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Van Gogh's Night Café to Remain at Yale

BY AURÉLIE KAHN

On 28 March 2016, the U.S. Supreme Court denied certiorari to Pierre Konowaloff in a case against Yale University, thereby ending a judicial battle over ownership of a Van Gogh's painting, which the Russian government expropriated from Konowaloff's great-grandfather in 1918.

BACKGROUND OF THE CASE

In December 1918, the Bolshevik secret police occupied the home of wealthy Russian industrialist Ivan Morozov and seized his art collection, including Van Gogh's masterpiece *The Night Café* (the "Painting") for nationalization. In 1933, the Painting was sold by the Russian government to a German gallery, who sold it to Knoedler & Company in New York. There, the Painting was purchased by Stephen Clark who bequeathed it to Yale University. In 1961, Yale received the Painting.

In 2008, Pierre Konowaloff, a French citizen and the great-grandson of Morozov, learned of Yale's possession of the Painting. He wrote to Yale inquiring about its ownership. Yale subsequently filed an action in the District Court of Connecticut to quiet title and for declaratory and injunctive relief. Konowaloff filed counterclaims seeking injunctive and declaratory relief, as well as replevin of, or money damages. This was the beginning of a long effort to retrieve the work that only ended eight years later with the decision of the U.S. Supreme Court.

(RE-)AFFIRMING THE ACT OF STATE DOCTRINE

Yale had moved for summary judgment, asking the District Court to reject all of Konowaloff's counterclaims based on the Act of State doctrine. Under the applicable legal standard, Yale had to show that there was no genuine dispute as to any material fact and that it was entitled to judgment as a matter of law[1]. The hearing was suspended however, until judgment in the case *Konowaloff v. Metropolitan Museum of Art*[2] *("Konowaloff 1")* came into force.

Konowaloff 1 involved the same scenario, with Konowaloff attempting to recover a Cézanne painting from the New York Metropolitan Museum of Art. That painting had been expropriated from Morozov under the same decree and at the same time the Soviet government expropriated *The Night Café*. The Court found, in *Konowaloff 1*, that "as Konowaloff had no right to or interest in the Painting other than as an heir of Morozov, and Morozov did not own the Painting after the 1918 Soviet appropriation, Konowaloff [had] no standing to complain of any sale or other treatment of the [Cézanne painting] after 1918, or to seek monetary or injunctive relief, or to seek a declaratory judgment with respect to the Museum's right or title to the [Cézanne painting]"[3].

Similarly, in his case against Yale, all of Konowaloff's counterclaims arose from his claim to ownership of the Painting. To prevail, Konowaloff had to prove title or a superior possessory right to the Painting, which was considered as "an *essential element* of [his] case with respect to which [Konowaloff had] the burden of proof at trial."[4] Yet for the Court to determine whether Konowaloff had proven this "essential element" would have required looking into the validity of the 1918 nationalization decree. This was precluded by the Act of State doctrine, which prevents U.S. courts, whether state or federal, from questioning the action of other sovereign States.

The Act of State doctrine was determinant in this case. Under the doctrine, the courts of the United States "will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles even if the complaint alleges that the taking violates customary international law"[5].

In *Konowaloff 1*, the Court insisted that the validity of the foreign State's act may not be examined, even when there is a claim that the taking of property was in violation of customary international law or that foreign State's own laws[6]. It also noted that the Supreme Court had "repeatedly applied this principle to cases involving nationalizations ordered during the Russian Revolution … notwithstanding the fact that formal recognition of the Soviet government by the United States occurred years after the decrees themselves."[7]

The Act of State doctrine, which appears rather unambiguous, is not absolute. The Bernstein exception gives the executive branch discretion to waive its application by informing the court that "it has no objection on foreign relations grounds to adjudication of the validity of a given act of a foreign state."[8] This exception originated in a 1954 decision in which the plaintiff was allowed to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the State Department[9]. It is justified by deference to the executive branch's views on the effect on foreign relations of adjudicating the validity of acts of a foreign State. In the Bernstein case, questioning the validity of the expropriation was not likely to damage the relations between the U.S. and post-war Germany.

By contrast, an element of Yale's claim was the allegation that the case could hinder U.S. foreign relations with Russia. Tensions were likely to arise in case of invalidation of the Soviet nationalization decree(s). These rather pragmatic considerations may have weighed in favor of the Court's decision to maintain a *status quo* by reaffirming the Act of State doctrine. The District Court found that the doctrine applied to bar Konowaloff's counterclaims and Yale's motion for summary judgment was granted, allowing the University to retain the Painting.

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On appeal, Konowaloff challenged the District Court's application of the Act of State doctrine to bar his action because, he argued, he had abandoned any claim on the grounds that the 1918 confiscation was illegal. This argument failed, principally because Konowaloff had accepted the validity of the 1918 expropriation and thus admitted any legal claim or interest he had in the Painting was extinguished at that time. Absent a claim to an existing interest in the Painting, Konowaloff had no standing to assert any of his counterclaims[10]. The District Court judgment was affirmed.

In a final attempt to retrieve the Painting, Konowaloff petitioned the U.S. Supreme Court. His writ of *certiorari* was denied without comments on 28 March 2016.[11] ◆

1 Fed.R.Civ.P. 56(a), see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)
2 Konowaloff v. Metropolitan Museum of Art, 11-4338-cv (2nd Cir. 2012)
3 Konowaloff, 702 F.3d at 147
4 Citing Celotex Corp., 477 U.S. at 323, 106 S.Ct. 2548
5 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)
6 Konowaloff, at 145-46 citing Sabbatino
7 Id. at 146, citing United States v. Pink, 315 U.S. 203, 230-33, 62 S.Ct. 552, 86 L.Ed. 796 (1942)
8 Restatement (Third) of Foreign Relations Law of the U.S., para 443 (1987) indicating that courts have discretion whether to accept the executive branch's recommendation that the doctrine can be waived
9 Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvart-Maatschappij, 210 F.2d 375 (2d Circ. 1954)
10 Yale University v. Konowaloff, , 14-3899 (2nd Cir. 2015), citing Konowaloff 1 at 147, holding Konowaloff had no standing to challenge "any sale or other treatment of the [Cézanne] Painting after 1918"
11 Pierre Konowaloff, v. Yale University, et Al. No. 15-921 (2016)

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The Herzog Collection: An Odyssey Through the U.S. Court System Continues

BY BIRGIT KURTZ[1]

After more than six years, the legal battle over the Herzog Collection continues. In March 2016, the D.C. District Court issued another decision in De Csepel v. Republic of Hungary, which involves the World War II era expropriation of an art collection. In this most recent decision, the Court held that it has jurisdiction over most claims under the "expropriation" exception of the Foreign Sovereign Immunities Act ("FSIA"), but not under the FSIA's "commercial activity" exception.

PARTIES

Plaintiffs in the case are heirs of Baron Herzog, a Jewish Hungarian art collector who had assembled a large art collection ("Herzog Collection") before his death in 1934. Defendants are the Republic of Hungary, the Hungarian National Gallery, the Budapest Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics.

PLAINTIFFS' ALLEGATIONS

During World War II, Hungary and Nazi Germany seized the Herzog Collection. After the war, Defendants retained some of the artworks, and Plaintiffs allege that Defendants agreed to return the artwork to the Herzog family upon request. Plaintiffs sued for the return of forty-four artworks from the Herzog Collection, arguing that Defendants breached post-war bailment agreements by refusing to return the artworks in 2008.

2010–2011: D.C. DISTRICT COURT

The case was commenced in 2010 in the D.C. District Court, and Defendants moved to dismiss for lack of jurisdiction under the FSIA. In 2011, the D.C. District Court held that it had jurisdiction under the FSIA's "expropriation" exception in 28 U.S.C. § 1605(a)(3).[2] While the District Court confirmed the general rule that a taking "in violation of international law" is not presumed when a sovereign expropriates property from its own citizens, the District Court held that that preclusion did not apply in this case because "Hungary did not consider [Plaintiffs' predecessors] to be Hungarian citizens at the time of the seizures." In addition, the District Court noted, Hungary "did not act alone" when it seized the Herzog Collection, and the Nazi involvement in the taking distinguished the case further for purposes of the general rule.

2011–2013: D.C. CIRCUIT COURT OF APPEALS

Plaintiffs and Defendants both appealed this decision, and, in 2013, the D.C. Circuit Court of Appeals issued its decision.[3] The Court of Appeals declined to rule on the applicability of the "expropriation" exception, holding instead that Plaintiffs' "claims fell comfortably within the FSIA's commercial activity exception" in § 1605(a)(2). The Court of Appeals held that the underlying activity was commercial in nature, stating that "Hungary's alleged breach of bailment agreements easily satisfies this standard" because the repudiation of a contract was "precisely the type of activity in which a private player within the market engages." Further, the contract established Hungary's commercial relations with respect to artwork, about which there was nothing "sovereign." Finally, the Court of Appeals found that the failure to return property to U.S. residents established a "direct effect" in the United States, another element required to apply the commercial activity exception of the FSIA.

2013–2016: D.C. DISTRICT COURT

In 2013, on remand, the D.C. District Court ordered discovery to proceed. In 2014, while fact discovery was still ongoing, Defendants moved to dismiss the case, and the District Court denied the motion without prejudice pending the close of fact discovery in 2015.[4]

In 2015, after the close of fact discovery, Defendants again moved to dismiss the case for lack of jurisdiction. In March 2016, the District Court ruled that it has jurisdiction over most of Plaintiffs' claims.[5] The District Court held that the "commercial activity" exception of the FSIA did not apply because (1) the direct effect of Defendants' limited commercial activities (e.g., solicitation of tourists) in the U.S. were not "sufficiently tethered" to the "gravamen" of Plaintiffs' claims, and (2) the alleged bailment agreement did not "necessarily contemplate the U.S. as the place of performance at the time of contract formation."

The District Court held, however, that it has jurisdiction over Plaintiffs' claims for 42 out of the 44 artworks at issue under the FSIA's "expropriation" exception. In applying this exception, it followed the recent decision in Simon v. Republic of Hungary[6] in three respects:

- The District Court based jurisdiction on the takings that took place during the Holocaust, even though Plaintiffs' substantive claims were not based on those takings.
- It held, "Property seizures from Jews during the Holocaust constitute genocidal takings which violate international law."
- It found that the 1947 Peace Treaty between Hungary and the Allies did not bar jurisdiction under § 1604.
- The District Court found that it did not have jurisdiction over claims for two artworks that Defendants had acquired after the War.

WHAT'S NEXT?

In April 2016, Defendants appealed the District Court's decision, and the parties' briefs on appeal are currently due between October 2016 and January 2017.[7] Unless the parties settle, a resolution of the jurisdictional issue is not expected before the spring or summer of 2017. ◆

1 Birgit Kurtz is an attorney at Gibbons P.C. in New York City.
2 De Csepel v. Republic of Hungary, 808 F. Supp. 2d 113 (D.D.C. 2011).
3 De Csepel v. Republic of Hungary, 714 F.3d 591 (D.C. Cir. 2013).
4 De Csepel v. Republic of Hungary, 75 F. Supp. 3d 380 (D.D.C. 2014).
5 De Csepel v. Republic of Hungary, No. 10-1261 (ESH), 2016 U.S. Dist. LEXIS 32111 (D.D.C. Mar. 14, 2016).
6 Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016).
7 De Csepel v. Republic of Hungary, D.C. Circuit Court, Case No. 16-7042.

Japanese Art Dealer Pleads Guilty after Seizure of Sculptures during Asia Week 2016

BY KATE FITZ GIBBON

Agents from the Department of Homeland Security seized a number of South Asian artworks in a series of raids during the 24th annual 2016 Asia Week Art Fair, held March 10-19 in New York, NY. One seizure resulted in the prosecution of a Japanese art dealer, Tatuzo Kaku, for criminal possession of stolen property, an antique statue said to be from northern Pakistan. Mr. Kaku is the 71-year-old owner of Ancient Art (Taiyo Ltd.) in Tokyo, Japan.[1]

The artwork in the Kaku case was a circa second century stone sculpture, depicting the footprints of the Buddha, known as a *Buddhpada*. This symbolic rendering of the presence of Buddha, rather than a figural representation as a human being, was characteristic of the early period of Buddhist art. Similar *Buddhapada* are also found in India and Afghanistan.[2]

The seizure resulted in a remarkably swift prosecution, a guilty plea agreement, forfeiture, conviction, and subsequent departure of the defendant for his home in Japan – all in less than two weeks. While Kaku's decision to plead guilty may have been the best choice for him, the case presents significant contradictions.

Although the Felony Information initially alleges that Kaku purchased the sculpture in Pakistan in 1982, that is, 34 years ago, it states elsewhere that Kaku "saw" it in Pakistan "15-20 years ago".[3] Kaku's position is that he purchased it from a dealer who brought it to Japan in 1982. No evidence was presented whether the statue originated in Pakistan or was only sold there.[4] Kaku's Plea Allocution statement to the court admitting guilt states that he *believed* that it had been removed unlawfully from Pakistan and then exported to Japan.

Once in Japan, an argument for Kaku's subsequent good title in the object can be raised. Even an admittedly "stolen" object need not stay "stolen" for long in Japan. With respect to foreign cultural property, Japan falls into the category of civil-law countries which have treated possession as virtually equivalent to good title. A claimant country had a short time frame in which to seek repatriation of an unlawfully removed object of cultural property.[5] While Japan has enthusiastically contributed to UNESCO programs dedicated to preserving cultural monuments worldwide, it was reluctant to accede to the terms of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and did not pass implementing legislation until December 9, 2002. Japan's 2002 Act Concerning Controls on the Illicit Export and Import of Cultural Property is prospective only and does not affect property lost or stolen before that date. Even after 2002, claims for recovery of stolen cultural property may be made only before two years have elapsed from import and within ten years from the time of the theft.[6]

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1 Jamie Schram, "Antique Dealer Arrested for Smuggling Ancient Sculpture," New York Post, 3/22/2016, http://nypost.com/2016/03/22/antique-dealer-arrested-for-smuggling-ancient-sculpture/

2 Buddhapada are considered an aniconic representation of the Buddha through symbol. In the early centuries CE, the region now including parts of India, Pakistan and Afghanistan were the cradle of Mahayana Buddhist civilization, in which Buddhism became a popular religion for the masses. Under the influence of a blend of Hellenistic and cosmopolitan cultures of the time, the Buddha later began to be rendered in human form. See, for example, Francine Tissot, Catalogue of the National Museum of Afghanistan, 1931-1985, 465,469, and The British Museum, registration no. 1880,0709.57, http://culturalinstitute.britishmuseum.org/asset-viewer/limestone-panel-depicting-the-buddhapada/twG1sWveihtGJg?hl=en

3 Felony Complaint, The People of the State of New York Against Tatsuzo Kaku, Docket No. 2016NY017906, p3.

4 Ibid. at 2. In the early 1980s, the author saw numerous ancient (and purportedly ancient) objects from Afghanistan, India, Nepal and even Thailand openly in the bazaars throughout northern Pakistan, and described as originating in the Swat Valley.

5 Geoffrey R. Scott, Spoliation, Cultural Property, and Japan, 29U.Pa.J.Int'lL.803(2008), 876. "In accord with Section 1 of Article 181 of the Civil Code of Japan, there is a consequent statutory presumption of ownership if a person exercises reasonable care in the purchase of an item, including an item of cultural property, and he genuinely believes himself to be the owner of that property. In addition, the transaction is, in these circumstances, deemed open, and as a result, the possessor acquires immediate title to the item. This condition is true notwithstanding that the object may, in fact, be lost or stolen."

6 Act Concerning Controls on the Illicit Export and Import of Cultural Property (Law No. 81) 2002, http://www.unesco.org/culture/natlaws/media/pdf/japan/japan_act_control_illicittraf_entof.pdf

According to newspaper reports on testimony in hearings on the matter, Kaku sold the Buddhapada sculpture in the early 1980s to a Japanese collector, who later sold it back to Kaku. It was sold again to an English gallery, sold back to Kaku again, sold to another collector and finally consigned by the deceased collector's heirs to Kaku for sale at Asia Week.[7]

Assuming these dates are correct, the sculpture appears to have been lawfully transferred numerous times in Japan in the years between its original acquisition in 1982 and its importation into the US in 2016, and to have been legally owned under Japanese law when it was shipped to the US in 2016.

A second issue relevant to the object's legal status in the U.S., is whether Pakistan had a valid national ownership law (vesting ownership in antiquities in the State) in 1982, possibly rendering the sculpture "stolen" under US law, regardless of the intervention of good faith purchasers or statutes of limitation. If the Pakistan law of 1982 date was an export law, not a vesting law, it would not be sufficient to make the sculpture "stolen" as a result of its unlawful export from Pakistan.[8]

Pakistan's 1976 Antiquities Act made export of antiquities without permission of the Director General of Archaeology unlawful.[9] A provision vesting ownership in all "buried antiquities" in the Federal Government of Pakistan (§13A), was not added until 1992. Non-buried antiquities are not so designated.[10] Moreover, since artifacts are sold openly in public venues throughout Pakistan, it would be difficult to show that domestic laws prohibiting trade in antiquities were enforced. A claim restricting import made under the Convention on Cultural Property Implementation Act of 1983 (CCPIA)[11] would not have been tenable, the *Buddhapada* sculpture having been more than 30 years outside of the country of origin, and Pakistan never having sought an agreement with the U.S. under the CCPIA.

Kaku's decision to enter a guilty plea may have depended upon other factors, including the complexity and length of a defense involving the laws of several foreign nations. It might simply have been worthwhile for him to get it over with, even at the cost of forfeiting a statue worth over a million dollars.

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Other highly publicized seizures during the height of Asia Week brought considerable negative media attention to the art trade. One involved two sandstone sculptures taken from Christie's Inc. by Homeland Security Investigations on March 11. These sculptures were said to have been seized as part of a continuing investigation into the activities of art dealer Subhash Kapoor, who is currently on trial in India. However, as Christie's counsel Sandra Cobden told the audience at a March 25 conference sponsored by the Lawyers' Committee for Cultural Heritage Preservation, what the press reported as a "raid" was a pickup pre-arranged by NY Prosecutor Matthew Bogdanos, who told her that Christie's vetting process was not at fault; the information that would have enabled the company to identify the sculptures as stolen was not publicly available. On March 16, Homeland Security Officers were photographed rolling a white marble sculpture of two Buddhist-style figures down East 67th St. after seizing it from rented space at a Manhattan gallery.[12] On March 17, Homeland Security officers removed three Indian and Thai objects along with business records from another Manhattan gallery. That same week, a schist head depicting a Bodhisattva, said to be 2nd century from Pakistan or Afghanistan, and destined for sale at an unspecified auction house during Asia Week, was seized at a U.S. port on entry, according to a press release from U.S. Immigration and Customs Enforcement.[13] The seizures are expected to discourage participation by European and other international art dealers in a U.S. art market already fraught with legal uncertainty. ◆

7 Ibid. at 1.

8 "The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects," Patty Gerstenblith, United States Attorneys' Bulletin, Vol 64, No 2, March 2016, 6: "It is crucial to note that mere illegal export from a foreign country does not make the object illegal in the United States unless there is a violation that makes the object illegal under U.S. law."

9 Act VII of 1976, Antiquities Act 1975, http://www.neduet.edu.pk/arch_planning/ICOMOS/22-11-11/1-Antiquities%20Act%201975.pdf

10 ACT No. XXI of 1992, The Gazette of Pakistan, EXTRA., SEPT 16, 1992, Part I, 553-554, states "6. Insertion of new section 13A, Act VII of 1976,-In this Act, after section 13, the following new section shall be inserted, namely:-13A Ownership of busied antiquities.-Notwithstanding anything contained in any other law for the time being in force, the ownership of all buried antiquities shall vest in the Federal Government."

11 Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. 2601 et seq.

12 "Ancient Statue is Seized from Manhattan Gallery," Tom Mashberg, NY Times, March 16, 2016.

13 "ICE, CPB recover 2nd century Bodhisatva head destined for auction during New York's Asia Week," https://www.ice.gov/news/releases/ice-cbp-recover-2nd-century-bodhisattva-head-destined-auction-during-new-yorks-asia.The object, which trade experts say appears to be inauthentic and which has suspiciously extensive gilding across face, headdress, and elaborate coiffure, was estimated by ICE to be worth hundreds of thousands of dollars.

France Adopts Safe Haven Provisions

BY AURÉLIE KAHN

On July 7, 2016, France adopted Law No. 2016-925 on the Freedom of Creation, Architecture and Heritage[1] (the "Law") introducing a system of safe haven for threatened cultural property. This followed French President François Holland's proposal in November 2015 to offer "asylum" to Syrian antiquities, to protect them from destruction. The proposal resulted in a late amendment to an existing parliamentary bill. The "Palmyra amendment" as it was later designated, has also introduced into French law a number of provisions aimed at better combatting the illicit trade in cultural property.

The Law first sets up specific customs control over the import of cultural goods[2]. Import from a non-E.U. country which is a party to the 1970 UNESCO Convention[3] is made subject to a certificate. Absent such certificate or equivalent document, import is prohibited. Previously, the control exercised in France over the international circulation of cultural property was very much export-focused, in part because E.U. regulations – enforceable as law in all Member States, subject the export of cultural goods outside the Community to the presentation of an export license[4]. The introduction of import controls enables France to comply more fully with its international commitments, in particular the 1970 UNESCO Convention that addresses the illicit import, export or transfer of ownership of cultural property.

The Law also specifically prohibits the circulation of cultural goods that have illicitly left the territory of a State, in the conditions determined by a resolution of the UN Security Council[5]. This provision will concern, most notably, cultural objects illegally removed from Iraq since August 6, 1990 and Syria since March 15, 2011, in accordance with Security Council Resolution 2199.[6]

In addition, the Law creates a system allowing the public owners of property acquired in good faith, which would later appear to have been stolen or illicitly exported, to ask for judicial cancellation of the contract, gift, or bequest whereby the property was acquired.

But perhaps the most innovative measure of the Law is the creation of refuge museums for endangered cultural property[7]. As an exception to the prohibition mentioned above, when cultural goods are in a situation of emergency and serious danger by reason of armed conflict or disaster in the territory of a foreign State that owns or possesses such goods (the "Source State") France may, upon request of the Source State or a resolution of the Security Council, offer temporary protection to pieces of movable heritage of the Source State that are exposed to serious threats of destruction or disappearance. The Law, while establishing French museums as refuge, also guarantees that the cultural goods will not be seized while granted asylum in France.

While on deposit, loans may be granted, subject to approval from the Source State. This is aimed at enabling the circulation of cultural goods and promoting knowledge of the endangered heritage through the planning of national and international exhibitions. The State hosting the exhibition shall also guarantee immunity from seizure.

With its new law, France becomes the third country, after Switzerland in 2014 and the United States this year, to adopt safe haven legislation. Common in purpose, the laws differ on a number of points. Most notably, the U.S. safe haven provisions only apply to a specific category of objects: tied to specific import restrictions for archaeological or ethnological material of Syria[8], the safe haven provisions came as a response to a specific concern that import restrictions would be harmful if applied to instances where such material would be imported for protection purpose. By contrast, the French and Swiss laws are designed for universal application, provided that the conditions for protection are met.

With its new law, France becomes the third country, (after Switzerland and the United States), to adopt safe haven legislation.

Beyond the protection that is offered, the international nature of the protection system reveals an evolution towards a global conception of cultural heritage. The responsibility to preserve does not only fall on the Source State but rather on everyone. Only that understanding can justify the protection of cultural objects by a foreign country. This is further affirmed with the possibility, as introduced in the Law, to grant loans over the objects that are being protected. Cultural objects which are granted protection can reach a public beyond the source and the refuge States. Away from the threats of destruction, disappearance, or seizure, cultural objects can be displayed and educate the public about a culture or tradition it might not have heard of, absent the protection offered by another State. ◆

1 Loi No. 2016-925 relative à la liberté de création, à l'architecture et au patrimoine

2 Art. 56 of the Law introducing new article L.111-8 in the French Heritage Code

3 Convention of 17 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

4 Council Regulation (EC) No 116/2009 and Commission Regulation (EC) No 1081/2012

5 Art. 56 of the Law introducing new article L.111-9 in the French Heritage Code

6 Resolution 2199 of 12 February 2015, para. 17: "… all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people…"

7 Art. 56 of the Law introducing new article L.111-11 in the French Heritage Code

8 Protect and Preserve International Cultural Property Act, H.R. 1493 (05/09/2016)

Germany Enacts Significant Changes to its Cultural Property Law

BY ARMEN R. VARTIAN

On July 8, 2016, The German Bundesrat approved a new Cultural Property Protection Act, following the Bundestag's prior approval of the law on June 23. The law, amending Germany's 1955 Kulturgutschutzgesetz, was proposed initially in 2015 and debated extensively in legislative circles as well as within the art and antiquities marketplaces. Criticism in the media – including from leading German artists who threatened to move their studios out of Germany if the law was enacted as originally drafted – resulted in substantial amendments in Fall 2015. The Act purports to harmonize German law with that of the EU generally, in particular EU Directive 2014/60/EU, and also to deter illicit traffic in cultural objects. Debates continue about whether the Act was needed for either of those purposes, but most agrees that it imposes additional burdens on dealers and collectors within Germany.

The key points of the new law are outlined below.

1. An export license will now be required for works of art that are more than 70 years old and valued at over €300,000. This requirement applies regardless of whether export is to another EU member state or outside the EU. Previously, exports of artworks from Germany to another EU state did not require an export license, although Germany has regulated the export of artworks outside the EU for decades. The 2015 amendments exempted works of living artists from this requirement. Such works will not require an export license, regardless of when they were created, minimizing the law's impact on the contemporary art market. For antiquities, the value thresholds are considerably lower (down to €0 for "archeological" items). For example, a strict interpretation of the Act would encompass most ancient Greek and Roman coins and other items.

2. Artworks that are considered to be a "cultural property of unique national importance" will be listed in registers of the various German federal states and cannot be granted a permanent export permit. For the first time, there will be a legal definition for cultural property, but as that definition will be applied at the German state level, it is likely that the courts will be involved in defining this definition eventually. Still unresolved is the issue of whether works by non-German artists such as Andy Warhol could ever be listed as German cultural property. Media reports suggest that some collectors have already removed their collections from Germany rather than deal with state regulators who may deny them the ability to move particular items, or sell them, abroad. And the states aren't happy either, judging from officials in Baden-Württemberg and Hesse who expressed concern to the German Ministry of Culture that undertaking their responsibilities under the Act was "an unforeseeable financial and logistical burden".

3. Artworks that are on long-term loan to public institutions will be considered cultural property during the term of the loan. This provision, originally absolute, was amended to allow lenders to opt-out of the cultural property designation.

4. The importation of cultural property into Germany will require an export permit from the country of origin. This requirement is a major point of contention among the government, dealers and collectors. The country of origin of items such as Roman coins, which by their nature were made in different places and also crossed many national boundaries in due course, is impossible to determine. Also, many artworks and antiquities have been in the legitimate marketplace for many years, before export permits were required or even existed.

5. Every domestic sale of cultural property must include detailed due diligence, including documentation of the item's prior ownership and location, and whether movements were accompanied by appropriate export permits. Some German galleries are no longer offering ancient Greek, Roman or Asian artworks because of the difficulties in documenting their provenance. The (German) chairman of the International Association of Dealers in Ancient Art has stated bluntly that the Act will "put an end to the trade in non-European art objects".

6. Illicitly obtained and imported cultural property will be returned to its country of origin. The Act makes it simple for foreign states to request return of particular items, requiring only (1) a proper description of the item; (2) a statement confirming that it is an item of national cultural heritage under national legislation or administrative procedures of the requesting state; and (3) and a statement confirming that the cultural heritage has been transferred from its territory illegally. Items privately owned are subject to these procedures,. Private owners are entitled to compensation for their original purchase price (not current market value) and only if they can establish their due diligence in purchasing the items.

Market participants are predicting that dealers, collectors and museums will have less interest importing works of art into Germany because of the heightened restrictions on importing items lacking a required export permit, as well as the risk that once successfully imported into Germany, works will be difficult to sell legally given the provenance documentation requirements and/or will be listed as cultural property and become subject to the export license requirement. Although states such as China, Egypt and exico have supported the Act for attacking the marketing of their cultural heritage and discouraging looting, it remains to be seen whether the Act functions properly enough to accomplish such lofty objectives. ◆

New York State and Federal Authorities Clamp Down on Sales and Use Tax Avoidance

BY ARMEN R. VARTIAN

In Spring 2016 New York state and federal prosecutors brought actions against art collectors who allegedly attempted to avoid New York's sales and use tax on works of art. The federal case, a grand jury indictment, targeted Morris Zukerman, a prominent energy investor. The state's case, commenced by New York Attorney General Eric Schneiderman, targeted real estate developer Aby Rosen. These cases show regulators' continued interest in enforcing sales and use tax laws in connection with art sales.

The U.S. government charged Zuckerman, among other things, with wire fraud against New York state, alleging that Zukerman used email and fax communications to orchestrate the purchase of over $52 million in art for use in Zukerman's New York residence and office, and that of a family member, without paying any sales or use tax. The indictment also alleges a purchase of diamond earrings from the New York office of a diamond merchant for $645,000 for which Zukerman schemed to avoid sales and use tax.

With respect to the artwork, the federal government alleges that Zukerman and one of his companies bought "Old Master paintings" from galleries and auction houses located in New York and caused those sellers to ship the paintings to addresses in New Jersey and Delaware, although his company had no physical presence in either of those states, and to collect no sales tax for the sales. According to the indictment, Zukerman arranged for the paintings to be transported back to Manhattan for hanging in his apartment and in the residence of a family member. The government further alleges that a second group of paintings, which galleries allowed Zukerman to "test drive" for a period of time in his New York apartment, eventually were purchased by Zukerman, removed from his apartment by the galleries and shipped to New Jersey and Delaware addresses, after which they likewise were picked up by Zukerman and transported back to his New York apartment. A third group of paintings, purchased from galleries and auction houses in Europe, were shipped to the New Jersey and Delaware addresses, where Zukerman picked them up for transportation to New York. Yet a fourth group of paintings were purchased from European galleries and auction houses, invoiced to Zukerman c/o New Jersey or Delaware addresses, but actually shipped to Zukerman's New York apartment. Zukerman has pleaded guilty to all charges.

New York state's case against Aby Rosen involved a different method for evading sales and use taxes. Rosen, well known as a collector of contemporary art as well as a real estate developer, was accused of purchasing more than 200 works of art, furniture, jewelry, and other decorative items, some of which he commissioned, for in excess of $80 million without paying any sales or use taxes. Between 2002 and 2015, Rosen allegedly used two companies, 22nd Century Acquisitions LLC and Lever House Artwork LLC, to purchase and, in the case of Lever House Artwork, commission artwork, claiming sales tax exemptions on the basis that the purchases and commissions were for resale. For each transaction, Rosen's companies prepared, and Rosen himself signed, resale exemption certificates for presentation to the galleries involved. According to the state's allegations, Rosen actually used the artwork for "personal enjoyment and the enhancement of the identity and brand of Mr. Rosen's real estate business", displaying it throughout his residences in New York and throughout his real estate business offices and properties.

Rosen denied the allegations, saying that any displays of the artworks were part of promoting them for resale. He agreed to settle with the state, however, paying $7 million and agreeing to what the state calls a "code of conduct" for future purchases including the following:

- Mr. Rosen and his companies will not use a resale certificate when purchasing artwork, unless the artwork is purchased for the exclusive purpose of resale;
- Mr. Rosen and his companies will timely report and pay New York state and local government compensating use taxes if artwork is purchased for resale but is subsequently diverted to a taxable use, including displaying such artwork within New York state, for personal or non-resale business use: (i) in any residence or office of Mr. Rosen; (ii) in any residence or office of any of his immediate family; or (iii) in any property owned, managed or sold by Mr. Rosen's real estate company or any of its affiliates; and
- 22nd Century and Lever House Artwork will employ (i) duly accredited outside accounting professionals to prepare and file all tax returns; and (ii) duly accredited accounting professionals to prepare all accounting and financial books and records.

The common factor in these cases was the use and display of the artwork in New York. Both Zukerman and Rosen bought from New York auction houses and galleries for use in New York, a classic situation where sales tax should be charged. The sellers' failure to charge sales tax was somewhat of a "red flag" for regulators. Although most of Zukerman's paintings were shipped out of New York, and Rosen used resale certificates in all of his purchases, the ultimate use of the artwork for both Zukerman and Rosen was in New York. Therefore, even if sales tax was not due, compensating use tax would be due. As Schneiderman pointed out in a press release, Rosen may well have intended to resell works at the time he purchased them, but as soon as he decided not to do that – when he hung them in his home or office – he should have paid use tax.

While none of the sellers were accused of wrongdoing, a cursory look at the facts raises questions about galleries and auction houses shipping to out-of-state addresses, and not charging sales tax, with knowledge that the works were either being delivered to New York or were likely to be displayed there. Attorneys should counsel their clients to avoid participating in any such practices. ◆

HR 1493: The Protect and Preserve International Cultural Property Act

BY AURÉLIE KAHN

On May 9, 2016, the Protect and Preserve International Cultural Property Act ("HR 1493") became law. The legislation: (1) expresses a sense of Congress that the President should establish an interagency committee to coordinate and advance executive branch efforts to protect and preserve cultural property in times of political instability, armed conflict and other disasters; (2) authorizes import restrictions on Syrian cultural goods; and (3) provides for temporary safe harbor for Syrian cultural goods at the request of foreign owners or custodians.

Congressman Elliot Engel (D-NY), the ranking Democrat on the House Foreign Relations Committee, first introduced the legislation late last term. At the time, the bill's supporters in the archaeological community and the State Department bureaucracy justified the need for quick passage based on widely publicized but ultimately unsubstantiated reports that the Islamic State was reaping hundreds of millions or even billions of dollars in profits from artifacts looted from areas in Syria under its control. Engel's initial effort died in Committee, but he reintroduced it early in the present Congress, and given the desire to "do something" about ISIS, it was quickly approved by House Foreign Relations and then passed in the House.

In contrast, the Senate Foreign Relations Committee, chaired by Senator Bob Corker (R-Tenn.), took a far more deliberative approach to the measure. Senate Foreign Relations scaled back HR 1493 dramatically. The final legislation, authored by Corker, is far less ambitious than Engel's initial proposals that created a "Cultural Property Czar" first in the White House and then in the State Department. That provision attracted significant opposition from museums and groups representing the interests of antiquities and coin dealers and collectors. They feared this "Cultural Property Czar" would view repatriation solely as a "soft power" measure and give concerns that collectors and dealers the short shrift.

In the end, legislation reminiscent to that passed in the wake of looting of the Iraq Museum in 2003 prevailed. Recent import restrictions imposed under the legislation take pains to limit otherwise breathtakingly broad restrictions to artifacts "unlawfully removed from Syria on or after March 15, 2011." 81 Fed. Reg. 53916-53921 (Aug. 15, 2016). As an aside, the date in question—set forth by the statute—relates to the date the Syrian civil war began. In contrast, other import restrictions on cultural goods are not retroactive, i.e., they come into force the date restrictions are announced to the public in the Federal Register.

Still, there are concerns that any artifacts Customs seizes will be sent to the Assad regime, which has been responsible not only for numerous civilian deaths, but bombing damage and looting of cultural heritage sites as well. Despite the presence of a safe harbor provision in the bill, the prospect that Customs may send artifacts back to a war zone raises a serious question whether the legislation still assumes repatriation rather than preservation as its ultimate goal. ◆

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