supra* note 1; Gervase Webb, *London "Centre of Looted Antiquities,"* EVENING STANDARD, Oct. 11, 1995, at 14; *London Is the World's Leading City for Looted Antiquities*, GUARDIAN, July 7, 1990, at 2.

13. Roberts, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* According to official figures, 2,400 art dealers operate in London. *Id.*

Finally, purchasers can leave the country with the items with a minimum of difficulty. This note outlines how the legal dimensions of each of the factors have helped make London the capital of the illicit art trade, as well as explores some possible means of lessening its severity.¹⁸

II. IMPORT REGULATIONS IN THE UNITED KINGDOM

Theoretically, rigorous import controls could help stem the flow of illicitly exported works of art by inserting an additional inspection step, which would make the discovery of suspicious items more likely.¹⁹ This measure would be even more effective if the laws of the source country were given effect should an illegally exported item be discovered.²⁰ In actual practice, however, few states expressly regulate the import of cultural property.²¹ They may be more or less compelled to advocate free flow of goods by virtue of their trade agreements or economic policies.²² Furthermore, nations that view market forces as benefitting them naturally tend to avoid imposing market controls.²³ Finally, the export laws of another country are unlikely to be enforced outside its borders.²⁴

18. 3 LYNDEL V. PROTT & P. J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* 561 (1989). By illicit art trade, I am following the definition set forth by Prott and O'Keefe:

An object being illicitly trafficked . . . is one in respect of which some offence has been committed: such an offence is defined by the laws of the country of origin and may include clandestine excavation, theft, breach of inalienability of rights of preemption, failure to comply with trading regulations or violation of export control.

Id. Illicit trade is to be contrasted with "legitimate trade," which "includes any sale or other passing of ownership by an owner which is in accordance with the law within the State where the owner holds the object." *Id.* at 560.

For an evaluation of recent scholarship in this area see John Henry Merryman, *Book Review*, 85 AM. J. INT'L L. 737, 737-42 (1991) (reviewing *THE ETHICS OF CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* (Phyllis Mauch Messenger ed., 1989); JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* (1989); and LYNDEL V. PROTT & P. J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* (1989)). Carmina M. Diaz, *Art Law Research: An Introduction*, 86 LAW LIBR. J. 335, 335-47 (1994). Diaz's article serves as a useful research tool. Another scholarly study in this area is Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982).

19. PROTT & O'KEEFE, *supra* note 18, at 576.

20. *Id.*

21. *Id.*

22. *Id.* at 584.

23. *Id.* at 576. France and Austria exemplify this tendency. *Id.*

24. *See infra* Part II C. Courts have relied upon this principle of international law in

A. *Laws Regulating Imported Goods*

The United Kingdom falls into the category of nations perceiving themselves to be favored by market forces.²⁵ In general, the importation of goods into the United Kingdom is governed by orders promulgated by the Board of Trade, which is granted that authority under the Import, Export and Customs Powers (Defence) Act of 1939.²⁶ The Import of Goods (Control) Order requires all imported goods to have a license; however, the Department of Trade and Industry issues an "Open General Import Licence," or GIL, allowing import of all goods except those coming from specifically excluded sources.²⁷ At present, the order excludes no cultural property.²⁸

B. *Import Taxes*

The United Kingdom currently does not impose a value added tax (VAT) on the import of art works.²⁹ The art market has supported the exemption of art works from the VAT, out of fear that imposition of the tax would drive art buyers toward countries not subject to EEC directives, such as Switzerland or the United States.³⁰ This lack of encumbrance creates a freer flow of art, legitimate or otherwise, into the London market.

C. *U.K. Approach to Import of Illegally Exported Items*

Theoretically, when a country makes a claim to an object exported in contravention of its laws, the inquiry should balance the interests of the country of origin against those of a possibly innocent purchaser.³¹ The

refusing to recognize another country's claims that an art work was illegally exported, absent a treaty to the contrary. *See, e.g., Jeanneret v. Vichey*, 693 F.2d 259, (2d Cir. 1982) (American court's refusal to lend validity to Italian export law).

25. PROTTE & O'KEEFE, *supra* note 18, at 576.

26. Import, Export and Customs Powers (Defence) Act, 1939, 2 & 3 Geo. 6, ch. 69, § 1(1) (Eng.).

27. PROTTE & O'KEEFE, *supra* note 18, at 579.

28. *Id.*

29. *Id.* at 594. Nor is a VAT imposed upon the full value of the market sale of a work, but the dealer's profit margin and the auctioneer's commission are subject to VAT. *Id.*

30. *Id.*

31. Susan M. Nott, *Title to Illegally Exported Items of Historic or Artistic Worth*, 33 INT'L & COMP. L.Q. 203, 203 (1984).

country of origin might well expect the return of such an object.³² In practice, however, British courts will not enforce foreign legislation authorizing the confiscation of property.³³ Thus, in the hypothetical case where a foreign country's export law prescribes confiscation of the goods for violation of the law, the country would not be able to enforce confiscation in a British court should the goods arrive in Great Britain.³⁴

In *Attorney General of New Zealand v. Ortiz*, the plaintiff attempted to circumvent this rule by arguing that title had already vested in New Zealand by virtue of the statute, so the British suit was seeking enforcement of title, not enforcement of the statute's confiscation provision.³⁵ The case involved a Maori carving exported from New Zealand without the proper documents, in contravention of New Zealand's Historic Articles Act 1962.³⁶ The carving was sold to one Entwistle, who in turn sold it to Ortiz.³⁷ When Ortiz consigned the carving to Sotheby's in London for sale, the New Zealand government filed suit to recover the object.³⁸

New Zealand's argument that it was entitled to take the carving did not succeed.³⁹ The court followed a narrow statutory interpretation in deciding the matter, and ruled that under the wording of the Historic Articles Act, forfeiture was not automatic.⁴⁰ The court ruled that title could not have passed to New Zealand unless the government had actually reduced the object to possession at some point, which had not occurred.⁴¹ The House of Lords never had to answer whether they would enforce New Zealand's claim to title arising because of this illegal export, because they found that the construction of this particular statute could not grant title to New Zealand under these circumstances. Accordingly, *Ortiz* does not settle the question whether British courts will recognize a foreign government's claim to title to an object when that claim arises from an illegal export.⁴²

32. *Id.*

33. *In re Claim by Helbert Wagg & Co. Ltd.* [1956] Ch. 323, 345-46 (Eng.).

34. *Id.*

35. *Attorney Gen. of New Zealand v. Ortiz*, [1983] 2 All E.R. 93, 95 (H.L.) (appeal taken from Eng.).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 100.

40. *Id.*

41. *Id.*

42. *Id.*

D. EEC Approach to Illegally Exported Items

The Council of European Communities promulgated a directive in 1993 to address the problem of illicitly exported cultural items.⁴³ The directive became effective in the United Kingdom on March 2, 1994.⁴⁴ The directive dictates that when a member nation discovers that a cultural object unlawfully removed from its territory is located within the territory of another member nation, the aggrieved nation has one year to demand its return.⁴⁵ A competent court in the nation where the object has been located, upon determination of the requisite criteria, orders its return to the nation of origin.⁴⁶ The same court can also order compensation to the possessor, if found to be warranted.⁴⁷ While the directive does address the problem of unlawfully removed art and antiques, it only offers a limited solution. Its provisions only apply to members of the European Community, so it provides no remedy for a non-member state to recover an illegally removed item.

III. EXPORT REGULATIONS IN THE UNITED KINGDOM

The two principal methods a nation may use to limit export of art works and antiques are prohibition and export licensing.⁴⁸ As the name suggests, export prohibition stops the outward flow of art works altogether.⁴⁹ The criteria most countries use to dictate requirements for an export license are the age and value of the object.⁵⁰ Even if the country has little wish to curtail exports of art and antiques, an export licensing system can still provide a useful record of exactly what is leaving the

43. Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, 1993 O.J. (L 74) 74-79 [hereinafter Directive].

44. *Id.* annex at 78-79.

45. *Id.* art. 7 (1) at 76.

46. *Id.* art. 8.

47. *Id.* art. 9.

48. PROTTE & O'KEEFE, *supra* note 18, at 481.

49. *Id.* No export prohibitions on works of art are currently in force in the United Kingdom. *Id.* at 482. Export prohibitions have been considered twice in the past, in 1913 and in 1952, but were both times rejected on the belief that compiling and updating the lists of objects to be excluded would prove unworkable. *Id.* Export prohibitions today are usually found in nations such as Nigeria and Iraq that have witnessed a grave depletion of their cultural heritage. *Id.* at 481.

50. *Id.* at 479.

country.⁵¹ Such a record can provide valuable information to scholars and curators.⁵² Export taxes can also be imposed to regulate the rate of export.⁵³ Critics of export controls claim that the delay and expense they cause leads to corruption by encouraging ways to circumvent the system.⁵⁴

A. *British Export Licensing*

In the United Kingdom, no export regulations apply to an object that has been in the country for less than fifty years.⁵⁵ A license is required to export antiques and collectors' items, including works of art, that have been in the United Kingdom for more than fifty years.⁵⁶ An "Open General Licence" suffices to allow the export of antiques valued at less than the statutory value.⁵⁷

If a potential exporter applies for a specific license, the object becomes subject to the state's right of pre-emption.⁵⁸ Once the exporter requests a specific license, it is routed to expert art advisers.⁵⁹ If an adviser believes the object is culturally significant, the application is then referred to the Reviewing Committee on the Export of Works of Art.⁶⁰ The Committee then evaluates the work using the guidelines set forth in the "Waverly Criteria."⁶¹ Should the object be found significant to the British cultural

51. *Id.* at 484.

52. *Id.*

53. *Id.* at 481. Most export tax systems operate in conjunction with a licensing system. *Id.*

54. Guy Stair Sainty, *What Makes Italy a Major Black Market in Art*, N.Y. TIMES, Mar. 16, 1990, at A34. One New York art dealer has made this argument with respect to Italy's export controls applying to art works. *Id.*

55. PROTT & O'KEEFE, *supra* note 18, at 496. The principal rationale for this exemption is to stimulate the market: dealers would be less likely to import an object for resale if such a resale could only be made to a national. *Id.*

56. Export of Goods (Control) Order 1985, *reprinted in* PROTT & O'KEEFE, *supra* note 18, at 485.

57. *Id.*

58. *Id.* at 502.

59. *Id.* at 484.

60. *Id.*

61. *Id.* The Waverly criteria consist of three questions:

- (i) Is the object so closely connected with our history and national life that its departure would be a misfortune?
- (ii) Is it of outstanding aesthetic importance?

heritage, the state is given a period of time⁶² to purchase the item itself.⁶³ If the government fails to exercise this option, the export license is granted.⁶⁴

This pre-emptive right of purchase can be effective only if the state has access to adequate funds to exercise it.⁶⁵ Toward that end, Parliament passed legislation to provide for such purchases.⁶⁶ This mechanism prevented the export of a famous Canova sculpture to the United States and allowed two leading British museums to purchase the sculpture together.⁶⁷

The outcome of this particular application of the Export Control Order, as well as its structure itself, suggests it is narrowly tailored to meet a very specific purpose: to oversee, and when necessary retain, objects of

(iii) Is it of outstanding significance for the study of some particular branch of art, learning or history?

Reprinted in PROTT & O'KEEFE, *supra* note 18, at 484.

62. Usually, the government must purchase the object within six months. PROTT & O'KEEFE, *supra* note 18, at 485. However, courts have upheld the Committee's authority to defer the decision regarding "outstanding objects." See, e.g., *The Queen v. Secretary of State for National Heritage, ex parte J. Paul Getty Trust* (C.A. (Civil Division), Oct. 27, 1994) (LEXIS, Intlaw library, Engcas file) (upholding Secretary's decision to extend the review period to eighteen months).

63. PROTT & O'KEEFE, *supra* note 18, at 502.

64. *Id.*

65. *Id.*

66. National Memorial Heritage Act, 1980 (Eng.). The Act is administered by a board of Trustees. *Id.* § 1.1. As far as purchasing art or antiques is concerned, the Trustees are empowered to "make grants and loans out of the Fund to eligible recipients for the purpose of assisting them to acquire, maintain or preserve . . . (b) any object which in their opinion is of outstanding historic, artistic or scientific interest" or "(c) any collection or group of objects, being a collection or group which taken as a whole is in their opinion of outstanding historic, artistic or scientific interest." *Id.* § 3 (1).

67. Rosanna de Lisle, *The Sunday Statue*, INDEPENDENT, Sept. 3, 1995, at 24. The sculpture, the *Three Graces*, was originally commissioned by the sixth Duke of Bedford in 1814, and housed in a specially-built temple on the grounds of his estate, Woburn Abbey. *Id.* The statue went on the market and was purchased in 1990 for 7.6 million pounds by the Getty Museum in California. Wendy Robertson, *Grace, Beauty, and Joy Move Into New Home*, SCOTSMAN, Aug. 9, 1995, at 3. In May 1990, an export license was refused for the statue. Carolyn Shelbourn, *Saving Graces—The Protection of the National Heritage*, NEW L.J., at 772, 772 (1990). A national campaign was mounted to purchase the statue involving the Victoria and Albert Museum, the National Gallery of Scotland, and private contributors such as Baron Thyssen and J. Paul Getty II (!), which ultimately succeeded in raising the necessary funds to purchase the statue. Robertson, *supra* note 1. The statue went on display at the National Gallery of Scotland in August, 1995, where it will remain until 1999. *Id.* Thereafter, it will rotate every seven years between the National Gallery and the Victoria and Albert. *Id.*

significance to British cultural patrimony.⁶⁸ As it applies solely to objects that have already been in the United Kingdom for fifty years, it cannot—nor is it designed to—detect items that were illegally removed from abroad.⁶⁹

Moreover, Britain's past experiences with a broadly-inclusive set of export guidelines suggest that the United Kingdom would hesitate before increasing the number of objects that would require an export license.⁷⁰ The present legislation is in fact a response to wide-reaching requirements that proved cumbersome to implement.⁷¹ Under the former system, all antiques and works of art over seventy-five years old and valued at more than 100 pounds were subject to export control.⁷² In 1950 alone, this requirement yielded a staggering 16,500 applications, of which only thirty-two were actually denied export.⁷³ The Waverly Committee undertook study of the system in 1952, and recommended that export control be limited to narrowly defined categories of highly important objects, and these recommendations were in turn incorporated into the present scheme.⁷⁴ Thus in 1950, when the art market presumably was considerably less active than it is now, the export system had to be reformed to make it more streamlined.⁷⁵ In light of these circumstances, the British government would probably now approach any expansion of the requirements for export licenses with caution.

B. EEC Export Regulations

The European Union deregulated its border controls in 1992.⁷⁶ Even prior to that date, some of the member states—especially art-rich

68. Nott, *supra* note 31.

69. Which is not to say that it does nothing to curb the illicit movement in art: take a hypothetical case where an important work that has been in the United Kingdom for more than 50 years is stolen. If an attempt were made to legally export the item, then it might be under the enforcement of the present export order.

70. PROTT & O'KEEFE, *supra* note 18, at 480.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See Clyde Haberman, *Italy Fears That Its Art Treasures Will Scatter in a Unified Europe*, N.Y. TIMES, Mar. 5, 1990, at A1; See also *Italy's Art Thefts Could Be Boosted by Europe's Single Market*, Reuters, Sept. 26, 1989, available in LEXIS, Nexis Library, Reuters File.

Mediterranean nations—expressed worry that opening the borders within the EEC would facilitate illicit movement of cultural objects.⁷⁷ There are suggestions that individual European nations have been slow to convert the EEC resolutions into domestic legislation.⁷⁸ In any case, it is probably too soon to predict the effects of the EEC regulations.

C. Export Taxes

There is no export tax on works of art currently in force in the United Kingdom.⁷⁹ Historically, adoption of such tariffs has been rejected.⁸⁰ Moreover, the United Kingdom's membership in the European Community adds a complicating factor should such a tax be contemplated now, because the European Court of Justice has ruled that export charges imposed on cultural property between member states violates article 16 of the Treaty of Rome.⁸¹ The Court ruled that an export tariff "hampers export trade in the goods concerned."⁸² Consequently, while it is not impossible that the United Kingdom might impose an export tax, it would almost certainly have to tailor the legislation to exempt other EC members to avoid violating this ruling. The potential complications of such a two-tiered system make it seem unlikely that an export tax on art works and antiques would be imposed now.

D. Conclusions on Export Regulation

In sum, the United Kingdom's restrictions on the export of works of art are aimed at protecting its own cultural heritage rather than curtailing the illicit trade in art.⁸³ Moreover, given the past experiences with a broad

77. Haberman, *supra* note 76.

78. Hugh Muir, *Plenty of Options for Gang Who Took Titian*, DAILY TELEGRAPH, Jan. 4, 1995, at 4.

79. PROTT & O'KEEFE, *supra* note 18, at 508.

80. *Id.* at 507. An export tax was first proposed with no success by George V in 1921 to counter what he perceived as the depletion of Britain's cultural heritage. *Id.* The idea was also considered in 1952, but rejected on the grounds that it would be too difficult to apply: it would be hard to fashion a working definition which would cover all possible items to which the tax would apply, while compiling lists of specific items to be taxed (should they ever be exported) would prove time consuming and cumbersome. *Id.*

81. Case 7/68, *Commission v. Republic of Italy*, Common Mkt. Rep. (CCH) ¶ 8057 (1969).

82. *Id.*

83. PROTT & O'KEEFE, *supra* note 18, at 502.

export licensing system, it appears unlikely that requirements will be expanded any time soon.⁸⁴

IV. THE UNITED KINGDOM AND INTERNATIONAL ACCORDS

Commentators have stressed that the illicit trade in art and antiques is an international phenomenon and accordingly can best be dealt with by international accords.⁸⁵ While such accords have been proposed and ratified by a number of countries, Great Britain has thus far remained cool toward multinational agreements.

A. UNESCO

The first international attempt to deal with the illicit art trade took place a quarter century ago.⁸⁶ In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property issued a set of directives as a solution on an international scale to the problem of illegitimate art sales.⁸⁷ The Convention called upon signatory nations to compile inventories of their cultural property⁸⁸ and to implement systems of export certification so that all works leaving a country would be documented.⁸⁹ Import controls should be established,⁹⁰ as well as channels to return works discovered to have been exported illegally.⁹¹ Nations could also be asked to cooperate in emergency situations brought on by excessive pillaging of a given country's artistic heritage.⁹²

The Convention, however, has been criticized for its narrow scope and its failure to dictate a means of dispute resolution.⁹³ It protects only

84. *Id.*

85. See, e.g., Lisa Marie Raffanelli, Note, *A Comparative Study of Cultural Property Import Regulation: The United States, the United Kingdom and Canada*, 15 COLUM.-VLA J.L. & ARTS 543, 564 (1991).

86. *Id.* at 546.

87. *Id.*

88. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 5, 823 U.N.T.S. 231, 238.

89. *Id.* art. 6, 823 U.N.T.S. at 240.

90. *Id.* art. 2, 823 U.N.T.S. at 236.

91. *Id.* art. 7, 823 U.N.T.S. at 240.

92. *Id.* art. 9, 823 U.N.T.S. at 242.

93. Ann P. Prunty, Note, *Toward Establishing an International Tribunal for the*

property taken from public spaces,⁹⁴ and its prohibition on the acquisition of illicitly imported works applies only to museums. Finally, it is not clear through which channels a wronged party's property would be restored.⁹⁵ Its weaknesses notwithstanding, the Convention at least offers a better situation than existed before its formulation, and sixty-five countries, including the US and Canada, have ratified the accord.⁹⁶

Nonetheless, the United Kingdom has refused to sign on to the Convention.⁹⁷ Britain objected to the accord on the grounds that the import regulations it proposed would not be workable.⁹⁸ However, the British opposition more likely reflected the art market's fear that adoption of the Convention would interfere unduly with the course of business and possibly drive its clients elsewhere.⁹⁹

B. UNIDROIT

Partly in response to the lack of adoption of the UNESCO Convention on a global scale, the International Institute for the Unification of Private Law, or UNIDROIT, has drafted a convention to protect cultural property.¹⁰⁰ Drafting of the UNIDROIT Convention began in 1988,¹⁰¹ and the latest meeting on this convention took place June 5-26, 1995.¹⁰²

The UNIDROIT Convention differs principally from the UNESCO Convention in that it would create litigable rights on the part of private individuals seeking return of stolen or illegally exported cultural property.¹⁰³ The convention would provide for the restitution of stolen or

Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles, 72 GEO. L.J. 1155, 1160 (1984).

94. *Id.* at 1160

95. *Id.* at 1166.

96. Muir, *supra* note 78.

97. *Id.*

98. PROTT & O'KEEFE, *supra* note 18, at 580.

99. *Id.*

100. RALPH E. LERNER & JUDITH BRESLER, ART LAW 158 (Supp. 1992). UNIDROIT is an international organization created for the purpose of harmonizing the laws of different nations. *Id.* It is based in Rome and currently has a membership of fifty nations. *Id.*

101. Barbara Hoffman, *How UNIDROIT Protects Cultural Property*, N.Y.L.J., Mar. 3, 1995, at 5.

102. *Smuggled Art Conference Aims to Harmonize Law*, Agence France Presse, May 31, 1995, available in LEXIS, Nexis Library, AFP File.

103. LERNER & BRESLER, *supra* note 100, at 159.

illegally exported items, while still preserving some rights of good faith purchasers who procured the item not knowing its illicit status.¹⁰⁴

Upon discovering the whereabouts of such an object, its owner would be able to sue for its return in the jurisdiction where it has been located, provided both the country of origin and the country of present location were signatories to the Convention.¹⁰⁵ The court could enforce return of the object, regardless of whether the present possessor obtained the object in good faith.¹⁰⁶

A good faith purchaser is given two defenses in the Convention: a statute of limitations and due diligence.¹⁰⁷ The draft of the Convention states that the owner must demand the return of the object within one or three years of discovering its whereabouts. Moreover, in no case could an owner make a demand for return of an object after thirty or fifty years of its theft or illegal exportation.¹⁰⁸ Museums would have a seventy-five year statute of limitations.¹⁰⁹ Even if the possessor were required to return the object, he or she could be eligible for compensation upon a showing that he or she made a serious effort to discover the origin of the object.¹¹⁰ These provisions were added to make art-importing nations more likely to adopt the convention.¹¹¹

At the end of the last meeting on the UNIDROIT Convention, almost eighty nations adopted the Convention.¹¹² The United Kingdom was not among them.¹¹³ In the month preceding the meeting, criticism of the project had appeared in the British press.¹¹⁴ Among the reasons given for opposing the Convention were its susceptibility to fraudulent claims: a possessor could lose an object any time he or she could not adequately

104. Hoffman, *supra* note 101.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* Sales of art would necessarily drop if buyers assumed the risk of having to return objects they had no idea were stolen, with no reimbursement of their purchase price. *Id.*

112. Olivier Baube, *Nearly 80 Nations Sign Accord Purging Art Market*, Agence France Presse, June 24, 1995, available in LEXIS, Nexis Library, AFP File.

113. *Id.*

114. Georgina Adam, *They're Out to Steal Our Stolen Art*, DAILY TELEGRAPH, May 22, 1995, at 16.

document its provenance, should a claim be initiated against him or her.¹¹⁵ Other detractors pointed out that the Convention would require countries to enforce other countries export laws.¹¹⁶ Finally, opposition also came from the art world: one dealer declared it would render the entire market "unworkable."¹¹⁷ Despite the noble aims of UNIDROIT, the United Kingdom seems unlikely to accept it for the foreseeable future.¹¹⁸

V. STEPS TO REDUCE THE PROBLEM

Before considering any potential solutions to the problem, it is first necessary to acknowledge that the United Kingdom has historically been conservative with respect to imposing regulations on the art and antiques marketing industry.¹¹⁹ Principal among the reasons for this resistance is the fear that buyers and sellers will be driven elsewhere.¹²⁰ In spite of the market's resistance to control, some important measures have been implemented that address the problem of the illicit trade in art and antiques: the abolition of market overt, the adoption of a code of practice by dealers, and the foundation of the Art Loss Register.

A. Abolition of Market Overt

In 1994, the rule of Market Overt (or Overt) was abolished in English law.¹²¹ The rule was effectively an exception to the principle that

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See, e.g., Muir, *supra* note 78.

120. *Id.*

121. Sean O'Neill, *Law to Close Open Market in Stolen Art*, DAILY TELEGRAPH, Aug. 3, 1994, at 6.

The rule of market overt developed in the Middle Ages, at a time when most goods were bought and sold at the local market and neither goods nor people were normally mobile. If goods were stolen or mislaid they were likely to turn up in the market because there were no other means of disposing of them, and it seemed a reasonable duty to place upon the owner of the goods that he should search for them in the market, and a reasonable protection for buyers that one who bought in good faith from that market should get good title. The rule of market overt applies these days mostly to a few ancient traditional street markets and in modern conditions, where the population is no longer dependent upon local markets for commerce and when goods stolen at lunchtime may be several hundred miles away by sundown, the original purpose of the rule is

a thief cannot pass good title to an object.¹²² Provided that the object was sold during daylight hours in certain markets recognized by charter or that have "existed since time immemorial," a buyer could automatically take good title regardless of where the title of the object vested before the sale.¹²³ Said Lord Renton, who introduced the legislation to repeal the rule, "The market overt rule is effectively a defense for anyone who is sued for possession of stolen goods—he can plead that they were sold in the hours of daylight at one of these ancient markets. It has become a thieves' charter, and this law will abolish it."¹²⁴

B. Attempts at Self-Regulation

In response to the growing problem of illicitly traded art, several notable fixtures of the London art market have promulgated a voluntary code of ethics entitled "Code of Practice for the Control of International Trading in Works of Art."¹²⁵ The agreement took effect on April 1, 1984,

obsolete and the only purpose the rule now serves is that of assisting thieves in the disposition of stolen goods and preventing the owner from recovering them.

Sale of Goods Act, note (amended 1994) (Eng.).

122. See Sale of Goods Act, note (amended 1994) (Eng.).

123. O'Neill, *supra* note 121. The old rule was codified in the 1979 Sale of Goods Act: "Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." Sale of Goods Act § 1 (1979) (Eng.). This statute was in turn derived from the Sale of Goods Act, 56 & 57 Vict., ch. 71, § 22(1) (1893) (Eng.). Sale of Goods Act, annotation (1979) (Eng.). For cases construing the market overt rule see *The Queen v. Wheeler*, 92 Crim. App. 279 (1991).

124. Quoted in O'Neill, *supra* note 121. The legislation proposed by Lord Renton became the 1994 amendment of the Sale of Goods Act, and took effect Jan. 3, 1995.

125. The code provides the following:

1. In view of the world-wide concern expressed over the traffic in stolen antiques and works of art and the illegal export of such objects, the U.K. fine art and antiques trade wishes to codify its standard practice as follows:

2. Members of the U.K. fine art and antiques trade undertake, to the best of their ability, not to import, export or transfer the ownership of such objects where they have reason to believe:

(a) The seller has not established good title to the object under the laws of the U.K., i.e. whether it has been stolen or otherwise illicitly handled or acquired.

(b) That an imported object has been acquired in or exported from its country of export in violation of that country's laws.

(c) That an imported object was acquired dishonestly or illegally from an official excavation site or monument or originated from an illegal,

and became binding upon its signatories, who included Christie's, Sotheby's, and a number of professional societies.¹²⁶ Provision 5 of the code limits its coverage to signatories, so its precepts would not affect dealers who choose not to subscribe.¹²⁷ Despite its apparently noble objectives, the Code has had, according to some critics, less than rousing success in meeting those objectives.¹²⁸ One major problem is that interpretation of the code falls upon the subscribers themselves.¹²⁹

A difficulty in this regard arose in the wake of Sotheby's offer to sell a number of ancient Greek vases in December of 1985.¹³⁰ The curator of Greco-Roman antiquities at the British Museum pointed out that all the vases legally excavated up through 1983 from the region where these objects originated had been catalogued.¹³¹ While the catalogue could not be presumed to be totally comprehensive, it did list over 6,000 legally excavated vases and it would be unlikely to contain a large number of omissions. Conspicuously missing from the catalogue were all the vases from the Sotheby's offering,¹³² a fact which leads to the logical conclusion that the vases could have been looted.

clandestine, or otherwise unofficial site.

3. Members also undertake not to exhibit, describe, attribute, appraise, or retain any object with the intention to promote or fail to prevent its illicit transfer or export.

4. Where a member of the U.K. fine art and antiques trade comes into the possession of an object that can be demonstrated beyond reasonable doubt to have been illegally exported from its country of export and the country of export seeks its return within a reasonable period, that member, if legally free to do so, will take responsible steps to cooperate in the return of that object to the country of export. Where the code has been breached unintentionally, satisfactory reimbursement should be agreed between the parties.

5. Violations of this code of practice will be rigorously investigated.

6. This code which is intended to apply to all objects usually traded in the fine art and antiques market has been subscribed by the following organizations. . . .

Reprinted in PROTTE & O'KEEFE, *supra* note 18, at 551-52.

126. PROTTE & O'KEEFE, *supra* note 18, at 552.

127. *Id.*

128. *Id.* at 554.

129. *Id.*

130. *The British Museum Has Warned the Auctioneers, Sotheby's, that Some of the Items at Its Antiquities Sale Next Week Have Been Illegally Excavated and Smuggled out of Italy*, OBSERVER, Dec. 1, 1985, at 3.

131. *Id.*

132. *Id.*

Selling items under these circumstances would therefore seem to be in contravention to Provision 2(c) of the Code of Practice, which proscribes dealers from importing, exporting, or selling items which they have "reasonable cause" to believe were looted from excavation sites.¹³³ One might expect a 6,000-item work of scholarship, not to mention the statement of an expert from the august British Museum, to constitute reasonable cause. Nonetheless, Sotheby's did not believe that it had reasonable cause to believe the vases were illicitly removed, and issued a public statement that as there was no evidence that any of the vases in the sale had come from a clandestine site, Sotheby's would proceed with the sale.¹³⁴ True to their statement, Sotheby's went through with the sale.¹³⁵ While Sotheby's did at least claim to be complying with the terms of the Code of Practice, they appear to have reconstrued its "reasonable cause to believe" requirement: "As can be seen from Sotheby's statement, it seems that the auction house would have required clear evidence that the vases had been looted, and would not regard strong evidence that they could not have been legally excavated as requiring them to refrain from handling the goods."¹³⁶

Kingdom of Spain v. Christie's illustrates the ineffectiveness of this self-monitoring system once a court of law was requested to apply the code.¹³⁷ Spain attempted to raise the provisions of the Code in support of its efforts to stop Christie's sale of a Goya painting, *La Marquesa de Santa Cruz*, alleging that Christie's had violated provision 2(b) of the Code of

133. See *supra* note 125.

134. *Sotheby's Still Intends to Go Ahead with Its Auction in Spite of Numerous Warnings that Several Items Were Excavated Illegally and Smuggled out of Italy*, OBSERVER, Dec. 8, 1995, at 3.

135. PROTTE & O'KEEFE, *supra* note 18, at 553.

136. *Id.* The situation was repeated in 1991, when the Greek government got a 24-hour injunction to keep Sotheby's from selling 42 Cycladic marbles, which the Greeks believed had been looted. Jean Stead, *UK: Greek Injunction on Cycladic Marbles Sale at Sotheby's*, GUARDIAN, July 6, 1990, at 24. The court refused to extend the injunction, and in an out-of-court settlement, the Greek government was allowed to purchase three sculptures from the group before the sale in exchange for relinquishing its claim to the items. Godfrey Barker, *UK: Greeks Buy "Smuggled" Sculptures*, DAILY TELEGRAPH, July 11, 1990, at 19.

As of this writing, Sotheby's is contemplating limiting its sales of antiquities to items whose provenance is well documented, in response to the accusations that the auction house has sold smuggled items. Godfrey Barker, *UK: Sotheby's May Cut Antiquity Sales*, DAILY TELEGRAPH, Feb. 12, 1997, at 9.

137. *Kingdom of Spain v. Christie, Manson & Woods, Ltd.*, [1986] 1 W.L.R. 1120, 1125 (Ch. Div'l Ct. 1986).

Practice.¹³⁸ Provision 2(b) provides, in relevant part, that dealers shall not import, export, or sell any object which they have reasonable cause to believe "has been acquired in or exported from its country of export in violation of that country's laws."¹³⁹ In his opinion, Vice Chancellor Browne-Wilkinson admitted that he was initially inclined to agree: "At first sight I thought that under clause 2(b) of the Code, if it were established that the picture had been exported from Spain with the use of forged documents, Christie's, giving effect to that clause would not have been prepared to auction it."¹⁴⁰

Christie's, however, took the position that provision 2(b) "does not apply where the vendor has acquired the picture innocently (i.e., is not implicated in the illegal export)."¹⁴¹ Instead, Christie's argued that because it was not implicated in the illegal export, the transaction was actually covered under clause 4 of the Code.¹⁴² Under this provision, "satisfactory reimbursement should be agreed between the parties" when the dealer is legally unable to return the object (as when British law recognizes the title vested in a third party).¹⁴³ In any case, the point was moot as far as the court was concerned:

Whether Christie's are right on either of those views is not for this court to say. The fact is that Christie's are prepared to and will go ahead with the sale, even if the documents are found by the court to be forgeries. In any event the Code is not a document on which the Spanish government can directly rely; it is not a party to the code.¹⁴⁴

The principle laid down in *Kingdom of Spain v. Christie's* thus seems clear: the British courts will not give effect to Code of Practice for the Control of International Trading in Works of Art if a party is not a signatory to the agreement.¹⁴⁵

138. *Id.* at 1120.

139. *Id.* at 1124.

140. *Id.* at 1125.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

The validity of Christie's position has been questioned on several bases.¹⁴⁶ Clause 2(b) and clause 4 do not seem mutually exclusive, nor does clause 4 override clause 2(b).¹⁴⁷ Clause 4 simply constitutes a pledge to cooperate in the return of an illegally exported object to its country of origin if it is legally possible to do so:

There is no reason why this obligation should nullify that of Article 2(b), which is not to import, export or transfer ownership of such an object. Even where the auction house was not legally free to return the object to Spain . . . , it could still perfectly well refrain from conducting transactions with the object.¹⁴⁸

In this respect, the fact that Christie's contested the applicability of the apparently relevant provision and determined to go on with the sale recalls Sotheby's position on the Greek vases.¹⁴⁹ Given the broad latitude exercised by the parties to the Code, it seems that relatively few transactions would fall within its exclusions.¹⁵⁰

Several major deficiencies with the Code ultimately come to light. Even though possible violations of the Code are to be "rigorously investigated" in accordance with provision 5, the court's declaration in *Kingdom of Spain v. Christie's* has the effect of depriving the most aggrieved party of the power to initiate such an investigation because he or she is not party to the agreement.¹⁵¹ In addition, a position such as Christie's will necessarily go unchallenged, for the Code appoints no authority to interpret it.¹⁵² Finally, it is not clear what measures would be taken should a breach of the Code be declared, for it does not stipulate any penalties.¹⁵³

Ultimately, this means that the Code of Practice for the Control of International Trading in Works of Art has little real effect on reducing the illicit trade in art and antiques.¹⁵⁴ As two commentators have rather wryly expressed it, "All in all, the British government can hardly be surprised, in

146. PROTTE & O'KEEFE, *supra* note 18, at 553.

147. *Id.*

148. *Id.*

149. PROTTE & O'KEEFE, *supra* note 18, at 552.

150. *Id.* at 553-554.

151. *Id.* at 554.

152. *Id.* The British courts have plainly declined such a role. *Id.*

153. PROTTE & O'KEEFE, *supra* note 18, at 554.

154. *Id.*

the light of these events, if exporting countries fail to regard the adoption of the Code as a major substantive advance against illicit trade."¹⁵⁵

C. Art Loss Register

Established by a private London based company, the Art Loss Register is a computer database to flag stolen art works and antiques.¹⁵⁶ The Art Loss Register's databases currently contain over 70,000 images of stolen art and antiques, which are reviewed by dealers, collectors, and law enforcement officials throughout Europe and North America.¹⁵⁷ It provides an accurate method for dealers to make a good faith effort to verify that any works that they handle are not stolen goods.¹⁵⁸

The Art Loss Register is an effective tool as far as curbing the trafficking in stolen art is concerned, but it is less useful as a means of controlling illegal export, because it does not register illegally exported objects.¹⁵⁹ In this respect, it can only address one aspect of the illicit art trade.

VII. CONCLUSION

The foregoing analysis has pointed out certain regulatory schemes which the United Kingdom has avoided or continues to avoid, and other which it has accepted more readily. Obviously, any recommendation needs to be pragmatic and take into consideration that the most effective reforms may also meet the most resistance. A balancing of interests here chiefly involves an evaluation of which controls have worked and which controls are likely never to be accepted because of the interests of the marketing community.

Accordingly, the most effective regulation would center on the principles that the art market has already accepted. Such a body of rules already exists in the Code of Practice.¹⁶⁰ While the Code has been

155. *Id.*

156. Raffanelli, *supra* note 85, at 564.

157. Jessica Gorst-Williams, *Money-Go-Round: Crooks Get Thieving Down to a Fine Art*, DAILY TELEGRAPH, Mar. 4, 1995, at 8. Any stolen item valued at more than 250 pounds can be registered. *Id.* The registration fee is 20 pounds, but in some instances insurers will pay the registration fee. *Id.*

158. *See generally* Raffanelli, *supra* note 85, at 564.

159. *Id.*

160. PROTT & O'KEEFE, *supra* note 18, at 551-52.

criticized as ineffectual, and courts have refused to give it the force of law, this does not mean that its rules could not be codified as legislation. The Code of Practice could be enacted as part of a dealer registration program. As Prott and O'Keefe have suggested, dealer licensing schemes in general can be an effective means of reducing the illicit trade in art.¹⁶¹ The licenses of dealers who violate those ideals by selling illicitly traded works could be revoked, thereby preventing them from further engaging in such practices. The risk of losing a license would moreover deter many dealers from selling illicitly traded works. In this manner, the dealers would be firmly regulated in accordance with their own professional ideals. Eventually, London's reputation as a convenient marketplace for illicitly traded art works would diminish, and traffickers of such works would cease to attempt to sell them there.

D. Michael Roberts

161. *Id.* at 553, 568.

