INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART

IADAA NEWSLETTER APRIL 2021

IADAA steps up its challenge over the new European Union import licensing regulations as the risks to the European Art Market remain a real threat

The draft implementing provisions for the purposes of Regulation 2019/880 on the introduction and the import of cultural goods have been published: Now IADAA has asked for the Regulatory Scrutiny Board to intervene.

April 21 marked the end of the four-week consultation period during which online comments could be made on the draft implementing provisions for the purposes of Regulation 2019/880 on the introduction and the import of cultural goods.
In order to comment effectively, those making submissions had to assimilate 45 pages of very complex recitals and articles, a task deemed too daunting by some, while others found four weeks too short a time to complete the exercise alongside their other commitments.
However, thanks to international cooperation, CINOA, the principal international confederation of Art & Antique dealer associations, representing 5,000 art and antique dealers worldwide, managed to submit a position paper on the proposed implementation rules for the Import of Cultural Goods (ICG) into the EU regulation (EU) 2019/880 on the Have Your Say website on April 20, 2021.
From the 58 international comments that were submitted, the overwhelming majority were critical of the proposals for a variety of reasons. As an example, let me quote from CINOA's position paper: *"CINOA's preliminary analysis of the proposed detailed rules for implementing certain provisions of Import of Cultural Goods (ICG) Regulation (EU) 2019/880 of the European Parliament and of the Council on the introduction of the regulations reveals that the legality of some of the rules may be questionable. Many of the rules are unnecessary complicated, burdensome, and disproportionate for the majority of ordinary cultural goods that are traded legally and unworkable unless modified. The rules will limit the circulation of cultural property that has been legally owned for decades or even centuries, without succeeding in its prime objective of combatting terrorist financing."*
In other words, the future of the European art trade is at stake. That is why IADAA has proposed to ask the EU's independent Regulatory Scrutiny Board (RSB) for an opinion on Regulation 2019/880 and the proposed implementation rules.
The RSB has already ruled twice on the proposals: in 2017 it rejected them, returning them to the commission for improvement; following a few minor changes, the RSB looked at them again, reluctantly issuing a positive opinion, despite still having strong reservations. Since then, what the RSB 'approved' has been changed considerably – and not for the better. **If adopted as they are, the proposed implementing provisions would create an unworkable situation that could potentially destroy the vulnerable European art market**.
With all of the above in mind, it is time to ask the RSB, as an independent body, to assess the proposals once more and address the art market's serious concerns as expressed by representatives from ten countries. These concerns include the following questions:

- Are the proposals in line with international law?
- Are they proportionate, not unnecessarily complicated or burdensome for the many micro businesses that make up the art market?
- Are the proposals evidence based?
- Can they succeed in their prime objective: *of combatting terrorist financing with the trade in cultural goods?* – Terrorist financing for which the Commission still has not presented any serious evidence.

IADAA's submission on the Have your say website

Smuggling antiques isn't worth it

Coins Weekly: April 1: This is a more detailed analysis of the case involving the jailing of a Bulgarian lorry driver for smuggling ancient coins and antiquities in the UK, as reported in last month's newsletter.

Coins Weekly takes a close look at the items seized and concludes: "Assuming that the quality of the depicted objects is representative and that there weren't thousands of objects in the two black parcels, the mentioned value (£76,000) seems to be way too high. We asked experts from the trade for an appraisal. Our hypothesis was confirmed: the shown pieces are – if I may – junk."

The article continues with specific appraisals on what is presented, concluding that the lorry driver clearly had little idea about the nature and value of what he was carrying – the risk to return ratio simply doesn't make sense.

As *Coins Weekly* concludes, whatever the motivation and lack of judgment on the art of those behind this crime "it's right and important to cut off the supply".

Mummies on the move: Egypt holds grand parade to transfer antiquities to new museum

Sky News: April 3: The mummies of 18 kings and four queens – each transported in its own capsule – paraded through the streets of Cairo during a sumptuous ceremony as they made their way from the Egyptian Museum in Tahrir Square to their new home in the city's National Museum of Egyptian Civilization in Fustat.

The parade took place on April 3. The Daily Mail provides extensive background to the story as well as numerous pictures of the ceremony.

Strict penalties set for violators of Antiquities and Museums Law

Saudi Gazette: April 3: Saudi Arabia has announced severe new penalties for the looting and trafficking of its antiquities. Penalties of up to three years' imprisonment and fines of up to SR300,000 ($80,000) will be imposed on those caught violating the state's Antiquities, Museums and Architectural Heritage Law.

This article is slightly confusing because it also reports the following: "The regulation punishes anyone who unlawfully seizes an antiquity owned by the state with imprisonment for a period of at least 6 months and not exceeding 7 years, and a fine of at least SR50,000 and not exceeding SR500,000, or one of these two penalties."

It also sets out penalties for other offences, from damaging a heritage site to faking antiquities.

Ongoing cooperation portfolio between Egypt, JICA hits $ 2.7B

Egypt Today: April 6: As part of the continuing co-operation between Japan and Egypt, Japan will provide $450 million for supporting tourism and antiquities as part of a $2.8 billion package.

"According to the annual report published by the Ministry of International Cooperation in 2020 titled 'International Partnerships for Sustainable Development:
Writing the Future in a Changing Global Dynamic', the ministry secured development

financing agreements worth $9.8 billion during the year; $6.7 billion was secured for financing sovereign projects representing 67.7 percent of the portfolio total, and the private sector received a financing worth $3.2 billion holding 32.3 percent."

Turkey Fights for Return of a Work It Says Was Looted

New York Times: April 12: A New York Federal Civil court will finally hear the arguments surrounding Turkey's claim on the Guennol Stargazer, a marble idol carved around 6,000 years ago and put up for auction at Christie's in 2017.

In brief, Turkey claims that the carving was looted and illegally exported from Turkey after the ruling Ottoman Decree governing such exports came into force in 1906. It argued that the decision to proceed with the auction, which netted $14.4 million for the Stargazer, was an action of "total and unconscionable disregard of Turkey's ownership law".

As Christie's have argued before, however, Turkey was unable to substantiate its claim and had had ample opportunity to make an earlier claim for the item's return over a period of at least 25 years when information on the Stargazer had been in the public domain.

Christie's proceeded with the sale in good faith and in light of the failure of anyone to provide any evidence of the Stargazer's status being illicit.

As the NYT notes: "Turkey's 25-year delay in making its claim baited the trap for dealers, collectors and auction houses," defence lawyers said in court papers. "And set them up for huge losses when Turkey claimed the Idol only after it came up for sale at a major auction house."

According to the NYT, the court's decision may well hinge on evidence presented as to the item's likely geographic origin and what is being heralded by Turkey as "comprehensive scientific evidence" from Dr Neil Brodie, a senior research fellow in the School of Archaeology at the University of Oxford, that the carving originated in Turkey.

However, whether it was created in Turkey or not, this does not exclude the possibility that the carving was moved centuries ago as examples of Stargazers have been found in numerous other locations.

Without evidence to show that it was illegally exported, any court decision in favour of Turkey's claim is likely to be made on the basis of reversing the burden of proof.

Off-duty Italy art cops find looted statue in Belgian shop

Far left: the recovered statue as pictured in the current Independent article. Right: As pictured in the report by Economie in January.

The Independent: April 13: This is a curious article as it refers to exactly the same raid reported in the media in January (see January newsletter). However, the absence of any date makes it look as though this is a newly discovered incident. Several new reports have appeared in the media on the same basis – it is not clear why and why now.

IADAA understands that the Sablon gallery in which the statue was discovered is not a specialist in antiquities, so it is not clear what due diligence was undertaken by the dealer as they would not have been subject to the specific code of conduct promoted by IADAA.

Call for feedback on EU's cultural goods importation rules

Antiques Trade Gazette: April 13: This article highlights the consultation exercise ending on April 21 over the impending European Union import licensing regulations (see *above*). The complex nature and extensive detail involved have raised concerns that those who want to register their comments may be discouraged from doing so.

However, as this article notes, if the regulations are to avoid overwhelming customs and targeting inappropriate items, the legal terms within the legislation must be more clearly defined.

One of the risks of making compliance burdensome is the loss of EU business to non-EU markets like the UK and US where the law will not apply.

Ironically, the regulations may have the unintended consequence of diluting expertise in the pursuit of provenance when it comes to items being imported to the EU for sale at auction as the necessary research must take place before the items are delivered to the auction house specialists responsible for cataloguing them.

Why Have US MOUs Become so Restrictive Against Coin Collectors?

Coins Weekly: April 15: US lawyer Peter Tompa is also a collector and Executive Director of the Ancient Coin Collectors Guild. In what at first seems to be a highly specialised overview and analysis of legal and political activity in Washington associated with international cultural diplomacy, he actually sets out a ground-breaking critique of the entire backroom lobbying effort behind the United States' policy on cultural property and how that has been shaped to affect private property as well as the world of dealing and collecting.

Import restrictions policy, Memoranda of Understanding between the US and MENA states, alleged undue influence at the top of the decision-making process and questions of partiality within the Cultural Property Advisory Committee (CPAC), which so heavily influences Congress, are just the starting point for the troubling questions Tompa goes on to raise.

Whether it is the role of State Department Assistant Secretary Dina Powell, the influence of Goldman Sachs or the access of advocacy and lobby group the Antiquities Coalition in raising the game on import restrictions, Tompa explores how MoUs may be exploited for wider political and economic purposes: "According to Lynn Roche of the State Department's Near East Affairs Bureau, 'Bilateral Memoranda of Understanding, based on the 1970 UNESCO Convention of Cultural Property, are creating the foundation for long-term partnerships with governments in the NEA region."

Brought together as a whole, Tompa appears to argue that the legitimate interests of collectors and others engaged in the international market for ancient coins are being sacrificed on the altar of these wider economic and political interests.

"This information helps confirm why collectors, dealers, museums, and representatives of displaced religious and ethnic minorities are treated as outsiders to the process of imposing restrictions on cultural goods," he writes.

How far this backroom activity extends is not clear, nor whether due process is followed in its execution. However, as a lawyer Tompa pays close attention to detail and evidence in his appeal for collectors to remain engaged. It will be interesting to see whether the authorities or media explore his concerns further.

'A search for anything to sell in ancient walls': How Covid sparked a rush of antiquities looting in Turkey

The Independent: April 17: This article is an overview of how the relaxation in protecting vulnerable sites has led to increased looting in Turkey during the pandemic.

"Cultural assets are regularly supervised by authorities, cultural tourism enthusiasts and nature lovers. However, during the lockdown, officials and conscious citizens were away from the field," says Nezih Basgelen, the archaeologist and founder of *Archaeology and Art Publication*. "The pandemic left us without formal and informal observers. By the time incidents were reported to law enforcement and resolved, treasure hunters had already been working freely in the field for days without anyone's knowledge."

Basgelen believes that economic hardship is also a driver for looting here.

"In a time of economic difficulty, treasure hunting has become a glimmer of hope for some people. During the pandemic, ill-intentioned people wondered, 'could I find anything to sell in the ancient walls, castles or historical sites'. Some of those facing economic suffering dream of finding a treasure in the mountains and hills. Some people were spending the only money left in their pockets or selling their wife's jewellery to buy metal detectors", added Mr Basgelen.

He now wants a greater effort to be made to protect cultural heritage in situ, whether by using social media to monitor sites and spread alerts or through educating the wider population – both policies that would fit with the 1970 UNESCO Convention and the obligations of countries of origin under its Article 5.

The Regulation of Stolen Cultural Artifacts

The Regulatory Review: April 17: Whether considering items looted from Iraq or artefacts taken from Native American sites, the fight against looting and trafficking of cultural objects is "a patchwork of laws and international agreements," this article argues. Now *The Regulatory Review* sets out the challenges of tightening restrictions by asking experts what they think should happen.

While one expert advocates "increased criminal liability for traffickers and more resources devoted to prosecuting those who knowingly deal in looted objects", another advises that "Federal regulators should oversee the museum acquisition of antiquities".

Perhaps most controversial, however, is a suggestion by Miami School of Law lawyer Lindsey Lazopoulos Friedman. She is reported as considering how the McClain doctrine, whereby U.S. courts recognize foreign governments as owning undiscovered antiquities in their jurisdiction, may need to be reviewed.

"The McClain doctrine has strict requirements to confirm government ownership of cultural property such as proof of origin and that traffickers knew the artifacts belonged to the government, which are difficult to prove in Syria's case," the article explains. "Friedman suggests that relaxation of the McClain doctrine requirements and heightened enforcement of the NSPA against buyers may be more effective in stopping ISIS looting."

This appears to suggest waiving the need for governments to prove that items were looted and trafficked – in other words reversing the burden of proof to establish a policy of guilty until proven innocent among collectors, dealers and other holders of cultural property. How this accords with property rights under the fifth and fourteenth amendments of the US Constitution is not examined.

More realistic is one of the proposals put forward by cultural heritage lawyer William G Pearlstein, whose six suggested reforms include "adopting binding interpretive guidelines under the CPIA (Convention on Cultural Property Implementation Act)".

UK treasure items cleared for sale may soon face problems with export to the EU

The Art Newspaper: April 19: A different take on issues arising from the proposed EU import licensing regulations. Hetty Gleave, a cultural property lawyer who is also vice chair of the UK Treasure Valuation Committee, argues that items released by the Crown to finders and landowners for legitimate sale might still fall foul of the EU regulations because the associated documentation would not meet the demands of the import process.

When items are released by the Crown for sale in this way, the Treasure Secretariat issues the owner with a letter providing all the details of the items in question as an official provenance document for ownership. However, it does not include any statement that title has officially passed to the new owner.

Amateur metal detectorists could be impacted by the EU laws
Courtesy of the Portable Antiquities Scheme.

"The list of documents that the importer is required to produce in support only refers to 'declarations under oath', as a catch all, but does not include treasure items where provenance is clearly unknown and the only relevant documentation relating to ownership does not expressly confirm that title has passed from the Crown, even though it may be implied," Gleave says.

The EU regulation does not address treasure items specifically and, under the UK Treasure rules, apart from the Secretariat letter there is no other way for a finder/landowner who has acquired title from the Crown to demonstrate provenance of the object.

Depending on how the law is interpreted, that could cause serious problems for anyone legitimately trying to export a cleared treasure item for sale in the EU.

Fights over looted artifacts question museums' role as culture guardians

Mexico News Daily: April 20: This article is interesting because among all the arguments about colonialism and looting, it acknowledges that the arguments over repatriation are not straightforward: "The question of cultural restitution is undoubtedly a complex one. Where efforts seem to be underway, there is a significant backlash not just from the old, 'colonial' lobby — that is to say those who seek to influence policy in favour of retaining the power imbalance between former colonies and their colonizers — but also those who more straightforwardly argue that items end up in museum collections for a variety of reasons which do not include looting and theft, including legitimate gifting."

Most ironically, as the article notes, this issue centres on the Quetzalcóatl Headdress, often known as Montezuma's Headdress, "dubiously purported" to have been given to "Spanish conquistador Hernán Cortés as part of a collection of 158 items by Montezuma himself, the last Aztec emperor".

The article then goes on to explore more complex ethical and moral arguments, but does not attempt to resolve them neatly, instead acknowledging the further complexity of cross-cultural attitudes within an historical perspective.

"As these questions creep forth in the international consciousness," it concludes, "the future of museums increasingly comes into question. Whatever the fate of artifacts held by institutions for centuries, there is no doubt that museums must face, head-on, the colonial power imbalances in which their very existence is steeped."
A thoughtful piece, it demonstrates that repatriation is not the clear-cut issue that so many would have it.

Is there loot lurking in your collection? Find out – before someone else does
The Art Newspaper: April 22: General advice to museums and collectors that initially focuses on Nazi-looted art, this opinion piece sets out actions to take to audit collections and could equally apply to antiquities.

From icons to gold detectors: how Romania's heritage crime went underground
Balkan Insight: April 23: This article looks back at the development of heritage policy in Romania following the lawlessness of the post-Communist era when, for more than a decade, property was looted and sold abroad.
It goes on to detail how, after the introduction of heritage protection regulation in 2001, criminals turned their attention to metal detecting and archaeology before the 'watershed' prosecution of looters of the Decebalus Treasure, since when "looting has been at a lower level".
It provides useful statistics for crime in 2020: "According to Romanian police statistics, the authorities recovered 3,423 heritage items in 2020, of which 1,887 were old coins mostly found underground using metal detectors."
Perhaps most revealing is its conclusion about who is involved now: "In contrast to the highly organised groups that discovered the Dacian treasure, most diggers now are isolated individuals armed only with detectors and an exhaustive knowledge of the goods they are searching for – but without the cross-border links of their more professional predecessors. "Sometimes they don't even know what to do with what they find," said the police commissioner, who explains that the sale of stolen art and heritage has overwhelmingly moved online."

Art & Antiquities crossing borders. Whose law wins?
A fascinating seminar hosted by London law firm Maurice Turnor Gardner LLP on April 29 invited legal experts to consider issues arising out of the seizure and return to Iran of the Persepolis fragment in 2017 and 2018. Subscribers can read the background to the case in the *Art Newspaper*.
What the panellists were there chiefly to debate was conflicting jurisdictions and how to negotiate them. Although at least one of the panellists, Fionnula Rogers (Consultant lawyer in the art and cultural property group at Constantine Cannon and Chair of UK Blue Shield) argued that although the UK courts could have become involved, essentially the case initially appeared to put the Quebec civil code and New York State law on a collision course. Alexander Hermann, Assistant Director of the Institute of Art & Law, argued that under the former, clear title is likely to have passed to the Montreal Museum of Fine Arts in 1951, thence to AXA Fine Art in 2014 and so to the dealers Rupert Wace and Sam Fogg in 2016. If that law had prevailed, there would have been no case to answer. However, under New York State law, because there is no statute of limitations for theft, title would never have passed from Iran, hence the seizure by the Manhattan District Attorney's office when the relief was sent for display at TEFAF New York in 2017.
Setting any public disputes about who knew what and when in the process of the dealers consulting academics on the status and history of the relief fragment, and the fact that it had been publicly displayed in the museum and then at fairs in London and the Netherlands

over a period of decades, Rogers noted that Iran may have waited to act until it was sent to New York because the chances of a successful legal outcome would have been greater there than elsewhere.

She cited an example where the owner of another disputed piece won her case in London because the UK court had decided to apply French law rather than Iranian law. This was because the disputed piece had been sold in France, under the application of whose law in her case she had acquired title regardless of the original theft contrary to Iranian law.

In the end, the 2017/18 New York case never concluded as the dealers voluntarily ceded the relief fragment to Iran in the face of clear evidence of its being located in Persepolis after Iran's 1930 cultural protection law would have prevented its legal export without official sanction.

However, as the panellists also noted, just as interesting were the arguments over the levels of due diligence carried out by the dealers. While this had been extensive, the DA's office argued that it had been insufficient under New York standards, even though the transaction in which the dealers had acquired it had taken place elsewhere. Was it reasonable to have expected the dealers to have taken into account many or all other jurisdictions across the world in approaching due diligence at the time of buying it, Rogers asked. She suggested that although many countries have still not ratified the convention, UNIDROIT's standards here might well help.

Also of interest was the role of the Oriental Institute in Chicago, among whose digital files the relevant photos of the fragment in situ in Persepolis eventually surfaced.

Wace and Fogg had been criticised for not checking the archive properly. However, as Rogers pointed out, when the Oriental Archives reported the 2011 theft from the Canadian museum, they themselves did not make the connection between the relief fragment and what was in their archives even though they were in the process of digitising them at the time. And it was also noted that the time and effort required to source the images in the archive was not as simple as ad been assumed.

Rogers, Hermann and their co-panellist, Ed Powles, Partner and Head of Art & Heritage at Maurice Turnor Gardner, then looked at what the trade could do to avoid being caught up in these complex situations of conflicting laws. Hermann advised buyers and sellers to protect themselves with contractual clauses covering warranties of title and implied warranty of quiet possession. Rogers suggested adding a warranty of marketable title to cover situations where any challenges could delay or interfere with transactions, while all three agreed that contract terms should stipulate whether they applied to just the jurisdiction of the transaction or other jurisdictions as well. Title insurance would also be a good idea, advised Hermann.

Powles argued that the relief fragment case showed that title may not always be the robust concept that it sounds and that there is no universal concept of title.

Ultimately, moral and ethical considerations overtook any legal arguments in returning the relief fragment, they agreed, but along with the changing cultural heritage landscape globally, the case pointed to the need for clarity on what constitutes reasonable due diligence across jurisdictions.

Hermann stressed that increasing regulation, such as the European Union's new import licensing laws, would have prevented such a case arising today because it would not have been possible to import the relief into the EU (including the UK at the moment, which has enacted part of the law) without an export licence or clear evidence showing legal export from Iran.

Powles concluded that we have reached a point in time where different standards may start to apply as cultural heritage issues increasingly occupy stage centre in the political and legal sphere.

Rogers approved of UNESCO's recent pledge to work more closely with the market in search of solutions as a more constructive way forward.
The seminar was especially successful at showing in microcosm the frequent flashpoints between the market, countries of origin, academics and others as they argue over conflicting rights.