A Battle over the Chinese Cultural Treasure Lost Overseas ----to be decided by Private International Law?

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"Tiger Ying", a rare Chinese bronze tripod water vessel is becoming an overnight internet sensation in China this week, as Canterbury Auction Galleries in Kent, southeast England announces that it is put up for auction on 10 and 11 April at an estimated price of 120,000 to 200,000 British pounds. This has aroused anger and outrage across the Country, since "Tiger Ying" is believed to have been taken during the looting of Beijing's Old Summer Palace by the British and French forces in 1860 which reminds Chinese people of the bitter experience suffered in the Century of Humiliation when China was turned into the plaything of the western powers.

The Chinese government cannot keep silence in face of the surge of nationalism on the internet. On 28 March, China's State Administration of Cultural Heritage (SACH) said in a statement that it is looking into the auction, adding that it opposes and condemns the sale and purchase of the Chinese cultural objects illegally lost overseas and urges that the Auction Galleries to honour the spirit of the relevant international conventions and to respect Chinese people's feelings. The statement of the SACH reveals important information.

First of all, the Chinese government does not recognise the legality of the *status quo* of the Chinese cultural treasures looted or stolen and taken overseas; therefore, it reserves the right to recover them depending on the specific circumstance. As a matter of fact, the SACH have reiterated such position on a number of occasions.

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Second, the Chinese government will take corresponding measures that it deems necessary and proper after it has acquired detailed information of the cultural object in question, which may include, *inter alia*, delivering a diplomatic note, inter-governmental negotiation, law-enforcement cooperation, and litigation. For instance, in 2016, Yokohama International Auction, a Japanese company, cancelled plans to auction off a number of murals and Buddhist manuscripts from China's Tang Dynasty, at the request of the SACH. Another example, after negotiations of years between the Chinese and French government, 32 gold foils stolen from the Eastern Zhou tombs in China's northwest Gansu Province in the 1990s were returned from France's Guimet Museum to China in 2015.

Third, the Chinese government has realized the weakness of the existing international conventions in support of its argument for the return of Chinese cultural objects lost overseas; hence it requests the Auction Galleries to honour "the spirit of" the relevant conventions instead the conventions *per se*.

At present, there are two most relevant international conventions with regard to the restitution and return of cultural objects to their original nation: (1) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 Convention") and, (2) Convention on Stolen or Illegally Exported Cultural Objects ("the 1995 Convention"). In spite of their importance, their practical effects are rather limited. Being the conventions adopted in modern times, they are helpless for China to recover its cultural objects lost in distant history. In other words, they do not have retroactive effect. Moreover, notwithstanding the achievements made by the 1970 Convention, its flaws are fatal which have been fully revealed after the implementation for more than four decades. On the other hand, while the 1995 Convention presents a marked improvement over the 1970 Convention, it has been ratified by only 42 countries by April 2018, most of which are source nations. As long as major market nations refuse to ratify it, there is little hope that the 1995 Convention can fulfill its aim.

Under such a circumstance, private international law, rather than public international law, provides much needed help. The most noticeable and latest example is the case of a stolen 1,000-year-old Buddhist mummy, known as the statue of Zhanggong-zushi. The statute of Zhanggong-zushi was believed to be stolen from a local temple in Fujian, a southeast Province China in 1995 which has been eventually acquired by a Dutch collector, named Oscar van Overeem.

While the statue was on display at the Hungarian Natural History Museum in the spring of 2015, it was recognized as the statue of Zhanggong-zushi by Yangchun villagers from Fujian Province. Since then, the villagers started the retrieval process. After the Oscar van Overeem refused to return the statue, the Chinese villagers filed two separate civil suits against him to retrieve the statue, one in Amsterdam, one in Sanming, Fujian. Both the actions are pending before the courts up to now. Though it is too early to conclude which party would win the legal battle, there is, however, one aspect on which everybody agrees: private international law issues involved are crucial to the results.

Indeed, the transnational civil litigation for recovering cultural objects has aroused a series of important and complex private international law issues. As the case of the Statue of Zhanggong-zushi illustrates, private international law problems surfaced in such cases usually include, *inter alia*, the followings: (1) jurisdiction, (2) standing to sue, (3) classification, (4) applicable law, and (5) recognition and enforcement of foreign judgement.

(1) Jurisdiction. As the principle "*actor forum rei sequitur*" is widely recognized, it is self-evident that the District Court in Amsterdam has the jurisdiction over the lawsuit brought by the Chinese villagers, insofar as the defendant's domicile is located there. In contrast, the jurisdiction of the Intermediate People's Court of Sanming City, Fujian Province is not easily to be understood. Though the specific ground on which this People's Court decides to entertain the lawsuit filed by the local villagers is unclear, its jurisdiction has been entrenched by the fact that Oscar van Overeem, the Dutch defendant, has raised no objection to its jurisdiction and has responded to the action by submitting a written statement of defense. This kind of jurisdiction is called "construed jurisdiction" under Article 127 of the Civil Procedure Law of the PRC.

(2) Standing to sue. Whether a plaintiff has standing to sue is a preliminary issue that the judge has to consider. In the case of the Statue of Zhanggong-zushi, the local Villagers' Committee is the plaintiff both in the Chinese and Dutch litigation. Though it is undoubted that Chinese law recongnises the standing of a Villagers' Committee to sue, such entity established under the Chinese law is completely unknown to the Dutch judge. Hence, whether the Dutch judge would recognise the standing of a Chinese Villagers' Committee before a Dutch court is matter of

uncertainty.

(3) Classification. What is the nature of the Statue of Zhanggong-zushi? Property, or corpse? This is an important, yet difficult question especially for the Dutch judge. If the Statue is classified as corpse, the Dutch collector is not entitled to the ownership, as no one can own an identified corpse under the Dutch law. Therefore, the Statue should be returned to the local families or the descendants. Nonetheless, if classified as a property, it is possible for the Dutch collector to assert ownership either on *bona fide* acquisition or adverse possession.

(4) Applicable law. One of the most widely accepted and significant rules of private international law today is that, in determining property rights, a court applies the *lex rei sitae*. Though some commentators criticise the application of the principle in cultural property disputes, as it may facilitate the "laundering of stolen art", and if in practice, it is combined with the rule to protect the purchaser in good faith, these two rules have a very destructive effect on efforts to protect the cultural heritage, its status, however, remain unchallenged so far. Therefore, the Dutch court, needless to say, would apply the Dutch law to the merits of the dispute, insofar as the defendant purchased the statue in Amsterdam. Nevertheless, which law would be applied by the Chinese judge? This is far more uncertain and interesting, as one of the most striking features of the Private International Law Act of the PRC of 2010 is that party autonomy has been introduced into the field of movables, as Article 37 of the Act provides that the parties may choose the law applicable to the real rights in movable property; in the absence of such choice, *the lex situs* at the time that the legal fact occurred applies. This article indicates that Chinese private international law has deviated from the universally accepted principle of the *lex rei sitae.* Hence, the Chinese local villagers and the Dutch defendant are entitled to choose the applicable law before the Chinese court. In this respect, keeping an eye on the development of the lawsuit in China, the governing law in particular, will be very interesting for private international law lawyers.

(5) Recognition and enforcement of foreign judgement. In the case at hand, the jurisdiction of the Dutch court based on defendant's domicile is not only more reasonable but also more efficient: once it renders the judgment, it can enforce it without any obstacle, if necessary. In contrast, even if the villagers win the Chinese lawsuit, the judgement by the Chinese judgment will be practically meaningless unless the Dutch defendant voluntarily fulfils it. Expressed differently, the recognition and enforcement of the Chinese judgement in the Netherlands is problematic, as two states have not concluded any international convention in this field.

The above is an illustrative, instead of exhaustive, list of the most intriguing, and perhaps, most interesting and important, private international law issues that may surface in the case of the Statue of Zhanggong-zushi and those of this kind. Though it is of great difficulty to predict the result of the legal battle between the Chinese villagers and the Dutch collector at the current stage, the importance of these private international law issues cannot be overstated.

For most common Chinese people, private international law is abstract, unfamiliar, out-of-reach, and probably unimportant; hence, this discipline is in constant danger of becoming a mere academic game in China. However, the battle over the Chinese cultural treasure lost overseas changes the situation. In this respect, it is a misfortune

that countless Chinese cultural treasures have been taken overseas out of looting, clandestine excavation, smuggling and illicit trade; however, it does provide a good opportunity for private international law to function and to arrest the attention of the public both at home and abroad which, to some degree, is a blessing in disguise for private international lawyers.