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Art & Cultural Heritage Law Newsletter

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US SIGNS BILATERAL AGREEMENT IMPOSING RESTRICTIONS ON CHINESE ARTIFACTS

By Erin Thompson and Patty Gerstenblith

On January 14, 2009, the United States and China signed a bilateral agreement restricting the import into the US of certain categories of Chinese, archaeological materials pursuant to the United States Convention on Cultural Property Implementation Act (CPIA) and Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property.

China has in recent decades experienced growing problems with illicit excavation and illegal export of its archeological and cultural heritage and first requested that the US impose import restrictions in 2004. However, not all observers agreed that this request was the proper method to address these problems. Art dealers and museums were the most vocal critics of the request. They were displeased about the proposed restrictions on the 19th and 20th century artifacts, arguing that such materials were often produced for export. They also argued that a major part of the demand spurring the illicit market for Chinese artifacts comes from within China itself, thus imposing restrictions on the US market would constrain US collectors while having a small effect on the overall illicit trade.

The 2009 agreement addressed some of these concerns. The request from China asked the US to restrict the import of a broad range of materials from the prehistoric period through the early 20th century. However, the CPIA defines archaeological materials as objects that are at least 250 years old. Therefore, the agreement narrowed the scope of materials for which China sought protection and is limited to archaeological materials from the Paleolithic period (75,000 B.C.) through the Tang dynasty (907 B.C.E.), along with monumental sculpture and wall art that is at least 250 years old. The specific list of restricted materials was published in the January 16, 2009 edition of the *Federal Register*. The designated categories of objects include bronze vessels, sculpture, coins, wall paintings, and objects of iron, gold, silver, bone, ivory, horn and shell, as well as silks, textiles, lacquer, bamboo, paper, wood, and glass. The United States government is now ***(cont'd on page 35)***

Welcome to our Fifth Issue!

On behalf of the Art & Cultural Heritage Law Committee, welcome to the fifth issue of our newsletter.

In this issue, we are pleased to provide readers background on major developments in the areas of art and cultural heritage law, including the signing of a bilateral agreement between the United States and China with the aim of protecting Chinese antiquities being smuggled into the United States. I also note the Committee's panel at the ABA International Law Section Spring Conference addressing problems posed for museums seeking to display State-owned antiquities, described on the following page.

Kimberley Alderman provides an invaluable exposé of page cutting of rare manuscripts in libraries worldwide. David Bright tackles the epic history of the battle over salvage rights to the *R.M.S. Titanic* in the first installment of his article addressing the application of international maritime law to the *Titanic* dispute in the US courts. Leila Amineddoleh provides readers insight into the peculiar history of the Aboutaam's art dealings, including the recent arrest of Ali Aboutaam in Bulgaria. In two separate articles, David Rowland, Jennifer Kreder, and Lucille Roussin address key issues in nazi-era art claims, reminding us that the legacy of nazi looting of art is as strong now as it has ever been. Ricardo St. Hilaire again shares with us a wealth of information in his tracking of news relating to art thefts and the looting of antiquities. Enjoy!

Cristian DeFrancia, Editor-in-Chief

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Submissions are welcome and will be published at the discretion of the editors. We also encourage artists to submit their work and border art in jpeg format, which will be duly credited to the artist. Views contained in the newsletter are those of the authors only and do not represent the official position of the Committee or the American Bar Association.

NAZI LOOTED ART IN THE SECOND CIRCUIT: RECENT DEVELOPMENTS

By Jennifer Anglim Kreder & Lucille Roussin

Two cases in the Southern District of New York may have a strong impact on the future of Nazi era art claims in the United States. First, *Bakalar v. Vavra* went to trial in the Southern District of New York the week of August 25, 2008, and Judge Pauley found against the heirs of Viennese cabaret performer Fritz Grunbaum on the facts and awarded Egon Schiele's drawing *Seated Woman with Bent Leg* to the present-day possessor. Civ. No. 05-Civ.-3037 (WHP). The case is now on appeal in the Second Circuit Court of Appeals. Second, *Museum of Modern Art and the Solomon R. Guggenheim Foundation v. Schoeps* involves claims by the heirs of German banker and art collector Paul von Mendelssohn-Bartholdy for title to two well known paintings by Pablo Picasso: *Boy Leading a Horse* (1906) and *Le Moulin de la Galette* (1990). Civil Action No. 07 Civ. 11074 (JSR). Both cases were filed as declaratory judgment actions after claimants came forward, but had not yet filed any litigation. The present-day possessors (Bakalar and the Museum of Modern Art and the Solomon R. Guggenheim Foundation) initially filed suit to quiet title. Both cases are discussed below. For a more complete discussion of the Mendelssohn-Batholdy factual allegations, see the Spring 2008 edition of this newsletter (page 14).

The *Bakalar* case concerns the heirs of Fritz Grunbaum, a prominent Jewish entertainer in Vienna who owned a significant art collection. He was arrested shortly after the 1938 *Anschluss* and immediately shipped to the Dachau concentration camp where he was forced to sign a Power of Attorney certificate to provide his wife, Elisabeth, with the legal power to manage his assets in accordance with Nazi law. Beginning in April 26, 1938, Nazi law forced Austrian Jews, including Elisabeth (on Fritz's behalf), to sign property declarations listing their assets, specifically including art collections, for assessment by Nazi appraisers. Before being arrested and shipped off to her death in the Minsk death camp in October 1942, Elisabeth was forced to sign a document that stated: "[T]here is no estate . . . [and] in the absence of an estate, there are no estate-related proceedings."

The parties dispute the legality of the sale of the art by Fritz's sister-in-law in 1956 and whether title could have transferred from Fritz after his arrest in light of the Austrian 1946 Nullification Act. Regardless of the circumstances, much of Fritz's art, including the Schiele drawing at issue in this case, was purchased by Eberhard Kornfeld, a partner in the Swiss art gallery Gutekunst & Klipstein. Kornfeld sold many Schieles in September of 1956 to the Galerie St. Etienne in New York. This gallery was founded by Otto Kallir, whose historical reputation as one who fled approaching Nazi persecution and rescued much modern art is now being questioned in some pending cases in the United States, which allege that he took advantage of some Jewish art collectors in Vienna. Gutekunst & Klipstein in Bern (now Galerie Kornfeld) is known to have sold artworks seized by the Nazis. It sold the Grunbaum drawing approximately six months after purchasing it in 1956 to Galerie St. Etienne, which sold it to Bakalar in 1963.

After a seven day trial ending September 2, 2008, the court found that title vested in Bakalar via the alleged sale by Fritz Grunbaum's sister-in-law. Under this theory, Fritz Grunbaum's Power of Attorney signed in Dachau gave Elisabeth Grunbaum the power to make a valid gift of the painting to her sister-in-law in Nazi Vienna after Fritz died intestate and shortly before Elisabeth was deported to a death camp. The Grunbaum heirs have appealed, and two

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groups of *amici* filed 'friend of the court' briefs on key legal issues.

Prior to trial, the trial court ruled against the heirs on a number of issues that crippled the case. The trial court excluded testimony by Holocaust scholar Jonathan Petropoulos, who could have informed the court about various Nazi practices designed to make involuntary transactions appear lawful. On appeal, the Second Circuit could only overturn the trial court's decision to exclude Petropoulos' testimony and its factual findings if it concludes the trial court abused its discretion.

Moreover, the trial court applied Swiss law instead of the law of Austria or New York, and misapplied the Swiss good faith purchaser defense to Kornfeld's purchase. The Second Circuit Court of Appeals likely will be the first court to address the argument that New York's Estates Powers and Trusts Law § 3.5-1(b) applies to Nazi era art claims brought by heirs such that the law encompassing the location of the initial theft applies regardless of the passage of an *objet d'art* through Switzerland and sale in New York. This statute appears to be easily overlooked in litigation outside of Surrogate's Court that may raise probate issues. This oversight might occur because courts are not accustomed to considering estate laws and thus choice of law statutes may be overlooked. This issue is critical because a trial court's choice of law determination is subject to *de novo* review.

The district court in its May 30, 2008, opinion correctly noted that New York's statute of limitations and *laches* doctrine apply to the *Bakalar* case without any need for conflicts analysis. Nonetheless, New York's conversion cases involving stolen art cited by the lower court performed conflicts analysis on precisely these issues. See *Warin v. Wildenstein*, Index No. 115143/99, 2001 WL 1117493, slip op. 40127(U) (N.Y. Cty. Sept. 4, 2001); *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98 Civ. 7664, 1999 WL 673347, at 3 (S.D.N.Y. Aug. 30, 1999).

The heirs and *amici* also argued that placing the burden of proof upon the possessor of allegedly stolen property to prove title is as essential a part of New York law as is demand and refusal. See *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 153, 550 N.Y.S.2d 618, 624 (N.Y.A.D. 1990) ("We recognize this burden to be an onerous one, but it well serves to give effect to the principle that '[p]ersons deal with the property in chattels or exercise acts of ownership over them at their peril.'").

Amici argued that even if interest analysis applied instead of New York's Estates Powers and Trusts Law §3(5)-1(b) concerning the legitimacy of the transfer from Fritz's estate, there was simply no justification for applying Swiss law in any respect when the art simply passed through Switzerland for a few months.

Interestingly, the Grunbaum heirs sought to certify a class of present-day possessors of Fritz's artworks, which also was denied without even allowing discovery into the issue, which is reminiscent of *In the Matter of Ellen Asch Peters v. Sotheby's Inc.*, 821 N.Y.S.2d 61 (App. Div. 2006), in which claimants were denied pre-filing discovery to determine the present-day possessors of art previously owned by their family offered advertised for auction.

While *Bakalar* was on appeal, *Schoeps* was set for trial to begin February 2, 2009. One of the core issues in *Schoeps* was whether a document from 1935 conferred a valid gift on Mendelssohn-Batholdy's second wife or was a backdated *Verfolgten-Testament*, a document often used by Jews to try to insulate their property from Nazi aryanization. Under *Military Government Law 59*, this document would have been rendered void. Whether the transfer was valid would determine who could have lawfully

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inherited the paintings. The two Picasso paintings at issue were given on consignment to art dealer Justin Thannhauser for sale in a Buenos Aires gallery in 1934. These, and another three Picasso paintings, failed to sell in Argentina and were returned to Thannhauser's cousin's Rosengart's gallery in Lucerne, Switzerland at some time after Paul von Mendelssohn's death in May 1935. The painting *Boy with a Horse* was sold in 1936 to New York art collector William Paley, via the Rosengart Gallery and through dealer Skira in 1936. Paley subsequently donated the painting to the to to the Metropolitan Museum of Art. The second painting, *Moulin de la Galette*, was brought by Thannhauser to the US when he emigrated in 1940 and he later bequeathed it to the Guggenheim Museum.

On January, 27, 2009, after the Notice of Appeal was filed in *Bakalar*, Judge Rakoff ruled on choice of law issues in *Schoeps* stating that "interest analysis leads to the conclusion that New York law applies to the sale of 'Boy' to Paley." The court held that German law "plainly" controlled whether the painting was transferred to the second wife under duress conditions. The court applied the five factors relevant to interest analysis in a contract case – as to the initial sale by the second-wife, not as to the subsequent sales in Switzerland or New York. Those factors are: (1) place of contracting; (2) place of negotiation; (3) place of performance; (4) location of the subject matter of the contract; and (5) domicile or place of business of the contracting parties. The court rejected out of hand, and neither party even raised, the idea that Swiss law might apply to the issue, even though one theory of the facts was that the painting was in Switzerland as long as four years.

As to the issue of the "validity and legal effect of the sale" of the painting in Switzerland, a separate conflicts analysis was necessary to determine whether "that sale . . . might create a 'good faith purchaser' defense for the [possessor] even if the transfer [in Germany] were infected with duress." The issue was essential because Swiss and New York law, the two potentially relevant laws, are diametrically opposed in terms of whether the present day possessor might be able to credibly assert such a defense. The court cited *Bakalar* and *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, 717 F. Supp. 1374, 1400 (S.D.Ind. 1989), for this point. Under New York law, it is by now axiomatic that (barring the expiration of the statue of limitations or application of the laches doctrine) one cannot obtain title from a thief unless the present-day possessor's title traces to someone with whom the original owner voluntarily entrusted the art. In contrast, under Swiss law, a good faith purchaser defense is available. In rejecting the applicability of the Swiss defense, the court noted that "when the parties did not intend that the property would remain in the jurisdiction where the transfer took place, that forum will have a lesser interest in having its laws applied."

As the parties had opposing views of the evidence, which party would bear the burden of proof in the litigation was extremely important. Schoeps argued the *Military Government Law No. 59* requires a presumption of invalidity as to all transfers of property from a Jew to a non-Jew in Nazi Germany between 1933 and 1945 such that the present-day possessor must bear the burden of proving the validity of title – not the claimant alleging conversion. Judge Rakoff cited the current German Civil Code on this issue to the same effect as *MGL 59*.

When the parties informed the court of their settlement, Judge Rakoff issued a show cause order for the parties to demonstrate why their settlement should remain confidential. No date for the hearing has been announced. Judge Rakoff has said he is "deeply troubled by the secrecy of [the] settlement."