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Art and International Cultural Property

PATTY GERSTENBLITH AND LUCILLE ROUSSIN*

I. Introduction

While progress in ratifications and implementations of international conventions continued this year, restitutions and claims concerning looted art works and antiquities continued to dominate legal developments in the cultural heritage field. On the litigation front, the District Court for the District of Columbia issued its second decision in *Malewicz v. City of Amsterdam* that may prove significant to the interpretation of the U.S. Immunity from Seizure Act and the Foreign Sovereign Immunity Act, particularly as applied to art works on loan to U.S. institutions.

II. International Conventions and Agreements

A. THE 1954 HAGUE CONVENTION

States Parties to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict increased in 2007 to 119 with Japan being the most recent country to join.¹ Although President Clinton transmitted the main Convention and First Protocol to the Senate in 1999,² no further action was taken until February 2007 when the State Department placed both instruments on its list of treaties that the Administration wants the Senate to take up during the current Congress.³ The Senate Foreign Relations Committee, however, has not as yet scheduled hearings. Furthermore, the State Depart-

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1. A complete list of States Parties to the Convention is available at <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E> (last visited Feb. 2, 2007).

2. President's Message to the Senate Transmitting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 35 WEEKLY COMP. PRES. DOC. 13 (Jan. 11, 1999).

3. Letter from Jeffrey T. Bergner, Assistant Secretary, Legislative Affairs, U.S. Dept. of State, to Joseph R. Biden, Chairman, Committee on Foreign Relations, U.S. Senate (Feb. 7, 2007) (on file with the authors).

ment recommended that the Senate ratify only the second part of the First Protocol, which is concerned with the status of cultural objects illegally removed from occupied territory.⁴

Germany, which ratified the First Protocol in 1967, is the first nation to enact specific implementing legislation for the protocol. This legislation prohibits the import of cultural goods removed in violation of the protocol from occupied territory of another State Party any time after November 11, 1967.⁵ This legislation entered into force with Germany's accession to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).⁶

B. THE 1970 UNESCO CONVENTION AND ITS IMPLEMENTATION

The 1970 UNESCO Convention is the primary instrument that addresses the international movement of cultural materials.⁷ Five nations joined the 1970 UNESCO Convention this year—Germany, New Zealand, Norway, Montenegro and the Republic of Moldova⁸—while Greece joined the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.⁹ New Zealand, which joined the Unidroit Convention in late 2006, enacted new comprehensive legislation that incorporates implementation of both conventions into its domestic law.¹⁰ In addition to regulating the export of protected cultural objects from New Zealand, the legislation prohibits the import into New Zealand of unlawfully exported foreign protected objects¹¹ and allows reciprocating states to bring actions to recover stolen or illegally exported protected objects.¹²

Germany also enacted implementing legislation for the 1970 UNESCO Convention in 2007.¹³ Under this legislation, Germany will not allow the import of any illegally ex-

4. *Id.*

5. Transformation Act of 25 Apr. 2007 (F.R.G.); Implementation Act of 18 Apr. 2007 (F.R.G.); Matthias Weller, *Portable Antiquities: The German Legal System*, Paper Presented at the Portable Antiquities in the Modern European Context: Law, Ethics, Policy, and Practice Conference at the University of Pecs, (July 12-13, 2007) (presentation on file with author).

6. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971), available at http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml [hereinafter 1970 UNESCO Convention] See discussion *infra* Part B.

7. See 1970 UNESCO Convention.

8. A complete list of States Parties to the Convention is available at <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited Feb. 2, 2008).

9. A complete list of States adopting the Unidroit Convention is available at <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Feb. 2, 2008).

10. See Protected Objects Act 2007, No. 41 (1975) (N.Z.), available at <http://www.legislation.govt.nz/act/public/1975/0041/latest/DLM432116.html>. Full analysis of this legislation falls outside the scope of this article.

11. *Id.* part 1, § 2(1). The definition of foreign protected object tracks the definition of cultural property used in the 1970 UNESCO Convention and Unidroit Conventions. See 1970 UNESCO Convention, *supra* note 6, art. 1.

12. Protected Objects Act 1975, *supra* note 10, part 1, § 10.

13. Implementation Act of 18 Apr. 2007, *supra* note 5, § 6(2), sentences 1-3. This same legislation also replaces Germany's legislation implementing EC Directive 93/7/EEC. The Report of the EC Commission of 21 Dec. 2005 indicates that Germany has been involved in five returns of cultural objects through diplomatic channels; two cases are pending; there have been twelve applications for searches for cultural objects; and three court proceedings for return (two to Greece and one to France).

ported cultural objects that have been individually classified in an accessible inventory by the country of origin one year prior to removal. In addition, the country of origin must place archaeological objects in the inventory within one year of the time when the country of origin gains knowledge of the excavation.

On December 29, 2006, Switzerland and Peru signed an agreement pursuant to the Swiss implementation of the 1970 UNESCO Convention, the Federal Act on the International Transfer of Cultural Property.¹⁴ The agreement provides for the return of cultural goods, particularly archaeological objects, from Switzerland to Peru. In November 2007, Switzerland and Peru announced the publication of a “red list” of Peruvian artifacts that are most at risk for looting and theft.¹⁵ At the same time, Swiss authorities returned a Chancay ceramic bowl, dating to about 1200 A.D., that had been intercepted by Swiss customs.¹⁶

The United States’ Convention on Cultural Property Implementation Act (CPIA)¹⁷ establishes a mechanism by which the United States and other nations that are party to the 1970 UNESCO Convention may enter into agreements to restrict the import of designated categories of archaeological and ethnological materials. During 2007, the United States extended its agreements for an additional five years with four countries: Peru, Cyprus, Mali, and Guatemala.¹⁸ The extended agreement with Cyprus restricts the import of Byzantine ecclesiastical materials, which had previously been covered under an emergency action.

Probably the most controversial development was the inclusion of ancient coins on the list of designated archaeological materials in the renewal of the U.S.-Cyprus agreement.¹⁹ Prior to this agreement, coins had not been included in a memorandum of understanding with any country, and the inclusion has precipitated a significant backlash from the coin dealer and collector community. On November 15, 2007, the Ancient Coin Collectors Guild filed a Freedom of Information Act suit against the State Department, seeking the

14. Federal Act on the International Transfer of Cultural Property, July 1, 2003, Cultural Property Transfer Act [BB1] 4475 (2003), available at http://www.kultur-schweiz.admin.ch/arkgt/files/kgtg2_e.pdf.

15. Museum Security Network, *Swiss and Peruvian Experts Have Presented a “Red List” of Peru’s Cultural Heritage that is Particularly at Risk from Looting and Illegal Art Traffickers*, Nov. 14, 2007, available at <http://www.museum-security.org/wordpress/?p=68> [hereinafter Museum Security Network] (last visited Apr. 7, 2008); Press Release, Swiss Confederation Fed. Office of Culture, *Liste rouge des antiquités péruviennes en peril [Red List of Endangered Peruvian Antiquities]* (Nov. 22, 2007), available at <http://www.news-service.admin.ch/NSBSubscriber/message/fr/15822> (last visited Apr. 7, 2008).

16. Museum Security Network, *supra* note 15.

17. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13 (2007).

18. For amendments to and extensions of the agreements, see respectively: Memorandum of Understanding Concerning Archaeological Material from Peru, U.S.-Peru (2007), available at <http://exchanges.state.gov/culprop/PeruMOU2007EXT.pdf> (last visited Feb. 2, 2008); Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material from Cyprus, U.S.-Cyprus, July 16, 2007, available at <http://exchanges.state.gov/culprop/CyprusAmendExt2007FRN.pdf> [hereinafter U.S.-Cyprus Agreement]; Agreement Between the United States and Mali Concerning the Imposition of Import Restrictions on Archaeological Material from Mali from the Paleolithic Era (Stone Age) to Approximately the Mid-Eighteenth Century, U.S.-Mali, Sept. 17, 2007, available at <http://exchanges.state.gov/culprop/Mali2007MoU.pdf>; Extension of Import Restrictions Imposed on Archaeological Material from Guatemala, U.S.-Guatemala, Sept. 29, 2007, available at <http://exchanges.state.gov/culprop/Gt07ExtFRN.pdf>.

19. See U.S.-Cyprus Agreement, *supra* note 18, § IIID of the list of designated materials subject to import restriction.

release of documents pertaining to its consideration of requests for agreements from Italy, China, and Cyprus and of the inclusion of Cypriot coins.²⁰

In February 2007, the State Department announced that it had completed the delegation of authority relating to emergency import restrictions on Iraqi cultural materials.²¹ The Emergency Protection of Iraqi Cultural Antiquities Act, enacted in 2005, allows the President to impose import restrictions on Iraqi cultural materials that left Iraq illegally after 1990.²² This authority has now been delegated to the Assistant Secretary of State for Educational and Cultural Affairs, but no import restrictions have yet been imposed pursuant to this legislation.

III. Recoveries, Restitutions, and Claims

A. RECOVERIES AND RESTITUTIONS

1. Manuscripts

The FBI Art Crime Team assisted in the recovery of fifteenth century Spanish maps stolen from Madrid.²³ At the request of the Spanish National Police and Civil Guard, the FBI assisted in the recovery of two fifteenth century maps from an edition of Ptolemy's *Geographia* that were stolen from the Spanish National Library in Madrid, Spain, earlier this year. United Kingdom, Australian, and Argentinean authorities have recovered nine other maps. "Spain has charged a citizen of Uruguay, Cesar Gomez Rivero, with the theft. Rivero is considered a fugitive and is believed to be in South America."²⁴

2. *Return of Sculpture to Cambodia*

The United States recovered and returned to Cambodia the head of an Angkor-era sculpture that had been stolen and smuggled out of Cambodia.²⁵ The artifact, a sandstone head of a celestial dancer, or *apsara*, from the twelfth century, was returned in accordance with the U.S.-Cambodia memorandum of agreement of 2003.

3. *Return of Artifacts to Peru*

In June 2007, the United States returned to Peru a cache of 412 pre-Columbian artifacts that had been seized in 2005.²⁶ The recovered artifacts included clay burial vessels of pre-Inca cultures, gold and silver jewelry, and *quipus* (knotted strings believed to have

20. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, No. 1:2007 Civ. 02074 (D.D.C. 2007 filed Nov. 15, 2007).

21. Delegation of Authority No. 296, 72 Fed. Reg. 8054, (Feb. 22, 2007) [hereinafter Delegation of Authority].

22. Emergency Protection for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108-429, § 3002, 118 Stat. 2434 (2004).

23. Press Release, FBI, FBI Recovers 15th Century Spanish Maps Stolen from Madrid (Nov. 8, 2007), available at <http://www.fbi.gov/pressrel/pressrel07/stolenmaps110807.htm>.

24. *Id.*

25. *U.S. Returns Stolen Artifact to Cambodia*, THE ASSOCIATED PRESS, July 30, 2007, available at <http://www.southeastasianarchaeology.com/2007/07/31/stolen-apsara-head-returned-to-cambodia/>.

26. Alfonso Chardy, *Peru Given Recovered Artifacts*, THE MIAMI HERALD, June 14, 2007, at 1B.

been used as counting devices) from the Inca culture. The individual who was attempting to sell the artifacts was arrested in an undercover operation and ultimately pled guilty to the sale and receipt of stolen goods.

4. *Statues Returned to Pakistan*

Thirty-eight ancient sculptures, which had been seized by U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection in September 2005 at the Newark Port of Entry, were returned to Pakistan.²⁷ The artifacts included several Gandharan-type sculptures (some of the “starving Buddha” type) of the third and fourth centuries A.D., a relief panel depicting a dance scene, a frieze showing monks meditating, and at least one object dating from the second century B.C.²⁸ Evidence indicated that they had been looted from archaeological sites in northern Pakistan. The artifacts were contained in two shipments for which the shipper had made a false declaration as to country of origin.

5. *Human Remains Returned to Tasmania*

Britain’s Natural History Museum returned the remains of seventeen Tasmanian aborigines.²⁹ Australia’s Tasmanian community had been fighting for about twenty years to recover the remains, which were taken in the nineteenth century. While the museum had agreed to the restitution in November 2006 upon recommendation of its Human Remains Advisory Panel, the museum also decided to conduct additional scientific tests before the restitution. The Tasmanian Aboriginal Centre decided to sue to prevent such testing, but a settlement was reached by which the museum could conduct additional but non-invasive scientific tests, such as measurements, scans, and the making of casts, but DNA and other invasive analyses were not allowed. This situation and anticipated claims for return of human remains held at Cambridge University, Oxford University, and the National Museum of Scotland are expected to follow the Guidance for the Care of Human Remains in Museums of the Department of Culture, Media, and Sports (DCMS), which calls for a balancing of scientific interests against the interests of descendant communities.³⁰

B. RESTITUTION OF CLASSICAL ANTIQUITIES

The restitution of significant numbers of classical antiquities to Italy continued in 2007. These restitutions are based on evidence found by Swiss and Italian authorities when they

27. Press Release, Dep’t of Homeland Security, Department of Homeland Security Returns Rare Artifacts to the Pakistani Government: Stolen Statues are from the Third and Fourth Century A.D. (Jan. 23, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070123newark.htm> [hereinafter Homeland Security Press Release].

28. Robert Birsell, *Looted Pakistani Artifacts Seized in U.S. Returned*, REUTERS, Mar. 8, 2007, available at <http://www.dawn.com/2007/03/08/rss.htm#23> (last visited Feb. 14, 2008).

29. Julia Hinde, *Invaluable Resource or Stolen Property?*, TIMES HIGHER EDUC., Sept. 21, 2007, at 18, available at <http://www.timeshighereducation.co.uk/story.asp?storyCode=310563§ioncode=26>.

30. DEP’T FOR CULTURE, MEDIA & SPORT, GUIDANCE FOR THE CARE OF HUMAN REMAINS IN MUSEUMS (2005), <http://www.culture.gov.uk/NR/rdonlyres/0017476B-3B86-46F3-BAB3-11E5A5F7F0A1/0/GuidanceHumanRemains11Oct.pdf>.

raided the warehouse of dealer Giacomo Medici in Geneva in 1995.³¹ In 2006, the Metropolitan Museum of Art in New York and the Boston Museum of Fine Art agreed to return to Italy antiquities that had been illegally removed from Italy over the past three decades. The trend continued this year with the announcement that the Getty and the Princeton University Art Museum will be returning additional ancient art works.

The Getty will return forty objects, the largest number of ancient works to be returned at one time, to Italy.³² Probably the most prominent of the objects to be returned is the over-life-size statue of a cult goddess, sometimes identified as Aphrodite, and likely to have originated in Sicily. The statue will remain at the Getty Villa on loan until 2010. The Getty and Italy will continue discussions as to the fate of a bronze sculpture, *A Victorious Youth*. As a result of the Getty restitutions, Italy has dropped its civil claim for recovery of the value of these artifacts against former Getty curator, Marion True. But her criminal trial, along with that of dealer Robert Hecht, continues, although the court held sessions only sporadically this year.

Similarly, the Princeton Museum of Art announced that it will return eight artifacts to Italy.³³ According to an agreement concluded on October 30, 2007, Princeton will return immediately to Italy four objects and will retain four objects on loan for four years, including three ancient vases and an Etruscan head of a winged lion. Princeton's title to seven other objects was recognized. According to the agreement, Princeton students will be given unique research opportunities at Italian excavations, and Italy will loan other objects of equal cultural significance.

For the first time, a private dealer, Jerome Eisenberg of Royal Athena Galleries in New York, has agreed to return artifacts to Italy.³⁴ The eight Roman and Etruscan artifacts to be returned include a Roman statue, bronze figurines, and several ancient ceramic vases and are worth approximately \$500,000. While the statue was probably stolen from a Roman villa, the vases were probably looted from archaeological tomb sites, and one statuette was stolen during an armed robbery in 1975 from a state archaeological office in Ercolano near Pompeii.

C. PERU/YALE AGREEMENT ON RESTITUTION

Hiram Bingham rediscovered the Inca site of Machu Picchu in Peru in 1911 and conducted excavations there in 1912 and 1915 with the support of Yale University and the National Geographic Society. Bingham took back to Yale more than 4,000 objects, including human remains, ceramics, and animal bones. In 2001 Alejandro Toledo, Peru's first president of Andean descent, presented a claim for return of the remaining artifacts.

31. PETER WATSON & CECELIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES* (2006).

32. Press Release, The Getty Museum, Italian Ministry of Culture and J. Paul Getty Trust Reach Agreement (Aug. 1, 2007) [hereinafter The Getty Museum], available at http://www.getty.edu/news/press/center/italy_getty_joint_statement_080107.html.

33. Cass Cliatt, *Princeton University Art Museum and Italy Sign Agreement Over Antiquities*, NEWS@PRINCETON, Oct. 31, 2007, available at <http://www.princeton.edu/main/news/archive/S19/37/62Q26/index.xml?section=topstories,featured>.

34. Ariel David, *Looted Art Returns to Italy from NY*, THE ASSOCIATED PRESS, Nov. 6, 2007, available at <http://abcnews.go.com/International/wireStory?id=3826943>.

Yale claimed that Peru had given the artifacts, whereas Peru claimed that they were on loan.

On September 14, 2007, Peru and Yale announced an agreement by which Yale recognized Peru's title to the collection.³⁵ Yale and Peru's National Institute of Culture will collaborate on international traveling exhibitions. The museum quality objects, approximately four hundred in number, will be returned to Peru, and a new museum will be built in Cuzco with Yale acting as an advisor. Peru and Yale will share the research rights in the collection. Although the agreement was at first hailed as another creative and collaborative solution to a cultural property dispute, the agreement was later criticized because of the small number of objects to be returned to Peru in the next few years and the extended period of time, reportedly another ninety-nine years, in which Yale would retain the remainder of the collection for continued research.³⁶

D. CLAIMS FOR HOLOCAUST-RELATED ART WORKS

1. *Schoeps v. The Andrew Lloyd Weber Art Foundation*

The fate of Picasso's *Portrait of Angel Fernandez de Soto (The Absinthe Drinker)* (1903), withdrawn at the last moment from Christie's auction in 2006,³⁷ was decided by the Supreme Court of New York in November 2007.³⁸ The claimant, Julius H. Schoeps, is the heir to Paul von Mendelssohn-Bartholdy who was a prominent Berlin banker and art collector. Mr. Schoeps' complaint asked for restitution of the painting, stating that his great uncle was forced to sell it when the Nazis decimated his personal fortune. In 1934 the painting was sold to Berlin art dealer Justin Thannhauser, who sold it to the Knoedler Gallery in New York in 1936. The painting was resold several times in New York and was bought by the Andrew Lloyd Weber Foundation (the Foundation) at Sotheby's in New York in 1995.

The Foundation moved to dismiss the complaint on the grounds of the plaintiff's lack of standing, lack of personal jurisdiction, and forum non conveniens.³⁹ In granting the Foundation's motion to dismiss, the judge stated that "in order to have standing and legal capacity to bring a claim on behalf of an estate in New York, a plaintiff must have been appointed as a personal representative [of the estate] in the United States, as opposed to a non-U.S. jurisdiction."⁴⁰ Moreover, the painting was apparently not included in the Mendelssohn-Bartholdy will. Thus the plaintiff would also have to prove that the estate was the rightful owner of the painting. The court held that in order to pursue any claim for restitution the plaintiff would have to be appointed the personal representative of the Paul von Mendelssohn-Bartholdy's United States estate by the New York Surrogate's Court.⁴¹

35. Press Release, Yale Univ. Office of Public Affairs, Joint Statement by the Government of Peru and Yale University (Sept. 14, 2007), available at <http://www.yale.edu/opa/newsr/07-09-14-01.all.html>.

36. Christopher Heaney, Op-Ed, *Stealing from the Incas*, N.Y. TIMES, Oct. 7, 2007.

37. Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 617 (2007).

38. *Schoeps v. The Andrew Lloyd Webber Art Found.*, No. 1:2006 Civ. 12934, at 1 (N.Y. Sup. Ct. Nov. 19, 2007) at 1 (2007); see Beth Bar, *No Standing to Claim Art, Judge Rules*, N.Y.L.J., Nov. 20, 2007, at 1.

39. *Schoeps*, No. 1:2006-12934, slip op. at 3 (S.D.N.Y. Nov. 7, 2007).

40. *Id.* at 4.

41. *Id.*

2. *Orkin v. Elizabeth Taylor*

The Orkin family, heirs of art collector Margarete Mauthner, sued in federal court in California for restitution of Vincent van Gogh's *Vue de l'Asile et de la Chapelle de Saint-Rémy* in the collection of Hollywood star Elizabeth Taylor.⁴² Mauthner bought the painting in 1914 and sold it before she fled Nazi Germany in 1939. Plaintiffs sued in replevin for restitution of the painting and under the Holocaust Victims Redress Act.⁴³ The district court dismissed the suit on the grounds that Congress did not create a private right of action under the Holocaust Victims Redress Act, and the California Holocaust Art Recovery Statute⁴⁴ did not apply because it was limited to recovery from galleries and museums. The court found that the three year California statute of limitations barred the claim. The Ninth Circuit affirmed the decision on appeal, and the U.S. Supreme Court denied certiorari.

3. *The Max Stern Collection*

The Max Stern Collection, which recovered Emile Lecomte-Vernet's *Aimee, A Young Egyptian* last year, has had two successful restitutions this year.⁴⁵ Max Stern was a prominent gallery owner in Düsseldorf who was forced by the Nazi regime to sell his entire stock at the Lempertz Auction House in Cologne. He emigrated to Montreal, Canada, where he opened the Dominion Gallery and upon his death bequeathed most of his estate, specifically including any artworks that might be restituted, to McGill University, Concordia University, and the Hebrew University of Jerusalem.

In February, the Holocaust Claims Processing Office of the New York State Banking Commission announced the restitution of a sixteenth century painting, *Portrait of Jan van Eversdyck*, to the estate of Max Stern.⁴⁶ The painting was in the collection of the Yannick and Ben Jakober Foundation in Mallorca, Spain. The painting was actually sold three times by the Lempertz auction house: in 1937 at the forced liquidation sale of the Galerie Stern, and again in 1977 and 1996, when Galerie Stern had been omitted from the provenance. The 1996 purchaser donated it to the Jakober Foundation. The Foundation is a State institution and under Spanish law, its property may not leave Spanish national borders without special permission. In an "open and amicable dialogue" the estate and the Foundation reached a creative solution.⁴⁷ The Jakober Foundation has transferred title to the Stern estate, but the estate will keep the painting on permanent loan with the Foundation.

In December, a painting attributed to Jan de Vos I, *Extensive Landscape with Travelers on a Track Near a Walled Town with a Castle and a Church, a Village Beyond*, was restituted to

42. *Adler v. Taylor*, No. 04 Civ 8472(C.D. Cal. Feb. 2, 2005), *aff'd sub nom.*, *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007), *cert. denied*, 76 U.S.L.W. 3224 (Oct. 29, 2007).

43. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

44. Cal. Code Civ. P. 354.3(c) (2007).

45. Gerstenblith & Roussin, *supra* note 37, at 617.

46. Press Release, Holocaust Claims Processing Office, *Painting Lost During Nazi Forced Sale Returned to Rightful Owners* (Feb. 27, 2007), *available at* <http://www.claims.state.ny.us/pr070227.htm>.

47. *Id.*

the Estate through the Holocaust Claims Processing Office of the New York State Banking Commission with the assistance of Christie's.⁴⁸

4. *The Hatvany Courbet Collection*

The vast art collection of Baron Ferenc Hatvany was placed in a private bank vault in Budapest when the pro-Nazi Hungarian government moved to expropriate all Hungarian Jewish property. The family fled the country just before the Nazi takeover of Hungary in March 1944. Among the losses were Courbet's erotic paintings, *L'Origine du Monde* and *Femme Nue Couchée*. The details of the recovery are still unclear, but apparently Hatvany managed to buy back *L'Origine du Monde* in 1946 and then sold it to French philosopher Jacques Lacan; it passed to the French government at his death. The whereabouts of *Femme Nue Couchée* were unknown until 2000, when a Slovakian art and antiques dealer contacted Christie's, who contacted the Commission for Art Recovery and, through attorney Charles Goldstein, negotiated the ultimate restitution of the painting to the Hatvany heirs. The painting will be among the works by Courbet on view at the Grand Palais in Paris from October 13, 2007, to January 28, 2008.⁴⁹

5. *Paintings by the Meister der Heiligen Sippe*

Robert and Virginia Stern have donated two paintings restituted to them in 2003 to the Yale Art Gallery. Nothing has been published about the restitution except the donation. The Nazis apparently acquired the paintings under duress in 1936. The paintings are now on display as part of *Art for Yale: Collecting for a New Century*.⁵⁰

6. *Rubens Paintings at the Courtauld Institute*

The Spoliation Advisory Panel of the DCMS has published a report that the three paintings by Peter Paul Rubens claimed by the heirs of Franz Koenigs were not sold under duress because of the actions of the Nazis and should remain in the collection of the Courtauld Institute.⁵¹ Franz Koenig, a Dutch businessman and art collector, lost possession of three paintings by Rubens when he placed them in the Lisser and Rosenkranz Bank as collateral for a loan. The three paintings are: *St. Gregory the Great with Ss. Maurus and Papianus and St. Domitilla with Ss. Nereus and Achilleus* (1606-07); *The Conversion of St. Paul* (ca. 1610-1612); and *The Bounty of James I Triumphant Over Avarice* (ca. 1632-33). The Spoliation Advisory Panel found that when the mainly Jewish-owned bank

48. Press Release, State of N.Y. Banking Dep't, Painting Lost Due to Nazi Persecution Returned to Rightful Owner (Dec. 6, 2007), <http://www.banking.state.ny.us/pr071206.htm>; Press Release, Concordia Univ., Dutch Old Master Painting Returned to Max Stern Estate with Assistance of Christie's (Dec. 6, 2007), available at http://mediarelations.concordia.ca/pressreleases/archives/2007/12/dutch_old_master_painting_retu_4.php.

49. John Lichfield, *Adventures of a Masterpiece: A Remarkable Episode in Art History*, THE INDEPENDENT, Sept. 28, 2007, available at <http://news.independent.co.uk/europe/article3007147.ece>.

50. Evangelia Podaras, *Yale Art Gallery Acquires Recovered German Works*, YALE DAILY NEWS, Nov. 28, 2007, available at <http://yaledailynews.com/articles/printarticle/22563>.

51. Spoliation Advisory Panel, Report of the Spoliation Advisory Panel in Respect of Three Rubens Paintings Now in the Possession of the Courtauld Institute of Art, London (Nov. 28, 2007), available at <http://www.culture.gov.uk/NR/rdonlyres/DB69E897-6B7D-4AA7-A580-D6BD47F7FCF5/0/reportsapH63nov2007.pdf>.

went into liquidation in 1940 because of the impending invasion of the Netherlands by the Nazis, the bank called in the loan, and Koenigs chose not to discharge it. The bank then sold the paintings.

7. *Claims against City of Linz, Austria*

The unnamed heirs of two victims of Nazi persecution are demanding restitution of two paintings held by the City of Linz. The paintings are an unfinished portrait of Ria Munk, daughter of an Austrian Jewish industrialist, and Emil Nolde's *May Meadows*, once owned by Fred Julius, a major patron of the *Die Brücke* school.⁵²

8. *Pissarro, Le Quai Malaquais, Printemps*

One of the most valuable paintings lost to Nazi confiscation during World War II (WWII) has been discovered in the private Swiss bank vault of Nazi art dealer Bruno Lohse along with several other paintings looted from Jewish owners during the war.⁵³ The painting was in the collection of publisher Samuel Fischer, who fled Germany to Austria and then fled again just before the Anschluss. The heir to the collection, Gisela Fischer, was contacted by the Art Loss Register, which proffered a letter written by U.S. historian Jonathan Petropoulos, who claimed to have located the painting. At a subsequent meeting between Ms. Fischer, Mr. Petropoulos, and Peter Griebert, a Munich art dealer, they showed Ms. Fischer digital photos of the painting and claimed to be representatives of the Swiss possessor. But they then demanded eighteen percent of the hammer value of the painting as a finder's fee.⁵⁴ When the safe in the Zurich Cantonal Bank was opened on orders of the Swiss prosecutor, at least three paintings were inside. Prosecutors have not disclosed which paintings were in the safe but have confirmed that between 1983 and 2004 at least fourteen works of art left the bank. The investigation is continuing.

9. *Gustav Klimt, Blooming Meadow*

The heir of Amalie Redlich, Georges Jorisch, has made an informal claim for Gustav Klimt's *Blooming Meadow* (1906), now in the collection of Leonard Lauder. Lauder has said that the painting never belonged to Redlich, who was the sister of Austrian magnate Victor Zuckerhandl. The claim arises out of the imminent publication of a new catalogue raisonné by Alfred Weidinger, the associate director of the Albertina Museum in Vienna, which states that the painting hung in Redlich's family villa outside Vienna.⁵⁵

10. *The Israel Museum: Works Acquired Through the JRSO*

The Israel Museum has put online a catalogue of paintings and objects of Judaica acquired after WWII by the Jewish Restitution Successor Organization. The web site lists

52. *Heirs Seek Return of Looted Art*, N.Y. TIMES, July 18, 2007, at E2.

53. Stefan Koldehoff, *Pissarro Lost and Found*, ARTNEWS, Summer 2007, at 76.

54. *Id.*

55. Robin Pogrebin, *A Dispute Over a Klimt Purchased in New York*, N.Y. TIMES, Sept. 26, 2007, at B5.

over 1,000 objects looted by the Nazis.⁵⁶ Most of the works were restituted to the Bezalel National Museum, the predecessor of the Israel Museum, in the early 1950's. Among the most valuable of the one hundred or so paintings are Egon Schiele's *The Small City-V* and Chagall's *Praying Jew*.⁵⁷

11. *The Nathan Katz Collection*

In March 2007 the four heirs of art dealer Nathan Katz filed a claim with the Dutch government for restitution of 225 paintings and two tapestries held in Dutch museums.⁵⁸ The claim became public only in September when the Dutch Ministry of Culture informed the museum directors of the claim. The claim includes prized paintings by seventeenth century artists Jan Steen, Jacob van Ruisdael, and Gerard Dou. The claim is quite controversial; according to Dutch looted art expert Rudi Ekkart, some of the paintings were sold before WWII. At least one source has claimed that the paintings were sold voluntarily and at fair market value to Alois Miedl, the dealer for Nazi leader Hermann Goering.

12. *Two Paintings Pulled from Munich Auction House*

Two paintings were pulled out of the Spring 2007 auction of the Hampel auction house in Munich. The Dresden Gallery claimed one of the paintings, Jan Breugel the Younger's *Village Tavern Scene*, had been stolen during WWII. The Pirmasens City Museum claims the other painting, *Roman Landscape* by Heinrich Bürkel, was looted during the war. A well known art collector placed both paintings for auction, although the auction house will not reveal his name. The Bavarian State Criminal Investigation Unit has seized the paintings. This incident is apparently the first example of a seizure by a criminal agency in Germany in a claim for Holocaust era looted art.⁵⁹

E. UNITED KINGDOM IMMUNITY FROM SEIZURE LEGISLATION

In 2007 the United Kingdom enacted legislation to provide immunity from seizure for objects that are on temporary loan for exhibition from collections in foreign nations.⁶⁰

56. The Israel Museum, Jerusalem, www.imj.org.il (accessible under "World War II Provenance Research On-line") (last visited Feb. 2, 2008).

57. Joseph R. Hoffman, *A Thousand Orphans*, THE JERUSALEM REPORT, Oct. 1, 2007, at 34; *Israel Museum Launches Online Catalog of Art Looted by Nazis*, THE ASSOCIATED PRESS, Aug. 28, 2007, available at <http://www.haaretz.com/hasen/spages/898354.html>.

58. Charmaine Picard, *Dutch Museums Face Largest Ever Restitution Claim*, THE ART NEWSPAPER, Nov. 22, 2007, at 1; Dinah Spritzer, *Doing 'Business' with the Nazis*, THE JERUSALEM POST, Oct. 14, 2007, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1191257298365>.

59. Stefan Koldehoff, *Dresden und Pirmasens erheben Ansprüche auf zwei Werke, die in München versteigert werden sollten* [Munich Auction House has to Withdraw Two Old Master Paintings Stolen from German Museums in 1945], SÜDDEUTSCHE ZEITUNG, Nov. 27, 2007, available at <http://msn-list.te.verweg.com/2007-November/008671.html>; Brita Sachs, *Gefeit ist Niemand*, FRANKFURTER ALLGEMEINE, Dec. 2, 2007.

60. Tribunals, Courts and Enforcement Act, 2007, c. 15, §§ 134-38 (U.K.). See also Department for Culture, Media and Sport, Consultation on Draft Regulations for Museums on the Publication of Information About Cultural Objects on Loan under Part 6 of the Tribunals, Courts and Enforcement Act 2007, available at http://www.culture.gov.uk/Reference_library/Consultations/2007_closed_consultations/draftregs_immunityfromseizure.htm.

The act provides immunity from seizure in any civil or criminal proceeding and by any law enforcement authorities. A museum that wishes to apply for immunity for objects on loan must first be approved by the Secretary of State; as part of the approval process, the museum must satisfy the Secretary that its due diligence procedures are satisfactory.⁶¹ Museums must then publish information about each object for which protection is sought before the start of the exhibition and provide additional information upon request in certain circumstances.⁶² Regulations to be issued will specify the information that a museum must provide and how much in advance of the loan the information must be provided. Draft regulations are available,⁶³ and public comment was sought by the DCMS before finalizing the regulations.

F. SCHØYEN COLLECTION

A large group of incantation bowls on loan from a private Norwegian collection to the University College London (UCL) is at the center of a dispute concerning their origin and proper disposition.⁶⁴ The collection was created by a wealthy retired Norwegian businessman, Martin Schøyen, who loaned most of the incantation bowls (654) to UCL in 1995 for them to be stored, studied, and catalogued.⁶⁵ The incantation bowls, dating to the fifth to eighth centuries A.D., contain inscriptions in Aramaic, an ancient Hebrew language. The vast majority of them, if not all, come from within modern Iraq.

After a documentary aired in 2003 questioning the origins of much of the Schøyen Collection, UCL initiated an investigation into whether it was holding the bowls in violation of U.K. law prohibiting the handling of antiquities that were or might have been removed illegally from Iraq after 1990.⁶⁶ A committee of inquiry issued its report on the status of the bowls in July 2006. It is said that the report, which has not been made public, concluded that the documents that accompanied the bowls were not “convincing” and that the bowls, even if they left Iraq before 1990, would be considered stolen property under Iraq’s national ownership law of 1936.⁶⁷ Despite these issues, the report apparently con-

61. Department for Culture, Media and Sport, *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Materials*, available at http://www.culture.gov.uk/Reference_library/Publications/archive_2005/illicit_trade.htm. Museums are expected to comply with the due diligence requirements spelled out in the DCMS Guidance. According to this Guidance, museums should borrow items only if they are legally and ethically sound and should be particularly concerned about objects that are not documented before 1970 or that have a provenance gap between 1933 and 1945.

62. Tribunals, Courts and Enforcement Act 2007, *supra* note 60.

63. Israel Museum, Jerusalem, *supra* note 56.

64. Michael Balter, *University Suppresses Report on Provenance of Iraqi Antiquities*, 318 SCIENCE MAGAZINE 554-55 (2007).

65. Schøyen Collection, <http://www.schoyencollection.com>. The collection includes over 720 manuscripts and other types of ancient written documents.

66. The Iraq (United Nations Sanctions) Order 2003, 2003, S.I. 1519 (U.K.), available at <http://www.hmso.gov.uk/si/si2003/20031519.htm>. Statutory Instrument 2003 No. 1519 was enacted in response to United Nations Security Council Resolution 1483. Section 8 prohibits the import or export of illegally removed Iraqi cultural property and created a criminal offense for “[a]ny person who holds or controls any item of illegally removed Iraqi cultural property . . . unless he proves that he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property.” *Id.*

67. Balter, *supra* note 64; Antiquities Law No. 59 of 1936 (Iraq); Amendment No. 120 of 1974 (Iraq); Amendment No. 164 of 1975 (Iraq). Article 3 of the Antiquities Law states: “All antiquities in Iraq whether

cludes that Schøyen might have acquired good title if he possessed the bowls for more than six years in good faith. In March 2007, the Schøyen Collection announced that it would sue UCL for return of the bowls. The litigation was settled in June with a press release stating that "no claims adverse to the Schøyen Collection's right and title have been made or intimated . . ."68 The press release also stated that the bowls had been returned to the Collection (presumably in London where the Collection is also based) and that UCL agreed to make a payment to the Collection. UCL has refused to release the report of its inquiry committee. Iraq is now reportedly investigating whether to bring a claim before the bowls leave London and is asking for assistance from the British government.⁶⁹

G. ODYSSEY MARINE EXPLORATION

Odyssey Marine Exploration, Inc., a company engaged in deep-water exploration of historic wrecks and recovery of artifacts for commercial sale, announced the recovery of over 500,000 silver and gold coins and other artifacts from a colonial era shipwreck code-named *Black Swan*.⁷⁰ Odyssey claims that the wreck is not yet identified and refuses to disclose its exact location; the wreck is described as located one mile west of the Straits of Gibraltar in international waters beyond the territorial waters or contiguous zone of any nation and at a depth of 1,100 meters. The discovery was announced after Odyssey had imported the artifacts into the United States; the artifacts are being cleaned and conserved and will then be offered for sale.

Odyssey has filed three admiralty claims (or arrests) for wrecks located in the Atlantic Ocean and in the western Mediterranean in federal court in the Middle District of Florida.⁷¹ Spain has entered all three as a claimant, asserting ownership of any Spanish property that might be located at these sites. In addition, Spain is seeking to dismiss Odyssey's filings because it had not described the defendant *res* (the shipwrecks) with sufficient detail.

IV. Malewicz v. City of Amsterdam

Plaintiffs are the surviving heirs of Russian artist Kazimir Malevich, who was recalled to the Soviet Union from Germany in 1928 and left a number of his paintings in Germany with his friend Hugo Haring, who gave them to the Stedelijk (City) Museum of Amsterdam (the Museum) in 1956.⁷² Fourteen of these paintings were loaned to the Guggenheim and deMenil Museums in 2003 as part of an international exhibition. The Department of

movable or immovable that are now on or under the surface of the soil shall be considered to be the common property of the State. No individuals or groups are allowed to dispose of such property or claim the ownership thereof except under the provisions of this Law." Antiquities Law No. 59 of 1936 (Iraq)

68. Balter, *supra* note 64, at 555.

69. *Iraq Asks Britain to Return Hundreds of Missing Artifacts*, AZZAMAN, Nov. 8, 2007, available at <http://www.azzaman.com/english/index.asp?fname=news%5C2007-11-8%5Ckurd.htm>.

70. Press Release, Odyssey Marine Exploration Announces Third Quarter 2007 Results (Nov. 7, 2007), available at <http://biz.yahoo.com/bw/071107/20071107006637.html?.v=1>.

71. Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel, Case No. 8:06-CV-1685-T-23TBM (M.D. Fla. Oct. 30, 2006) (The case involves the historic wreck code-named the *Black Swan*).

72. Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).

State granted these paintings immunity under the Immunity from Seizure Act. In 2005 the heirs brought suit against the Museum for the value of or restitution of the paintings in the District Court for the District of Columbia. The court reserved its ruling because there was insufficient evidence that the expropriation exception of the Foreign Sovereign Immunities Act (FSIA) applied.⁷³

In 2007, the City renewed its motion to dismiss on several grounds, including the Act of State doctrine, failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure, the statute of limitations, and lack of jurisdiction under the FSIA.⁷⁴ The court rejected the Act of State doctrine, finding that the City's attempt to characterize the acquisition of the Malewicz works as an "act of state" stretched the meaning of "official act" too far.⁷⁵ Most significantly, the court rejected the City's motion to dismiss under the purview of the FSIA, stating that "the record contains sufficient contacts to establish jurisdiction under the FSIA's expropriation exception."⁷⁶ Furthermore, the City's loan of the art works to U.S. institutions was commercial in nature, thus constituting a basis for jurisdiction under the FSIA.

V. British Litigation Concerning Iranian Artifacts

A. IRAN V. BEREND

A French collector, Denyse Berend, placed for auction at Christie's in London a fragment of an Achaemenid limestone relief, taken from the eastern staircase of the Apadana structure (or audience hall) of Persepolis, dating to the first half of the fifth century B.C.⁷⁷ Berend purchased the relief at a public auction in New York in 1974 and took possession of it in Paris, also in 1974. When Berend transferred the relief to London, Iran sued and received a temporary injunction restraining the sale. While both parties agreed that Iran had good title to the relief before 1974, the court held that the question of title should be decided according to the *lex situs* where the title that is now in dispute was purportedly acquired (Paris).

Iran first tried to argue that under French conflict of laws, a French court would apply the doctrine of *renvoi*, thereby utilizing the law of Iran (the country of origin) to resolve the title dispute.⁷⁸ The British court held, however, that there was no compelling or overarching doctrinal basis for applying *renvoi* to movable property under the facts of this case. The court then turned to the resolution of the dispute under French law. According to French law, a possessor may acquire title either by possession for three years in good faith under Article 2279 of the Civil Code (acquisition of title by possession) or by possession that is continuous, uninterrupted, peaceful, public, and unequivocal (Article 2229) for thirty years under Article 2263 of the Civil Code (acquisition of title by thirty year prescription). In this case, both parties conceded that the possessor had acted in good faith.

73. Foreign Sovereign Immunities Act, 28 U.S.C. § 1602.

74. *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007).

75. *Id.*

76. *Id.*

77. *Islamic Republic of Iran v. Berend*, [2007] EWHC (QB) 132 (Eng.).

78. *Id.* at 8.

The current possessor was therefore allowed to maintain her title to the relief. It sold at auction in October for £580,500.

B. IRAN V. BARAKAT

The second case involves the application of Iran's national ownership law of antiquities to determine the disposition of a cache of antiquities imported into England by a dealer, Barakat.⁷⁹ The antiquities at issue include jars, bowls, and cups made of chlorite that allegedly were excavated illegally in the Jiroft region of southwestern Iran and date to the third millennium B.C. Iran based its claim of title to the antiquities on its laws pertaining to antiquities.

The trial court first examined various laws of Iran that pertain to its archaeological heritage, in particular the laws of 1930 and 1979. In examining these laws, however, the court concluded that none made a clear statement of ownership that would vest title to undiscovered antiquities in the nation. The court then turned to the question of whether Iran has a right to possession of the antiquities, so that the defendant had committed conversion or the tort of wrongful interference with goods. For the claim to succeed on the basis of a right to possession, Iran had to demonstrate that it had both a proprietary right and an immediate right to possession. While the court agreed that Iran had an immediate right to possession, because of a requirement that accidentally discovered antiquities had to be submitted to the state, Iran's right was not proprietary, as indicated by the court's earlier discussion of the failure of the law to clearly vest title in the nation.⁸⁰

Although Iran had failed to prove its ownership interest in the antiquities, the court turned to consider, in *obiter dictum*, the question of whether, even if Iran's law was clearly a vesting law, its ownership claim could be vindicated. The court cast this issue in terms of the justiciability of Iran's claim. Public laws of one nation, such as penal and revenue laws, are not enforceable in another state. On the other hand, the court conceded that a nation could assert its ownership rights to property located in another state. But the court seemed to limit enforceable ownership rights to those acquired by means by which private individuals could acquire ownership, such as by purchase, gift, and inheritance. Because acquisition by means of a national ownership law is a method available only to sovereigns, the court therefore characterized such laws as public in nature and held that Iran's claim was not justiciable.⁸¹ The appeal in the case was heard in October, and a decision is expected soon.⁸²

79. Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWHC (QB) 705 (Eng.).

80. *Id.*

81. *Id.*

82. The trial court's holding was reversed on appeal in late December 2007. A discussion of the appellate court's decision will be given in next year's Year in Review.

