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–What Role has Private International Law Played?

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1. Introduction

On 4 December 2020, the Sanming Intermediate People's Court of China's southeastern Province of Fujian rendered a judgment ordering the Dutch defendants to return a stolen 1,000-year-old Buddhist mummy, known as the statue of Zhanggong-zushi, to its original owner: two village committees in the Province within 30 days after the verdict comes into effect. [1]

This is the first time in history that a Chinese court seized jurisdiction over a case filed by Chinese plaintiffs to repatriate a stolen cultural property illicitly exported. Once published, the judgment has aroused immediate attention both at home and abroad. Given the enormous quantity of Chinese cultural property stolen and illegally exported overseas, the potential influence of the judgment can hardly be overstated. This note focuses on the major legal issues that the Chinese judgment dealt with and attempts to analyse the role of private international law that has played.

2. Summary of Facts

Oscar Van Overeem, a Dutch architect, purchased a Buddhist statue for 40,000 Dutch guilders (US \$20,500) in 1996 from a collector in Amsterdam who had acquired it in Hong Kong. In 1996, Van Overeem contacted a restorer to repair some chips and cracks in the exterior. When the restorer opened the bottom of the statue, he found two small pillows, and resting on the pillows, the body of a mummified monk. Initial radiocarbon testing found that the body was approximately 900-1000 years old. The statue was taken to the Meander Medical Center in Amersfoort, where a full CT scan was performed and samples taken through endoscopy. The investigative team found scraps of paper on which Chinese characters were written, placed inside the body in the cavities normally containing organs. These identified the Buddhist mummy as the mummy of a monk known as "Zhanggong-zushi".

In 2014, Van Overeem loaned the statue to the Drents Museum in Assen for an exhibition, "Mummy World," which traveled to the Hungarian Natural History Museum in the spring of 2015. Press reporting on the Hungarian exhibition alerted the Chinese villagers. Based on photographs from Hungary and archival materials in China, the Chinese villagers believe the statue is the one that have held the mummy of the village's patriarch, Zhanggong Zushi. The statue was enshrined in the Puzhao Temple, jointly owned by the two villages named "Yunchun" and "Dongpu", and worshiped by the local residents, for over 1,000 years until it went missing in December 1995.

After an unsuccessful negotiation, the Committee of Yunchun Village and the Committee Dongpu Village sued Van Overeem to demand the statue's return both in Fujian Province of China and in Amsterdam of the Netherlands at the end of 2015,[2] fearing that a statute of limitation might bar their case. Three years later, the Amsterdam District Court made a decision on 12 December 12, 2018, [3] ending one chapter in the legal battle over the statue of Zhanggong-zushi, but failed to resolve a controversial situation or illuminate the path forward for the parties, as the Dutch court did not decide anything about the ownership of the

parties.[4] It simply determined not to hear the case, based on its finding that the two village committees did not have standing to sue in the Dutch court.[5]

Against this background, the lawsuit before the Chinese court is more important in terms of legal analysis. According to the information released by the Sanming Intermediate People's Court (the Court), it formally filed the case on 11 December 2015, which then served the Dutch defendants by international judicial cooperation. The Court, thereafter, held the hearings on 26 July and 12 October of 2018 respectively, and publicly pronounced the judgement on 4 December 2020.[6] Lawyers of both sides were present both at the hearings and the pronouncement of the judgement. From the perspective of private international law, the following two issues, among others, are particularly worth of concern:

(1) Jurisdiction: The Court exercised the jurisdiction over the dispute because the Dutch defendants did not raise an objection to its jurisdiction who responded to the action timely.[7]

(2) Application of Law: Based on the interpretation of "the *lex rei sitae* at the time that the legal fact occurred" in Article 37 of the Private International Law Act, the Court held that Chinese law, rather than Dutch law, shall govern the ownership of the statue.[8]

3. The Jurisdiction of the Chinese Court: Prorogated Jurisdiction

Jurisdiction is the first issue that the Court had to consider when it dealt with the dispute. Under the Civil Procedure Law of China (CPL), the general rule of territorial jurisdiction is that a civil action shall be brought in the People's Court of the place in which the defendant is domiciled subject to various exceptions grouped together under the title of "special jurisdictions".[9] As the defendants in the present case are domiciled in the Netherlands,[10] the jurisdiction of the Court depended on "special jurisdictions" among which the jurisdiction on actions on contractual disputes or disputes over property rights is most relevant.

In international civil litigation, many cases involve a foreign defendant not domiciled or residing within China. Given the importance of some of such cases, the CPL empowers Chinese courts the jurisdiction over actions involving contract disputes or disputes over property rights against a non-resident defendant if certain conditions are satisfied. Article 265 of the CPL prescribes the following:[11]

In the case of an action concerning a contract dispute or other disputes over property rights and interests, brought against a defendant who has no domicile within the territory of the People's Republic of China, if the contract is signed or performed within the territory of the People's Republic of China, or if the object of the action is located within the territory of the People's Republic of China, or if the defendant has distrainable property within the territory of the People's Republic of China, or if the defendant has its representative office within the territory of the People's Republic of China, the People's Court of the place where the contract is signed or performed, or where the object of the action is, or where the defendant's distrainable property is located, or where the torts are committed, or where the defendant's representative office is located, shall have jurisdiction.

Therefore, for actions concerning a dispute over property rights brought against a defendant who has no domicile in China, a Chinese Court may exercise jurisdiction if one of the following conditions are satisfied: (1) the property is located in China; (2) the defendant has distrainable property in China; (3) the tort was committed in China; (4) the defendant has its representative office in China.

In the case at hand, one can hardly argue that the Court has the jurisdiction under Article 265 of the CPL, as the statue is not located in China when the action was filed, nor did the defendants steal it or purchase it in China, nor do they have distrainable property or representative office in China. However, the Court ruled that its jurisdiction over the case was established pursuant to the prorogated jurisdiction under the CPL regime.

Prorogated jurisdiction under the CPL refers to situations where a party institutes proceedings in a court, and the other party implicitly acquiesces to the jurisdiction of that court by responding to the action and not raising an objection to the jurisdiction. That is to say, the defendant's failure to object is understood as defendant's consent to the Chinese court's jurisdiction. Article 127 of the CPL provides as follows:[12]

Where a party raises any objection to jurisdiction after a case is accepted by a people's court, the party shall file the objection with the people's court during the period of submitting a written statement of defense. The people's court shall examine the objection. If the objection is supported, the people's court shall issue a ruling to transfer the case to the people's court having jurisdiction; or if the objection is not supported, the people's court shall issue a ruling to dismiss the objection. Where a party raises no objection to jurisdiction and responds to the action by submitting a written statement of defense, the people's court accepting the action shall be deemed to have jurisdiction, unless the provisions regarding tier jurisdiction and exclusive jurisdiction are violated.

Since the defendant's failure to object constitutes consent to jurisdiction, it is imperative that defendants, foreign defendants in particular, raise a timely jurisdictional objection. Under Article 127 of the CPL, if a party to a civil action objects to the jurisdiction of a People's Court, the objection must be raised within the time period prescribed for the filing of answers. According to Articles 125 and 268, defendant shall have fifteen days, or thirty days if residing outside the territory of China, to file his answer upon receipt of plaintiff's complaint. Thus, if a defendant wants to challenge the People's Court's jurisdiction, he must do so within this statutory fifteen-day or thirty-day period.[13]

It should be noted that the Dutch defendants in the present case did not raise objection to the jurisdiction of the Court; instead, they had responded to the lawsuit by submitting a written statement of defense represented by two Chinese lawyers, to the surprise of many observers. Hence, jurisdiction of the Court over this case was established under the prorogated jurisdiction of the CPL in an unexpected manner.

4. Choice of Law Issue: *Lex Rei Sitae* = *Lex Furti*?

One of the most widely accepted and significant rules of private international law today is that, in determining property rights, a court applies *lex rei sitae*. This rule has been accepted by Chinese private international law, though party autonomy is placed before *lex rei sitae* by Article 37 of the Private International Law Act. Given that it is very rare that the parties reach agreement on the applicable law after the dispute over the property has occurred, the *lex rei sitae* plays a *de facto* decisive role.

However, the question of application of the *lex rei sitae* in specific cases remains open out of diverse possible interpretations of the rule. From the perspective of comparative law, it can be found that many jurisdictions, say England, prefer to apply the law of the place of last transaction,[14] while others, say France, apply the law of place where goods are located at the time of the litigation.[15] As far as China is concerned, its courts has never clarified the meaning of the *lex rei sitae* in Article 37 of the Private International Law Act; therefore, the outcome of the present action was entirely dependent on the interpretation of this article.

The Chinese plaintiffs commenced the action for recover of the stolen statue by arguing, among other things, that they are its owners because *bona fide* acquisition does not apply to stolen cultural property under the Property Law of China. The Dutch defendants took the stand, claiming to have purchased the statue on good title under Dutch Civil Code. Thus, it had to be decided which of the two laws shall be used in the present case: whether Chinses law or Dutch law shall govern the ownership of the statue. The Court, by resorting to Article 37 of the Private International Law Act, held that title was to be determined by Chinese law.

However, the Court acknowledged that the statue was stolen and illicitly exported before the implementation of the Private International Law Act, therefore, it had

to decide in the very beginning whether the Act is applicable to the present dispute. To determine the issue, the Court referred to Article 2 of the Judicial Interpretation on the the Private International Law Act issued by the Supreme People's Court,[16] which states that:

As to a civil relationship involving foreign elements which occurred before the implementation of the Private International Law Act, People's Court shall determine the governing law according to the choice-of-law rules effective at the time of the occurrence of such relationship. In case no choice-of-law rules existed at that time, the Private International Law Act may be resorted to in order to determine the applicable law.

Given the General Principles of Civil Law, the most significant and primary legislation on private international law in China before 2010, is silent on the law applicable to property right,[17] the Court decided it is proper to invoke the Private International Law Act to fill the lacunae pursuant to the above article. The Court then referred to Article 37 of the Private International Law Act of China which provides that "the parties may choose the law applicable to the real rights in movable property; in the absence of such choice, the *lex rei sitae* at the time when the legal fact occurred applies".[18] As the parties in the case failed to reach agreement on the applicable law, the Court decided that the ownership of the statue shall be governed by the *lex rei sitae* at the time when the legal fact occurred.

With regard to the meaning of "the time when the legal fact occurred", the Court stated that it pointed to the time when the statue was stolen, rather than the time when Oscar Van Overeem purchased it in Amsterdam. Summarising the conclusion, the judge stressed that the statue is a cultural property of great historic and religious significance, instead of an ordinary property. As the illicit traffic of cultural property usually creates a number of legal facts which inevitably leads to the proliferation of the *lex rei sitae*, including the law of the location of a cultural property had been stolen (*lex furti*), the law of the place of first transaction, the law of the place of last transaction, the law of the place of exhibition, the law of the location of a cultural property at the time of litigation,

etc., the judge emphasised the need to spell out the *lex rei sitae* at the time when the legal fact occurred for the cases of recovering cultural property.

The Court stressed that when interpreting the *lex rei sitae* in a cultural property repatriation case, the object and purpose of international conventions of cultural property should be taken into consideration. It went on to highlight two conventions to which China is a contracting party: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the 1970 Convention”) and Convention on Stolen or Illegally Exported Cultural Objects (“the 1995 Convention”). As both those conventions are devoting to prohibiting the illicit trafficking of cultural property and facilitating the return of cultural property to its origin nations, the Court concluded that it should interpret the *lex rei sitae* at the time when the legal fact occurred in the light of their object and purpose.

Hence, the Court decided that the *lex rei sitae* at the time when the legal fact occurred should be understood as the *lex furti*, *i.e.*, law of the location of a cultural property had been stolen, insofar as such interpretation favours the protection of cultural heritage and facilitates the return of cultural property illicitly trafficked, whereas the place of transaction not only favours the laundering of stolen cultural property but also adds considerable uncertainty to the question of title.

The Court then referred to the Property Law of China under which *bona fide* acquisition does not apply to stolen cultural property. Consequently, the Court ruled that the Chinese village committees retain the title of the statue and demanded the defendants to return it to plaintiffs.

5. Concluding Remarks

Under the CPL, judicial proceedings in China occur in two instances, namely, trial and appeal. Therefore, the Dutch defendants are entitled to appeal to the Higher

People's Court of Fujian Province within 30 days. If they do not appeal within the time limit, the judgment will become effective.

At the present stage, it is not clear whether the defendants will comply with the judgment or appeal, or simply ignore it. Though as a Chinese, I do hope that the Dutch defendants will return the statue as ordered by the Court; nevertheless, I am afraid that ignoring the Chinese judgment may be one of their reasonable options because of serious obstacles to recognize and enforce this Chinese judgment in the Netherlands.

In spite of the uncertainty ahead, one cannot overestimate the significance of this judgment. First of all, as noted in the very beginning, this is the first time that a Chinese court exercises the jurisdiction over case to recover a Chinese cultural property stolen and illicitly exported. Therefore, it is a historic judgment, no matter it will be enforced or not in the future.

Second, the Court in the judgement clarified for the first time that "*lex rei sitae* at the time when the legal fact occurred" in Article 37 of the Private International Law should be interpreted in the light of the object and purpose of the 1970 Convention and the 1995 Convention, so that the *lex furti*, i.e., Chinese law, shall govern the ownership of cultural property lost overseas. Given the huge number of Chinese cultural property stolen and illicitly exported abroad, the author believes the impact of the judgment is tremendous.

[1] The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V., the Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, Date of judgment: 4 December 2020.

[2] China villagers launch Dutch court bid to retrieve mummy, <https://www.bbc.co.uk/news/world-europe-40606593>, last visited on 8 December 2020.

[3] C/13/609408 / HA ZA 16-558, Court of Amsterdam, 12 December 2018,

available at
<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:8919>
, last visited on 8 December 2020.

[4] Chinese villagers disappointed about Dutch rejection of mummy Buddha repatriation case,
http://www.xinhuanet.com/english/2018-12/14/c_137672368.htm, last visited on 8 December 2020.

[5] Uncertain Future for Golden Statue Holding Buddhist Mummy,
<https://culturalpropertynews.org/uncertain-future-for-golden-statue-holding-buddhist-mummy/>, last visited on 8 December 2020.

[6] <http://fjfy.chinacourt.gov.cn/article/detail/2020/12/id/5647265.shtml>, last visited on 8 December 2020.

[7] The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V., the Sanming Intermediate People's Court (2015) Sanmin Chuizi No. 626, Date of judgment: 4 December 2020, p.21.

[8] *Id.*, at pp. 24-35.

[9] Zhengxin Huo, Private International Law (2017), pp.148-151.

[10] The defendants are Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V.

[11] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] art. 265 (1991, revised in 2017) (PRC).

[12] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] art. 127 (1991, revised in 2017)(PRC).

[13] Zhengxin Huo, Private International Law (2017), p.157.

[14] E.g., *Winkworth v. Christie's Ltd.*[1980] 1 Ch. 496.

[15] *Stroganoff-Scerbatoff v. Bensimon*, 56 Rev. crit. De dr. int. privé(1967).

[16] See Zhengxin Huo, 'Two Steps Forward, One Step Back: A Commentary on

the Judicial Interpretation on the Private International Law Act of China' (2013) 43 HKLJ 685, 710.

[17] The General Principles of Civil Law was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, coming into force on January 1, 1987. It was abolished on January 1, 2021 when the Civil Code of the PRC took effect. For a quite a long period, the GPCL was the most important source of Chinese private international law. Structurally, the GPCL has devoted an entire chapter to regulating the conflict of laws (i.e., Chapter Eight, Application of Laws to Civil Matters Involving Foreign Elements), where nine conflict rules can be found.

[18] Zhonghua Renmin Gongheguo Shewai Minshi Falvguanxi Shiyongfa [Act on the Application of Laws over Foreign-related Civil Relationships] art. 37 (2010) (PRC).