

Art & Cultural Heritage Law Newsletter

A Publication of the Art & Cultural Heritage Law Committee



CONTENTS

**FOREIGN SOVEREIGN
IMMUNITY AND
MUSEUMS
PAGE 3**

**RARE BOOK THIEVERY
CONTINUES
PAGE 4**

**THE MODERN SAGA OF
THE R.M.S. TITANIC LIVES
ON IN THE COURTS
PAGE 7**

**PHOENIX ANCIENT ART &
THE ABOUTAAMS IN HOT
WATER AGAIN
PAGE 13**

**NAZI-LOOTED ART IN THE
SECOND CIRCUIT: NEW
DEVELOPMENTS
PAGE 16**

**ART & ANTIQUITIES
TRAFFICKING NEWS
NOTES
PAGE 19**

**NAZI-ERA CLAIMS 10
YEARS AFTER THE
WASHINGTON
CONFERENCE
PAGE 30**

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



"Cowboy Buddha," Millar Kelley, www.millarkelley.com

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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.

THE 2008 AMENDMENTS TO THE FOREIGN SOVEREIGN IMMUNITIES ACT: HAS CONGRESS GONE TOO FAR OR NOT FAR ENOUGH?

By Laina Lopez

On April 16, 2009, a panel sponsored by the Art and Cultural Heritage Committee of the ABA Section of International Law will seek to answer the question “The 2008 Amendments to the Foreign Sovereign Immunities Act: Has Congress Gone Too Far or Not Far Enough?”

Congress amended the Foreign Sovereign Immunities Act in January 2008 to enhance the abilities of terrorism victims to sue certain nations which commit acts of terrorism and/or provide material support and funding to commit terrorist acts, and to collect sovereign assets in satisfaction of judgments once issued. For example, among other things, the amendments permit for the first time plaintiff victims to sue such nations for punitive damages. The amendments also now allow plaintiff victims to attach the assets of the nations’ agencies and instrumentalities to satisfy judgments issued only against the nations even if the agency at issue has no connection to the underlying act of terrorism.

The panel will explore the merits of these amendments for terrorism victims, defenses still available to defendants, and some of the legal problems the amendments create for third parties.

As a result of these amendments, Syria was recently unable to lend 55 ancient cultural objects to the Metropolitan Museum of Art fearing possible attachment proceedings by plaintiffs who hold terrorism judgments against it. The objects were going to be included in the Met’s exhibition, *Beyond Babylon: Art, Trade, and Diplomacy in the Second Millennium B.C.*, and in fact already had been listed in the exhibition catalogue. On one of the exhibit’s wall labels, the Met wrote, “We express our deep regret that recent legislation in the United States has made it too difficult and risky for these planned loans to proceed.”

Panelists will discuss the amendments from multiple points of view, including the viewpoints of the victims, the foreign sovereigns, the United States, US companies, and US non-profit organizations such as museums affected by these amendments.

Information regarding the Metropolitan Museum of Art loan was gathered from a November 21, 2008, post on <http://www.artsjournal.com/culturegrill/>



Syrian Cuneiform Tablet at the Museum of the Cobb Institute of Archaeology, Mississippi State University

THIEVES TAKE A PAGE OUT OF RARE BOOKS AND MANUSCRIPTS

By Kimberly L. Alderman

On June 8, 2005, a librarian at Yale University's Beinecke Library noticed a razor blade on the floor of the rare documents room. She saw a man in the nearby stacks and looked on the register to get his name – Edward Forbes Smiley III. The industrious librarian googled him and saw that he was a rare maps dealer. The police caught Smiley with several stolen maps, including one 500-year-old Thorne map worth \$150,000.

Upon questioning by FBI agents, Smiley admitted that he had stolen and sold 97 maps from collections in the US and UK, worth an estimated \$3 million. The FBI began a painstaking process to recover the maps. They consulted with the dealers and collectors to whom Smiley sold, other law enforcement agencies, and the libraries that he admitted having frequented.

Recovering the maps was difficult because most of them had been modified to look like they did not come out of books. Librarians in the US and UK were asked to pour through their collections. Many had not even realized pages were missing. Ultimately, 92 of the 97 known stolen maps were recovered. Some antiquarians, however, have voiced suspicions that Smiley's activities were more extensive than admitted.

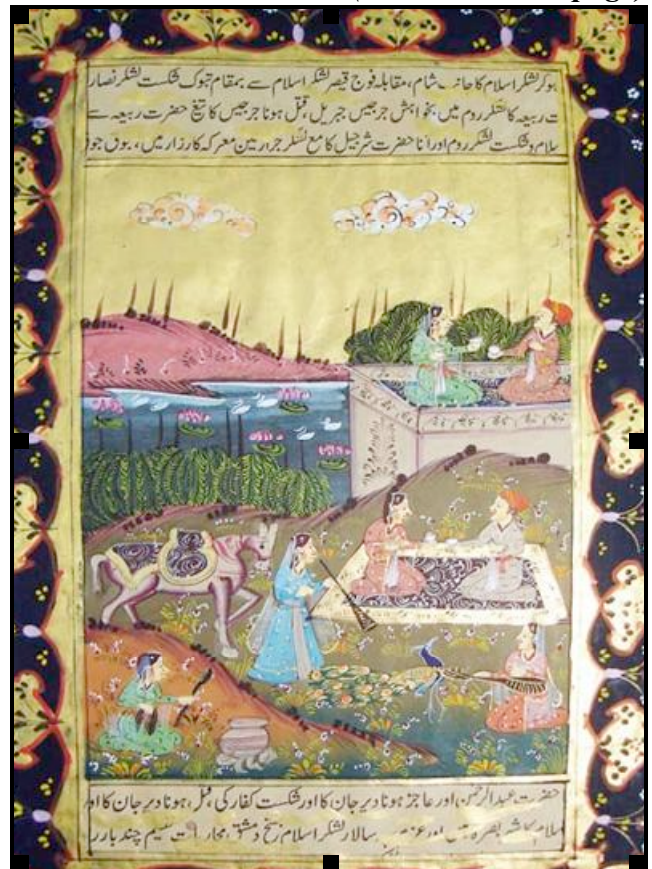
In September 2006, Smiley was sentenced to 42 months incarceration on the federal charges. He was later ordered to pay \$2.3 million in restitution.

The *Smiley* case was high profile because of the value of the stolen materials. But Smiley was hardly the first person to steal pages out of rare books. In 1996, former Ohio State University professor and antiquarian Anthony Melnikas was discovered attempting to sell pages he cut from a manuscript commissioned by Petrarch, the 14th-century scholar. Melnikas, a Lithuanian refugee, had been one of the Vatican Library's most

trusted scholars, with access to the collection for thirty years.

Melnikas attempted to consign the pages through Bruce Ferrini, a rare book dealer based in Akron, Ohio. The dealer found the items suspicious and consulted James Marrow, a professor of art history at Princeton Museum, who recognized them as pages from a Vatican text. A Vatican Library prefect confirmed their loss and recalled that Melnikas had access to the originating text nearly a decade prior.

It further turned out that two other illustrations Melnikas earlier consigned to Ferrini were stolen from the Spanish cathedral libraries in Tortosa and Toledo. Those pages were recovered and returned. *(cont'd on next page)*



In January 2009, an Australian tourist attempted to smuggle this page, torn from a Mughal manuscript, out of Egypt.

THIEVERY OF RARE BOOKS CONTINUES (CONT'D)

Melnikas was charged in federal court with eight counts of receiving, possessing, and smuggling stolen cultural property. He was not charged with theft because the thefts occurred outside of the country. Melnikas was sentenced to 14 months imprisonment, fined \$3,400, ordered to pay \$10,000 for the return delivery and restoration of the pages, and ordered to perform 250 hours of community service. The case was legally significant because it was the first prosecution of trafficking in foreign-origin artifacts under the Archaeological Resources Protection Act.

Also in 1996, across the Atlantic, Peter Bellwood of Essex was sentenced to four years imprisonment for page thefts from the British Library. He stole 97 rare Victorian sporting prints and maps of the Holy Land valued at £150,000. After his release, Bellwood continued his activities. Between March and August 2000, he used a razor to remove 50 pages from rare atlases in the National Library of Wales in Aberystwyth.

The case was unique because, unlike the usual page thief, Bellwood was not an antiquarian. Instead, he was a landscape gardener with a gambling problem. He used David Bannister's book, *Antique Maps*, to determine which rare prints to steal. The book lists the top 60 collections in UK libraries, and Bellwood referred to it in court as a "thieves handbook." Bellwood sold some of the maps he stole to Bannister for cash.

The 50 stolen pages were valued at £100,000, and Bellwood had sold them to Bannister and dealer Michael Cox for a total of £72,000. After Bellwood was finally arrested in 2004, a British court sentenced him to 4 1/2 years imprisonment for the thefts.

These were not Bellwood's only thefts. He had also stolen 11 maps from the Danish Royal Library in 2001. A videotape of the theft was used to identify Bellwood. After his sentencing

in the UK, Bellwood was turned over to the Danish court, which sentenced him to a year in prison and a 324,000-kroner (\$67,000) fine. The Danish maps were not recovered, and only a handful of the Aberystwyth maps were located and returned.

Moving forward to 2007 and back over to the States, the arrest of James Lynman Brubaker of Montana recovered tens of thousands of pages torn from rare books. Like Smiley, Brubaker was discovered by an industrious librarian. After the theft of nearly 700 pages from the Western Washington University, librarian Rob Lopresti kept an eye on *eBay* by monitoring 40 keywords likely to come up if the pages were auctioned. When he saw a seller with items looking suspiciously similar to those stolen from his own library, Lopresti asked some East Coast friends to pose as buyers. They bought the items, which turned out to be exactly what the librarian suspected.

Lopresti's sting operation led to the arrest of the 73-year-old Brubaker, who had completed 9,000 deals on *eBay* in 2007 of rare books and pages, totaling over \$500,000 in sales. A search of Brubaker's home yielded 1,000 books stolen from at least 100 libraries across the country, as well as 20,000 pages and maps ripped from rare books. In September 2008, Brubaker was sentenced to three years imprisonment and ordered to pay restitution of \$23,162.

In the UK last year, Farhad Hakinzadah was tried for having stolen pages of rare books from the British and Bodleian Libraries. He cut pages from Mughal manuscripts right under the noses of the librarians, causing an estimated \$750,000 in damage. The Iranian-born businessman and London millionaire pled guilty to 14 counts of theft. He was sentenced to two years in jail.

Our final and most recent example of page theft is also from Mughal manuscripts. On January 20, 2009, an Australian tourist was

THIEVERY OF RARE BOOKS CONTINUES (CONT'D)

caught in the port of Damietta, 220 km north of Cairo, trying to smuggle pages torn from an illustrated Mughal manuscript out of Egypt. The pages were slated for return to the Islamic Arts Museum in Cairo. Nothing further has been reported on the case.

These stories represent millions of dollars worth of damage done by thieves cutting or tearing pages from rare books, usually in the reading or map rooms of major libraries. The British Library alone was successfully targeted by a good portion of these thieves over the course of a dozen years.

Several systemic flaws allow such thefts to continue to occur and go long undetected. The first is that thieves often target books scarcely illustrated, so they would be located in the rare book room instead of the map room of a library. Rare book librarians are generalists, and may not be as equipped as map librarians to monitor and ensure the safety of maps within broader volumes.

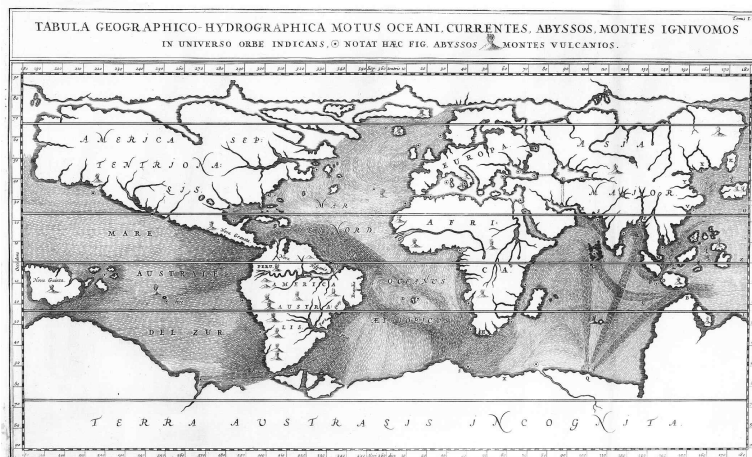
The second is lax security, especially for known scholars. Hakimzadeh and Melnikas were given largely unsupervised access to priceless collections because of their status as scholars. Of Melnikas, the prosecutor explained, "He was considered one of the family or a piece of furniture around the library. He collaborated with the Vatican Library in publishing his 1975 three-volume work, and in 1987 was working

with the Library translating the Vatican's 'Gratiani Decretum' into modern Latin."

Third, there is a culture of secrecy in the institutional libraries regarding thefts. There are concerns that going public with unrecovered losses will cause political embarrassment and encourage further thefts. Further, some law enforcement agencies advise that stolen goods are easier to recover when the thief is unaware that the loss has been discovered. Finally, the portable nature of maps and illustrations makes them easy to carry out of libraries and, once identifying marks are removed, difficult to distinguish as having been bound in a book.

It is interesting that rare books and manuscripts can be so intensely valuable, but that people are allowed to handle them with little supervision. A single page of a rare book can be worth \$100,000 or more. Yet, people are allowed to handle them in an insecure environment because they are culturally as well as financially valuable. Until security is improved in rare books libraries worldwide, maps and illustrations will continue to be surreptitiously removed and sold to collectors on the private market.

Kimberly Alderman is a cultural property law scholar and author of The Cultural Property & Archaeology Law Blog at <http://culturalpropertylaw.wordpress.com>.



LAW FROM THE BOTTOM OF THE SEA: RIGHTS TO THE TITANIC SHIPWRECK DISPUTED IN US COURTS

By David Bright

Introduction

On April 14, 1912, as the *R.M.S. Titanic* was en route from Southampton, England to New York City on her maiden voyage, she struck an iceberg on her starboard side. The collision caused approximately 1/3 of the ship's watertight compartments to fill with water and she began to sink. In the early hours of April 15, 1912 and in less than three hours after the collision, the *R.M.S. Titanic* sank, coming to rest more than two miles below the surface of the North Atlantic. Although exact totals vary, it is estimated that 1,500 passengers perished in the disaster, with just over 700 passengers surviving.

The following morning, news of the disaster spread around the world, and although nearly a century has passed since her sinking, interest in the *R.M.S. Titanic* and her tragic voyage has not waned. In fact, thanks to the discovery of the wreckage of the *R.M.S. Titanic* in 1985 and James Cameron's 1998 motion picture, *Titanic*, interest in the ship and her sinking is arguably as high as it was in the days after her sinking. In the absence of any clear claims on ownership of the *R.M.S. Titanic*, litigation over salvage rights was inevitable. The legacy of this famous shipwreck continues to be the subject of legal disputes to this day, providing important lessons in the legal status of underwater cultural heritage.

This article discusses some of the events and effects of the sinking of what is arguably the world's most well-known example of cultural property. The first part of this article will discuss an attempt by the United States Congress ("Congress") to prevent salvage of the wreck. The first part will then discuss litigation that occurred from 1992 through 1999 and that resulted in salvage rights to the *R.M.S. Titanic* being awarded to RMS Titanic, Inc. ("RMST"). The second part of this article will discuss a second round of litigation that occurred beginning in 2000, as well as a recent international agreement that attempts to enhance the protection of the *R.M.S. Titanic*.

Search and Discovery

The *R.M.S. Titanic* was originally owned by the White Star Line, a British cruise line company that was part of an international maritime conglomerate owned by J.P. Morgan. In 1934, the White Star Line was sold to Cunard Shipping Lines, without any mention of the wreck in the agreement. The *Titanic* was not included in this sale presumably because it had sunk and could not be recovered. Cunard Shipping has stated publicly it does not own the wreck and none of the

insurance companies that insured the hull ever came forward to claim ownership. The general maritime law of nations, including the law of salvage and finds, would eventually be applied in



Image Courtesy of Mona Caron (www.monacaron.com)

LAW FROM THE BOTTOM OF THE SEA: THE TITANIC (CONT'D)

US courts to determine who has rights in the event of a successful salvage operation.

After several unsuccessful attempts at salvage, in 1985, the French Institute of Research and Exploitation of the Sea ("INFREMER") and the Woods Hole Oceanographic Institution ("WHOI") combined their talents and technologies in a joint French-American search for the wreckage of the *R.M.S. Titanic*. Led by WHOI's Dr. Robert Ballard ("Dr. Ballard") and INFREMER's Jean-Louis Michel, the expedition discovered the debris field of the wreck of the *R.M.S. Titanic* early on the morning of September 1, 1985, 453 miles southeast of the coast of Newfoundland and 2.5 miles below the sea. After 73 years, the wreck of the *R.M.S. Titanic* had finally been discovered. Within hours, the world would see the first pictures of the ship since her first and only voyage. Unfortunately, the discovery would also mark the beginning of a long battle for the legal rights to the *R.M.S. Titanic*.

Litigation

The question of rights to the *R.M.S. Titanic* requires some understanding of the law of the sea. In 1974, the United Nations commenced the United Nations Conference on the Law of the Sea III (UNCLOS III). In reference to shipwrecks and other cultural property in international waters, UNCLOS III states:

All objects of an archaeological or historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

The US Congress followed similar principles when it passed the RMS Titanic Maritime Memorial Act of 1986 ("Titanic Act of 1986"). Congress summarized how it viewed future activities involving the *R.M.S. Titanic* as follows:

It is the sense of Congress that research and limited exploration activities concerning the *R.M.S. Titanic* should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance: Provided, That, pending adoption of the international agreement described in section 450rr-4(a) of this title, or implementation of the international agreement described in section 450rr-3 of this title, no person should conduct any such research or exploration activity which would physically alter, disturb, or salvage the *R.M.S. Titanic*.

While Congress certainly had good intentions when it passed the Titanic Act of 1986, it was not able to prevent a battle over the rights to the *R.M.S. Titanic*.

In 1987, INFREMER joined with Titanic Ventures in a salvage operation on the wreck. The French government took possession of approximately 1,800 items recovered from the wreck and allowed three months for claims to be filed on the recovered artifacts. Unclaimed artifacts were transferred to Titanic Ventures.

Litigation began on August 7, 1992, when Marex Titanic, Inc., a competitor of Titanic Ventures, filed a complaint in the United States District Court for the Eastern District of Virginia, seeking the rights to the *R.M.S. Titanic*. Marex produced two artifacts from the wreck, despite never having salvaged the ship. By an Order dated August 12, 1992, the Court issued a warrant of "arrest" of the property to assert jurisdiction over the ship and any items salvaged therefrom until it could determine ownership. Pursuant to the Order, "...Marex was to publish notice of the order and arrest announcing that Marex had filed a claim with respect to the Titanic and allowing any persons claiming any interest in the *in rem* defendant an opportunity to file their claim within thirty days."

LAW FROM THE BOTTOM OF THE SEA: THE TITANIC (CONT'D)

Marex posted notice thirty-two (32) days later, on September 23, 1992. On the same day, Titanic Ventures filed a Motion to Vacate Arrest and Dismiss Complaint. Although the parties agreed to maintain the *status quo* on the salvage operations, Marex informed Titanic Ventures that it would be sending a ship to the location of the wreck. In response, Titanic Ventures filed a Verified Motion for Preliminary Injunction to prevent Marex from engaging in salvage operations.

On September 28, 1992, the Court granted a Temporary Restraining Order against Marex prohibiting salvage for the duration of the hearing. Marex filed a Notice of Voluntary Dismissal of the Action on October 1, 1992, but the Court vacated it, reasoning that under Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, "...voluntary dismissal may be denied by the Court if the case has gone into the merits and substantial evidence has been received at the time the notice is filed."

On October 2, 1992, Titanic Ventures agreed to the Court's jurisdiction over the vessel and related property, and both parties agreed that this gave the Court the authority to determine who had exclusive salvage rights to the Titanic. The Court vacated the earlier warrant of arrest, declared Titanic Ventures to be the salvors of the wreck and issued a permanent injunction preventing Marex from any future salvage operations. On November 12, 1992, the Court denied Marex a reconsideration of their voluntary dismissal.

Unfortunately for Titanic Ventures, the US Court of Appeals for the Fourth Circuit reversed the decision based on the denial of Marex's voluntary dismissal, voiding Titanic Ventures salvage award to the *R.M.S. Titanic*. The Court of Appeals determined that the District Court did not have the discretion to vacate notice of voluntary dismissal that is filed before the

opposing party had served an Answer or Motion for Summary Judgment.

Titanic Ventures became RMST and on August 23, 1993, it filed a complaint in the Eastern District of Virginia, asking the District Court to declare it as the owner of any items salvaged from the *R.M.S. Titanic*. Notice was given to other interested parties and possible salvors, with only Liverpool and London Steamship Protection and Indemnity Association ("LLSP") filing a claim. RMST settled with LLSP and the Court dismissed LLSP's claim. On June 7, 1994, as there were no other claims pending, the Court granted salvor-in-possession rights to RMST, including the right over items salvaged from the *R.M.S. Titanic* while it maintained salvor-in-possession status. Despite this ruling, RMST would soon be back before the same court, yet again defending itself as salvor of the *R.M.S. Titanic*.

On February 20, 1996, John A. Joslyn ("Joslyn") filed a motion to rescind the Court's Order of June 7, 1994. Joslyn, who had not been a party to the original action, claimed that RMST had "...failed to diligently salvage the RMS Titanic and has evidenced no intention to salvage it in the future." On April 1, 1996, the District Court found that Joslyn had standing to file a motion seeking the rescission of the Court's order naming RMST as salvors of the *R.M.S. Titanic*, and granted Joslyn's request for a hearing.

On May 10, 1996, the District Court again ruled in favor of RMST. In reaching its decision, the Court applied a test from the First Circuit. The Court stated that a salvor-in-possession must demonstrate that its salvage operations are: "(1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect for success."

With respect to the first prong of the test, the Court found that RMST had acted with due diligence. The Court relied on the fact that RMST had conducted expeditions in 1987, 1993,

LAW FROM THE BOTTOM OF THE SEA: THE TITANIC (CONT'D)

and 1994; recovered nearly 3,600 artifacts; invested significant capital; employed skilled divers; worked to preserve the site; employed conservationists to preserve the artifacts; kept the artifacts together; made them available for the benefit of the general public.

With respect to the second prong of the test, the Court found that RMST had not only planned another expedition, it had also invested in sponsoring two (2) cruises to the site. The Court also relied on the continuing efforts to preserve and exhibit the artifacts to support its findings that the second prong had been met.

With respect to the third prong, the Court found that the operations were clothed with a prospect of success because of the previous expeditions and because RMST had completed plans for a 1996 expedition. Having found all three prongs satisfied, the Court denied Joslyn's motion to rescind RMST's salvage rights. However, the Court also modified its original Order by requiring more frequent periodic reports from RMST on the status of its salvage operations. Joslyn soon tried another approach by announcing his intention to dive on the wreck and photograph it. In response, RMST sought a preliminary injunction to prevent him from conducting his planned expedition.

In deciding to grant the injunction, the Court applied the balance-of-hardship test from the Fourth Circuit case of *Blackwelder Furn. Co., Etc. v. Seilig MFG. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977). "The test is as follows: (1) likelihood of irreparable harm to the plaintiff without an injunction; (2) likelihood of harm to the defendant with an injunction; (3) plaintiff's likelihood of success on the merits; and (4) the public interest."

Based on RMST's considerable investment of time, money, effort and ingenuity in salvaging the wreck, the Court found that the likelihood of irreparable harm to RMST was considerable in the absence of an injunction. As to the likelihood

of harm to the defendant as a result of the injunction, the Court found that Joslyn had decided to photograph the wreck only after learning of RMST's plans to do so. Therefore, any harm he might incur could have been avoided by seeking a clarification of RMST's salvage rights from the Court.

The Court also found that RMST was likely to succeed on the merits as it had already been granted salvage rights to the wreck: "The Court is of the opinion that photographs can be marketed like any other physical artifact and, therefore, the rights to images, photographs, videos, and the like belong to *R.M.S. Titanic*." The Court further found that in keeping the artifacts together and exhibiting them, the public interest factor was fulfilled as well. The Court noted that this was consistent with the Fourth Circuit's decision to accord importance to archaeological and historical preservation efforts of salvage operations like those for the *R.M.S. Titanic*. Finding all of the factors of the test satisfied, the Court granted the injunction on August 13, 1996. In less than two years however, RMST would fight to maintain its status as salvor of the *R.M.S. Titanic* against yet another party.

In 1998, another group announced plans to sponsor an expedition to the site of the wreck of the *R.M.S. Titanic*. Deep Ocean Expeditions ("DOE") intended to provide private individuals the chance "...to dive and photograph the *R.M.S. TITANIC* wreck for \$32,500 per person." Brochures promoting the expedition acknowledged RMST's salvage rights and stated that no artifacts would be recovered, however they also stated that dives to the wreck would be conducted and photographs could be taken of the wreck, in contravention of the Court's Orders of June 7, 1994 and May 10, 1996. In response, RMST again sought a preliminary injunction.

One of the potential participants, Christopher S. Haver ("Haver"), filed an action for a declaratory judgment that he had the right to visit

LAW FROM THE BOTTOM OF THE SEA: THE TITANIC (CONT'D)

and photograph the wreck. On May 12, 1998, finding Haver's claim dealt with the same issues as DOE's, the Court consolidated the actions. On May 22, 1998 the Court granted RMST's motion for a preliminary injunction, again applying the hardship-balancing test.

The Court found that the likelihood of irreparable harm to RMST was high, as the DOE expedition could interfere with its salvage operations, as well as its considerable investments in such operations. Regarding the irreparable harm to DOE and Haver, the Court found only Haver had demonstrated any such harm, but his "nostalgic injury" was insignificant when compared to the potential harm to RMST. As to the likelihood of success on the merits, the Court found as a matter of law that RMST was the salvor-in-possession of the wreck and as such, it had the right to exclude others from visiting and photographing the wreck. Finally, the Court found that it was in the public interest to prevent any intrusion by other parties and allow RMST to continue as salvor-in-possession.

As a result of these findings, the Court held: Until further order of this Court, these parties are ENJOINED from (i) interfering with the rights of RMST, as salvor in possession of the wreck and wreck site of the *R.M.S. Titanic*, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Unfortunately again for RMST, this decision would soon be partially overturned on appeal.

On March 24, 1999, the United States Court of Appeals for the Fourth Circuit announced its decision on the ruling. The Court affirmed the injunction preventing "...Haver from interfering

with the ongoing salvage operations of RMST..." The Court stated that the District Court has constructive *in rem* jurisdiction "...over the wreck of the Titanic by having a portion of it within its jurisdiction and that this constructive *in rem* jurisdiction continues as long as the salvage operation continues." The Court noted that this "constructive *in rem*" jurisdiction falls short of giving the court sovereignty on the wreck." The Court took issue however, with the lower Court's expansion of "...traditional salvage rights to include the right to exclusive photographing of the wreck and the wreck site."

In a memorable passage, the March 24, 1999 Fourth Circuit opinion confirmed jurisdiction of the US courts to adjudicate claims in international waters under Article III of the US Constitution, which extends judicial power to the federal courts in "all Cases of admiralty and maritime Jurisdiction." Citing earlier decisions of the Supreme Court, the Appeals Court noted that the body of law to be applied was the "venerable law of the sea" which arose from the "custom among 'seafaring men'" being applied for 3,000 years or more and had been codified over the years in "ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the law of *Oleron*) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681)." Having constitutional jurisdiction to draw off of and contribute to the development of the "*jus gentium*" of international maritime law, the Court noted the long history of admiralty courts adjudicating claims on the high seas. In this context, the Court distinguished the grant of subject matter jurisdiction over a shipwreck in international waters from the extraterritorial assertion of sovereignty.

Traditionally under international maritime law, there are two branches that may be used in cases involving shipwrecks; the law of salvage and the law of finds. Determining which law

LAW FROM THE BOTTOM OF THE SEA: THE TITANIC (CONT'D)

applies depends upon whether or not the ship has been abandoned or lost. If it is determined that the ship was lost, salvage law applies, but if the ship was abandoned, the law of finds applies.

The granting of salvage rights does not convey ownership of the vessel to the salvor. Rather, when a court awards salvage rights it will grant an award to the salvor in order to cover costs they incurred in their salvage operations from the true owner. In the case of the *R.M.S. Titanic*, the chance of the true owners coming forward to claim the ship was unlikely. Lastly, during the proceedings determining the salvage rights, the only claimant to come forward had been LLSP, and it had settled its claim with RMST.

The District Court decided that RMST should be able to recover its costs through the exclusion of third parties from photographing the wreck site. Again because this was a “historical salvage” case, the Court found that “...traditional salvage rights must be expanded for those who properly take on the responsibility of historic preservation... Therefore, if [RMST] is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income.” The Court incorrectly gauged its decision as comports with those of the Fourth Circuit on granting salvage awards.

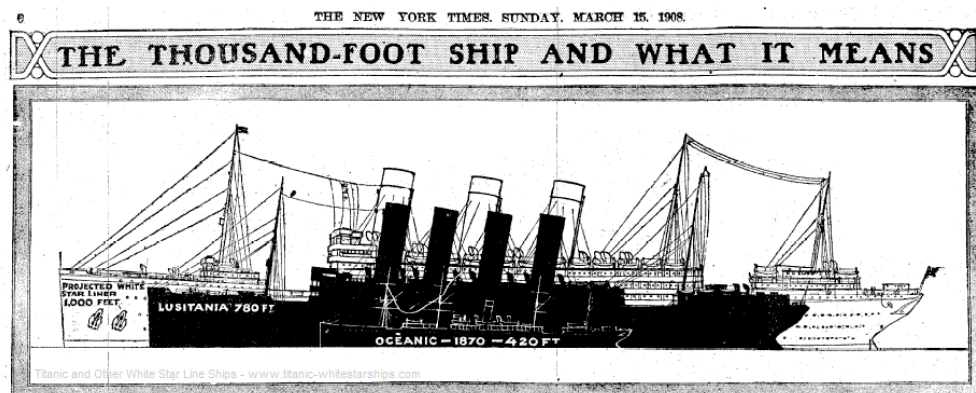
The Court of Appeals stated that “[t]he district court’s expansion of salvage rights to include the right exclusively to photograph or

otherwise record images of the wreck for the purpose of compensating salvors for their effort is both creative and novel.” The Fourth Circuit could find no precedent for this decision, and felt that such an expansion was not proper. Salvage law was meant to encourage individuals to come to the aid of ships, with the goal of saving the ship and cargo. The Court feared that enabling salvors to receive compensation through a “commercial use” would undermine this policy. “Salvors would be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.” The Supreme Court declined to hear arguments on the matter on October 4, 1999.

One commentator has said that the Fourth Circuit’s decision “provides salvors with greatly augmented legal protection.” Despite this protection, RMST would soon return to court over its salvor-in-possession status over the *R.M.S. Titanic*.

Conclusion

In the next issue of this Newsletter, the second part of this article will discuss litigation over the *R.M.S. Titanic* from 2000 to the present, as well as the proposed international agreement intended to further enhance protections afforded to the shipwreck of the *R.M.S. Titanic*.



PHOENIX ANCIENT ART AND THE ABOUTAAMS IN HOT WATER AGAIN

By Leila Amineddoleh

Phoenix Ancient Art was founded in Beirut, Lebanon in the 1960s by Sleiman Aboutaam, and is now located in New York City and Geneva, Switzerland. After Sleiman's death in 1998, the business was taken over by his sons, Ali and Hicham. The gallery does more business in antiquities than Sotheby's and Christie's combined, and the business continues to grow. However, the Aboutaams have been implicated in numerous cases involving provenance and looting disputes.

The Aboutaam brothers have connections to Giacomo Medici, an art dealer convicted of stealing ancient artifacts and selling them for top dollar in the international art market. The links between Medici and Phoenix Ancient Art are viewed by many as extensive: the brothers have been seen with him at auctions, their names appear in Medici's paperwork, and objects in Medici's possessions were "sold" at auction to the Aboutaams, and then ended up back in Medici's collection. The book *The Medici Conspiracy* suggests that the Aboutaams may serve as "fronts" for other people, operating a holding company and assisting in the laundering of objects.

In 2003, Hicham Aboutaam was arrested for smuggling a looted ceremonial drinking vessel from Iran into the US and claiming that it came from Syria. He pleaded guilty to the federal charges, paid a fine, and the vessel was seized by the authorities. Then in 2004, the brothers sold an *Apollo Sauroktonos* statue attributed to Praxiteles (one of the most esteemed Greek sculptors of 4th century B.C.) to the Cleveland Museum of Art. Experts point to the puzzling gaps in its ownership history. The brothers admit to gaps in the ownership record, but claim that the statue was acquired legitimately. The Greek Ministry of Culture insists that it was fished out of international waters and belongs to Italy. The

provenance of the statue is so hotly contested that the Louvre withdrew a request to borrow the piece for a Praxiteles exhibition (even though it potentially is the only surviving piece by the artist in existence).

Another controversial object linked to the Aboutaams is the *Ka Nefer Nefer* burial mask they sold to the St. Louis Art Museum in 1998. The US Department of Homeland Security is examining the provenance of the mask, after the Egyptian government claimed that there is no record showing the mask left the country legally. The Aboutaams claim no wrong-doing, although there is no clear ownership record for the piece. Other questionable cases include the Etruscan terracotta plaque gifted to Princeton University's collection (which was later transferred to the Italian government due to its dubious ownership record) and a coveted Egyptian stele and its companion pieces (the brothers denied any wrong-doing in association with the pieces and they pleaded ignorance about its ownership since they were acquired by their now-deceased father, but the brothers eventually returned these pieces to the Egyptian government).

The Egyptian government now accuses Ali Aboutaam of involvement with Tarek El-Suesy (al-Seweissi), who was arrested in 2003 under Egypt's patrimony law for illegal export of antiquities. Egypt's *Law 117/1983* vests ownership of all antiquities discovered after 1983 to the Egyptian nation. Any antiquity excavated after that date and removed without permission is considered stolen property under Egyptian law. Aboutaam allegedly aided a convicted antiquities thief, El-Suesy, in smuggling 280-300 artifacts out of Egypt by mislabeling them as bottles or hiding them in boxes of toys and electronics marked as exports. Egypt's general prosecutor, Maher Abdel Wahed, stated that Aboutaam was indicted based on telephone conversations and

PHOENIX ANCIENT ART AND THE ABOUTAAMS IN HOT WATER AGAIN (CONT'D)

information showing that he received smuggled artifacts through El-Suesy's ring. Aboutaam was tried *in absentia* in an Egyptian court in April 2004; he was pronounced guilty and was fined and sentenced *in absentia* to 15 years in prison. According to a statement by Phoenix Ancient Art, Ali Aboutaam was never informed of proceedings against him, and he was not invited to participate in them. He claims he was also never invited to take part in the appeal. On appeal, his guilt was affirmed (although some sources claim that the charges were dropped). Under Egyptian law, Aboutaam would typically be eligible for a retrial if he returns to Egypt.

Aboutaam remained at large until his arrest in September 2008, but purportedly faced detention while traveling in Bulgaria in 2008. Egypt's chief archaeologist, Zahi Hawass, said that this arrest was a "concrete step toward stopping the trade in illegal antiquities around the world." But Aboutaam was released and there is uncertainty regarding the details of his detention. Neither the Bulgarian or Egyptian governments have disclosed all of the facts surrounding the dealer's arrest.

Some sources claim that Aboutaam was arrested in Bulgaria with the help of Interpol, and spent several weeks under house arrest in Sofia. His travel ban was purportedly lifted on January 5. Sofia City Court told the Bulgarian daily newspaper Dnevnik that Bulgaria and Egypt did not have an extradition agreement, so Aboutaam could not be sent to Egypt, and that the decision was "final and conclusive." The Sofia City Court ruling was appealed and denied, and Aboutaam was released. His name was taken off the wanted list, and he returned to Switzerland on January 7, 2009.

In a written statement, the Aboutaams stated that Ali Aboutaam returned home to Switzerland after the Bulgarian courts determined that

Egypt's legal procedures were deficient, that Ali never had an opportunity to challenge the charges, and that the Egyptian courts threw out the related charges in which Ali was named. According to the brothers, Ali was restricted to Bulgaria and lived at his family home there. They claim that his detention was not based on guilt, but on Bulgaria's necessity to detain him until it could evaluate and ultimately reject Egypt's request for extradition. Ali's attorney stated, "The Bulgarian authorities found that Ali was not afforded fundamental protections and that the underlying conviction was bogus."

Yet some reporters claim that the proceedings were not that straightforward, and that Aboutaam was released due to corruption in the Bulgarian court system. Journalist Arthur Brand presents this alternative account. He alleges that Ali was arrested at the Sofia Airport on September 18, 2008 because his name appeared on Interpol's red wanted-list (Interpol File Number 25913/2007). After his arrest, two very powerful men helped to release him. Bulgarian billionaire and art collector Vasil Bojkov felt responsible for Ali's arrest because he had invited him to Bulgaria. So Bojkov contacted Bulgarian head prosecutor Kamen Mihov, one of the most powerful men in the country. Mihov arranged for Aboutaam to be released from prison and board a private jet to Switzerland, and allegedly created the story of the arrest and trial so that "officially" Aboutaam was in Bulgaria waiting for extradition to Egypt. In reality, he was in Switzerland. These allegations are supported by other sources. An article in the Society section of the *Sofia Echo* states, "Dnevnik quotes an anonymous Interior Ministry source as saying that one of Bulgaria's largest collectors of antiquities was involved in arranging the release of Aboutaam." Arthur Brand presumes that this collector is Bojkov. The Supreme Cassation

PHOENIX ANCIENT ART AND THE ABOUTAAMS IN HOT WATER AGAIN (CONT'D)

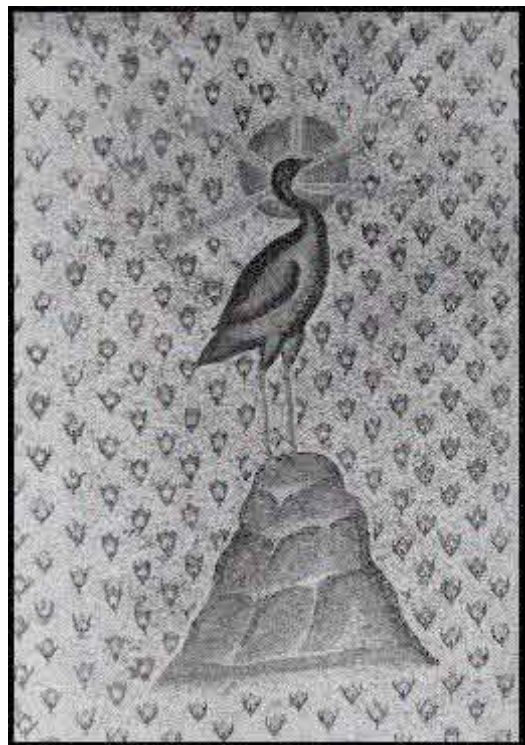
Prosecution Office did not comment on the Sofia City Court decision to refuse extradition.

There are unanswered questions regarding Bulgaria's refusal to extradite Aboutaam. Bulgaria does not have a bilateral extradition agreement with Egypt. (It is important to note that Bulgaria did extradite an Egyptian Islamist who had been sentenced *in absentia* to life imprisonment in 1990.) However, the Thirty-Ninth National Assembly of the Republic of Bulgaria passed the Extradition and European Arrest Act ("the Act") on May 20, 2005. Article 2, No. 3 of the Act states that extradition will take place where an individual is the subject of "a detention order by the judicial authorities of another state [Egypt] or by an international court." According to the language of this Article, Bulgaria should honor Egypt's request.

The Act sets forth guidelines for when extradition may be refused. Art 8, No. 4 states that refusal is proper, "where the conviction was rendered *in absentia* and the person was not aware of the prosecution against him/her." However that provision provides an exception for instances when the requesting state "gives sufficient assurance that the person will be afforded a retrial..." As stated earlier, Ali would be given a retrial if he returned in Egypt, thus refusal to extradite is improper in this case. Furthermore, it is unlikely that Ali was unaware of the prosecution against him. The outcome of the trial (prior to the appeal) was reported in the New York Times (and various other news sources), as early as February 2004. In fact, Ali Aboutaam even made a statement about the charges in the February 2004 article. He knew about the indictment against him before the sentencing in April 2004, thus the exception in

Art. 8, No. 4 does not apply. Furthermore, Bulgaria cannot claim improper process on the part of Egypt; the extradition request was proper because it was presented through Interpol, and the Act allows extradition requests to be made through Interpol. (Article 9, No. 2.)

What is Egypt's next move in regards to Ali Aboutaam? And how does this affect the nation's efforts to crack down on the smuggling and looting of antiquities? Will Egypt's failure to enforce Aboutaam's sentence affect the country's ability to press charges in future cross-border cases involving stolen cultural heritage property? According to Zahi Hawass, a new antiquities law is slated to replace the current *Law 117/1983*. The new law has not been passed, but it will carry more severe penalties in hopes of preventing further trafficking of antiquities.



Mosaic of Phoenix on the altar (marble and limestone) 2nd half of the 3rd century CE. From Daphne, a suburb of Antioch-on-the-Orontes. Department of Greek, Etruscan and Roman antiquities in the Louvre, Denon, ground floor, room 30.

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-Bartholdy 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

NAZI-LOOTED ART IN THE SECOND CIRCUIT (CONT'D)

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

NAZI-LOOTED ART IN THE SECOND CIRCUIT (CONT'D)

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 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 statute 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."

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

by Ricardo St. Hilaire

November 2008

According to the *Jerusalem Post*, the Justice Ministry in Israel was given six months to reassess its case against Oded Golan who is suspected of forging the ossuary that purportedly contains the name of Jesus. The ossuary appeared with much fanfare at the Royal Ontario Museum and in the pages of *Biblical Archaeology Review*, but police arrested Golan in 2003 after finding a forgery workshop at his residence. Recently, the Jerusalem District Court judge hearing Golan's case commented that the prosecution failed to prove Golan's culpability.

Press TV of Iran reported that Iraq asked Iran to "help gather information about the artifacts, which have been stolen from Iraqi sites since the 2003 US-led war. . . . The Iraqi government said . . . that Iran could participate in maintaining the ruins of the ancient Persian capital of Ctesiphon, located in southern Baghdad."

The Guardian reported that bronze sculptures of a rat and a hare from the *Versaille of the East* being offered at auction by Christie's prompted Chinese officials to protest the sale as "war plunder." Christie's asserted that the objects enjoy clean title. The objects were in the collection of famous designer Yves Saint Laurent, who died in June 2008, and were part of a zodiac fountain. The British and French burned the palace of Yuanmingyuan during the Second Opium War. Christie's eventually sold the items.

The Swiss Federal Culture Office said it plans to continue a project with *eBay* to stop the illegal sales of cultural objects after a successful three month project. "By the end of the trial the number of offers had dropped dramatically, with virtually none offered for sale," reported *swissinfo*.

Switzerland announced the return of 4,400 ancient artifacts looted from archaeological sites in Italy, according to *The Associated Press*. They were discovered in storage rooms belonging to two Basel art dealers in 2001. Italian authorities are prosecuting one of the dealers. Meanwhile, Swiss officials still do not know the origin of 1,400 additional antiquities.

The Jakarta Post reported the start of the trial accusing businessman Hisham Djojohadikusumo of illegally possessing five cultural artifacts stolen from the Radya Pustaka Museum in Surakarta.

CCTV of China reported that Spain was to return three stolen antiquities to Egypt.

Scotland Yard returned an icon stolen in 1978 from the St. John the Baptist Monastery in northern Greece. *ANA-MPA* reported that "[a]fter it was stolen, the icon was cut in half to fit in a suitcase and at some point it ended up in the possession of a Greek shipowner and collector of contemporary Greek art who died a year ago in London."

The Simferopol Art Museum in Ukraine refused to return 87 paintings to Germany, which found



Artwork Courtesy of Lupe Grainne, www.lupegrainne.com

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

November 2008 (cont'd)

their way to the Soviet Union during World War II. *Deutsche Welle* reported that “[t]he museum's management reportedly justified the intention not to give up the paintings, citing a Ukrainian law giving people or organizations having suffered property damage during the German invasion of the Soviet Union during WWII legal title to German property captured by Red Army troops in later stages of the war.”

☞ Harvard's Peabody Museum announced its intention to return to Mexico approximately 50 carved Mayan jade pieces found near the ruins of Chichen Itza. *The Associated Press* reported that “[t]he artifacts were among hundreds of pieces taken to the United States by American consul Edward Herbert Thompson, who dredged up the bottom of the sacred lake between 1904 and 1910 to recover offerings deposited there by the Mayas.”

☞ *The Cleveland Plain Dealer* reported that the Cleveland Museum of Art agreed to return 14 objects illegally excavated or exported from Italy. The agreement resulted after 18 months of negotiations and called for Italy to lend the Cleveland Museum of Art 14 equivalent objects for 25 years.

☞ A 20-foot chariot missing from the Madhavrai Temple in Madhavpura since 1988 was scheduled to be returned, reported *Indian Express*. “Earlier, the original had reached Jaipur and was being readied to be smuggled out of the country when the CBI busted the racket. After the intervention of the Rajasthan Chief Minister’s Office, the genuine chariot was handed over to the temple trustees According to Arunbhai Thaker, the president of Madhavrai temple trust, the original chariot was sent to a carpenter in Junagadh for renovation. The carpenter had replaced it with a duplicate and sold it to an antique trader in Ahmedabad from where it was sold to a Jaipur-based firm, Popular Art Palace.”

☞ New York and Miami art dealer Giuseppe Concepcion was arrested on charges of selling forged paintings, purportedly by Henri Matisse, Marc Chagall and others. *The Associated Press* reported: “Prosecutors said Concepcion induced customers to buy the forgeries between 2005 and 2007 as he operated in Manhattan and out of the Proarte Gallery in Miami. . . . A criminal complaint . . . said Concepcion acquired authentic works by the renowned artists and then acquired or commissioned forgeries of the paintings. Concepcion falsely represented to buyers that the forged versions were genuine or deliberately failed to disclose that they were forgeries, the complaint said.”

☞ *The Independent* described how Ethiopia made a demand for several artifacts, including a royal crown. “President Girma Wolde-Giorgis wrote to the British Museum, the Victoria & Albert Museum, the British Library and Cambridge University Library seeking the restitution of more than 400 so-called ‘treasures of Magdala,’ which were stolen by British soldiers following a battle in 1868.”

☞ Henri Matisse's *Le Mur Rose* was stolen sometime after 1937 from a prominent German Jewish family and kept by a Nazi military officer. It was to be given to the British charity, Magen David Adom UK, and the proceeds would fund the charity’s medical services in Israel, said *The Associated Press*.

☞ *The National* newspaper reported that Dubai customs officers seized over 100 looted Iraqi antiquities.

☞ The US Department of Homeland Security is looking into the case of the mummy mask of Ka-Nefer-Nefer, obtained by the St. Louis Museum of Art (SLAM) in the 1990s. This follows a request made by Zahi Hawass, the head of Egypt’s Supreme Council on Antiquities, according to *The Associated Press*. Mohammed Zakaria Ghoneim placed the mask in a warehouse at Saqqara in 1952 where it was documented. The mask then appeared at the SLAM in 1998, prompting calls for its return

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

November 2008 (cont'd)

to Egypt. Brent Benjamin, head of the museum, stated: "To date, we have not seen information that we believe is compelling enough to return the object." Hawass commented: "This is the No. 1 case," he said, "Egypt has a right to the mask."

Sotheby's withdrew a fake 13th century belt buckle from its December sale. *The Art Newspaper* reported concerns about the authenticity of the item, and Sotheby's took the buckle off the auction block.

The Caledonian Record reported that a Vermont court ordered Anni Wells to undergo intensive substance abuse programs while she's on probation. Wells was one of four people who stole \$1 million dollars of metal sculptures from the Joel Fisher studio to gain drug money. The lead criminal, Roger Chaffee, was sentenced to up to 20 years in prison in July 2008.

John W. Pilcher, who bought and later sold a painting stolen in a burglary, pled guilty in a Utah court to a reduced charge of misdemeanor theft by receiving. *The Salt Lake Tribune* reported that he was accused of being part of a theft ring. The court sentenced Pilcher to probation, 100 hours of community service and a \$500 fine, "[b]ut Pilcher admitted no guilt in connection with a second stolen painting, which he bought from the trunk of a car in the parking lot of a downtown Sears store," said the paper.

A van carrying a \$100,000 mosaic of St. Padre Pio and two stained glass pieces created by Conrad Pickel Studio in Florida was stolen in Pennsylvania. The employees delivering the items stopped at a hotel in Philadelphia when the van was taken, according to *TCPalm*.

Bentonville, Arkansas police arrested six people in connection with the theft of safes containing a \$15,000 silver bar, ten coins valued at about \$15,000, and a rare D. H. Lawrence first-edition book valued at approximately \$5,000, a bag of silver coins valued at approximately \$10,000, and several World War II medals. *The Associated Press* wrote: "When the thieves tried to sell the 62. 5-pound silver bar at a metal recycling business, the proprietor convinced the burglars that the bar was really made of lead and gave them \$30 for it. Then he called police." "They're kids, they had no idea what they had," Detective Mike Stegall remarked.

The Jakarta Post said that businessman Hashim Djojohadikusumo planned to seek charges of fraud against Hugo Kreijger, a Dutch expert on Southeast Asian artifacts. Hashim is on trial for violating the Protected Cultural Artifacts law by not registering the six stolen Buddhist statues that once belonged to the Radya Pustaka Museum in Surakarta. Hashim is claiming that he did not know the statues were stolen and blames Kreijger for his legal troubles after Kreijger sold him the statues. "In June, the Radya Pustaka Museum curator, Suhadi Darmodipuro, was sentenced to 18 months in prison for helping steal the six statues and for replacing them with replicas to cover up the crime. Suhadi sold the statues to Kreijger for between US\$3,500 and \$20,000 each," reported the *Post*.

Father and son duo Donald Woodworth Parker and Steven Woodworth Parker were arraigned in federal court in California, charged with "conspiracy, unlawful transportation of archaeological resources removed from public lands, unlawful interstate transportation of archaeological resources removed in violation of state law, and possession of stolen property," according to a press release by McGregor W. Scott, the US Attorney for the Eastern District of California. They allegedly stole archaeological artifacts from public lands, which were found at their home.

The Salt Lake Tribune reported that Robert Paul Tucker pled guilty in a Utah state court to felony

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

November 2008 (cont'd)

theft and felony burglary for stealing paintings from the art gallery where he worked. The court sentenced him to one to five years in prison. Tucker worked at the Repartee Gallery and had a criminal history that included retail burglaries. He was also charged with stealing art from a medical office in Saratoga Springs and from a gallery in Fruit Heights. Those cases are pending.

Thieves stole a safe from the Toronto home of Paul and Judy Bronfman that had \$1 million of jewelry, including Stanley Cup rings. Paul Bronfman's father, co-owned the Montreal Canadiens. Kuitenbrouwer, through *nationalpost.com*, reported that the family hired a former Toronto homicide detective to help recover the jewels, but Toronto police cautioned that their plan to offer a reward for their recovery with no questions asked, would violate Canadian law. Criminal Code, Section 143 A states: "Everyone who publicly advertises a reward for the return of anything that has been stolen or lost and in the advertisement uses words to indicate that no questions will be asked if it is returned, is guilty of an offence punishable by summary conviction."

Pakistan News reported that the notorious *Idol Thief* Vaman Ghiya was sentenced in Jaipur, India to life imprisonment on after having been found guilty of operating an international antiquities smuggling network. It is said that this case is the first in India where the culprit received life in prison for "intentionally and habitually dealing with stolen property." It has been reported by several news outlets over the years that Ghiya operated a transnational smuggling ring that included Swiss shell companies that bought and sold many looted Indian antiquities offered for sale at Sotheby's and elsewhere. He ultimately was caught by police detective Anand Shrivastava.

A bookkeeper who worked at a Bellevue, Washington art gallery, Kenneth Behm Galleries, was charged by authorities with stealing \$100,000 worth of paintings and money over six years, said *The Associated Press*.

The Arkansas Democrat-Gazette said that Kenneth Spry was sentenced in federal district court after having pled guilty to taking arrowheads from the Ozark National Forest. He was fined \$500 and ordered to pay \$3,288 restitution.

December 2008

Artifacts stolen by former US Army helicopter pilot, Edward George Johnson, were returned to Egypt by US authorities. A federal district court in New York sentenced Johnson to 19 months probation for transporting stolen property and wire fraud after Johnson pled guilty. *The Associated Press* wrote: "'When (Johnson) stole these items from Egypt, he robbed a nation of part of its history,' according to Peter J. Smith, head of US Immigration and Customs Enforcement's New York office. 'The repatriation of the Ma'adi artifacts reunites the people of Egypt with an important piece of their cultural heritage.' Johnson was deployed to Cairo in September 2002 when about 370 artifacts were stolen from the Ma'adi Museum. He sold about 80 pieces to an art dealer for \$20,000."

A former New Hampshire assistant attorney general, William McCallum, who was convicted of art theft and who spent three years in prison has stopped paying restitution. He is expected to be summoned to court to explain why he still owes \$1,290 after taking art from schools, libraries, and museums, according to *WCAX*.

Two Port St. Lucie, Florida men were arrested after they were caught stealing a metal sculpture of a fish located outside the Stuart Heritage Museum. Sgt. Kim Major saw the pair cut the statue from

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

December 2008 (cont'd)

its base and stash it in their vehicle's trunk, *TCPalm* reported.

Police arrested John E. Hammond Jr. and Jamie Lee Custer for the September 2008 theft of an eight foot tall antique statue of Padre Pio, which once occupied the Hall of Justice in Sao Paolo, Brazil, from the National Centre for Padre Pio in Barto, Pennsylvania. The pair is alleged to have cut the bolts from the base so that the roughly 1200 pound statue could be placed on the back of a pickup truck. They then reportedly rented a saw, cut the statue, and sold the scrap metal for \$952, said *The Morning Call*.

A federal court in Massachusetts sentenced a 74 year old former criminal defense attorney to seven years in prison for receiving paintings he knew were stolen. Robert Mardirosian was convicted by a trial jury in August 2008 of taking the impressionist works that were stolen by one of his clients and storing them in Europe. Chief Judge Mark L. Wolf remarked that "[t]he only reason I'm sentencing a 74-year-old man in the early stages of dementia is because you were calculating enough to get away with this for 30 years," according to *The Boston Globe*.

A woman stole an image of *Our Lady of Guadalupe* from the Cathedral of the Blessed Sacrament in Sacramento, California. Cathedral rector Monsignor James Murphy, said other items have been taken and commented: "Basically, if it's not tied down, it's been stolen," according to *The Associated Press*.

Police arrested a Washington State dog walker and house sitter, Allison Chodl, for stealing art, jewelry, and furniture from affluent households in Medina, Bellevue and Seattle. *KOMO* reported that police moved two truckloads of evidence from Chodl's home. Chodl has a past criminal record in California, Alaska, and Washington.

A Worcester County, Massachusetts grand jury charged Joanne Shea with stealing goods for 13 years from her former employer, an antiques dealer and auction house, and then covering up the scheme in the accounting books. The *MetroWest Daily News* stated that paintings, antique vases, and jewelry were acquired by accounts set up by Shea in the name of relatives. Attorney General Martha Coakley indicated that Shea kept money from auction proceeds and covered the costs with incoming check payments. In all the 72 year old Shea is alleged to have stolen \$724,000 in goods and money.

A federal judge in Virginia sentenced Lester Weber to four years in prison. A former archivist at The Mariner's Museum, Weber sold up to 3,500 documents under his care on *eBay*. "Weber made \$172,357 on the fraudulent sales between 2002 and 2006, according to court filings. But the museum estimates the worth of the stolen items at more than \$500,000," stated *The Daily Press*. *The Daily Press* added: "You broke the trust of the public," said US District Judge Rebecca Beach Smith, saying the public has an interest in preservation of historical artifacts."

The *Times-Standard* reported that Park Ranger Greg Hall arrested James Edward Truhls, on two felony and two misdemeanor charges after uncovering grave robbing at Patrick's Point State Park in California. Ranger Hall tracked down the suspect after Truhls posted a *YouTube* video showing himself digging at a sacred tribal burial site of the Yurok people located in the state park.

Brian Ekrem of Selby and Richard Geffre of South Dakota were charged by a federal grand jury with trafficking in archaeological resources and trafficking in Native American cultural resources. The indictments, according to *The Associated Press*, allege that the men trafficked in copper arm bands, beads, stone knives, bone tools, pipes, pottery, bone fish hooks, antler arrow points, cannonballs, etc.

In his final days in office, President George W. Bush pardoned David Lane Woolsey of St.

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

December 2008 (cont'd)

George, Utah, according to *Deseret News*. Woolsey was convicted in 1992 of violating the Archaeological Resources Protection Act and sentenced to three years probation and 100 hours of community service. Hikers saw Woolsey and a co-defendant digging in an Indian ruin at Boulder Creek. *Deseret News* indicated that “[f]ederal prosecutors sought to send a ‘significant message’ about a trend of archaeological site vandalisms” during the 1990s.

News.com.au says that an unidentified 61 year old teacher from Australia was arrested at Cairo International Airport after security found mummies of a cat and ibis as well as 19 votive objects in his bags.

The Moscow City Court sent Tatyana and Igor Preobrazhenskaya, to prison for selling forged paintings from the art gallery, Russkaya Kollektzia. The pair were specifically accused of selling faked paintings valued at \$730,000. The Russian news agency *Itar-Tass* stated: “The court had established that Preobrazhenskaya and her husband (trained in art) sold five paintings to Uzzhin, claiming they were created by Russian art classics. According to the judge, the authorship of two of them has not been determined. The other three paintings are real works of North- or West-European artists of the late 19th or the early 20th century, purchased at auctions in Europe at much lower prices that they were sold to the businessman. Experts found signs of counterfeiting on the paintings: distortion of the plot and fake signatures of Russian classics.”

FinancialMirror reported on an event sponsored by the Cypriot embassy and Greek Academics of North Rhine-Westphalia and held in Germany. Professor Klaus Gallus spoke about how cultural artifacts from occupied Cyprus have saturated the black market. *FinancialMirror* added: Gallas made an extensive reference to the case of Turkish art dealer Aydin Dikmen in Munich and criticized the German authorities for not giving the go ahead for the return of artifacts which have proved to be of Cypriot origin. Turkish born art dealer Aydin Dikmen, is facing charges of illegal export, possession and attempts to sell property belonging to the church of Cyprus.”

The *Institute for War & Peace Reporting* in London says that authorities in Herat, Afghanistan are blaming Iran for the theft of cultural objects and the destruction of historic sites. *IWPR* reported: “According to statistics compiled by the Herat Department for the Preservation of Historic Sites, Herat has lost more than 100 sites or artefacts since the city was added to UNESCO’s tentative list of World Heritage Centres in 2004. Ayamuddin Ajmal, head of the department, told *IWPR* that over the past few months the city’s historical sites and artefacts have been targeted even more than usual, resulting in significant losses. According to Ajmal, 22 artefacts, some of them more than 3,000 years old, were taken from the National Museum of Herat in late September [2008]. Twelve historical sites, including an ancient mosque and engraved headstones in a cemetery, have also been desecrated in recent weeks.” Neamatullah Sarwari, Head of the Department of Information and Culture Department explained that Iran was motivated by competition for UNESCO World Heritage Centre status. Sarwari was quoted by *IWPR* as saying: “According to our information, Isfahan, in Iran is also one of the nominees for the UNESCO list. This has raised suspicions that specific individuals in Iran are orchestrating the thefts of historical artefacts and participating in the destruction of historical sites.”

Martha Dahlgren inherited from her grandfather, an Austrian soldier, a fragment of the frieze from the Parthenon and returned it to Greece. The soldier acquired removed the fragment in World War II. *Reuters* reported that the Greek Culture Minister Michalis Liapis welcomed the return of the item,

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

December 2008 (cont'd)

which was likely taken in 1943.

☞ Iraq made a successful attempt to stop an auction at Christie's in New York that contained neo-Assyrian jewelry from the treasure of Nimrud, excavated in 1989. *The Christian Science Monitor* quoted Donny George, the former director of the Iraq Museum and now a professor at Stony Brook University in New York: "I am 100 percent sure they are from the same tombs from Nimrud. Nothing of this nature has been excavated from it before – I witnessed the excavation. I would say it is 100 percent from there." Days before the sale, *Yahoo! News* reported that Christie's decided to suspend the sale: "'When Christie's learned that there might be an issue with the provenance of the earrings they withdrew the lot from the sale,' says Sung-Hee Park, a spokeswoman for the auction house in New York. 'The lot is still with Christie's in New York, but we are cooperating in the investigation.'"

☞ In an effort to overcome ownership issues associated with pieces of the Greek Parthenon held across the globe, Francesco Buranelli, General Manager of the Vatican's Pontifical Commission for the Cultural Heritage of the Church, has called for the establishment of a pan-European museum to hold the Elgin or Parthenon Marbles. *ArtInfo* reported: "Under his plan, he says, the countries that own Parthenon fragments — Britain, France, Germany, Denmark and the Holy See — could then 'put them on permanent display, maintaining their legitimate ownership of the works while bringing together a heritage which belongs to the whole of humanity.' The director 'should probably be British,' he said, 'given that Britain holds the majority of the Marbles.'"

☞ *The Associated Press* told of the Iraqi decision to deploy police commandos to protect its archaeological sites in the wake of coming plans for US troops to withdraw from the country.

☞ Two paintings by Ecuador Kingman, which were stolen from the Posada de las Artes Kingman Museum in 2003, were recovered by Colombian police inside a black plastic bag located in a pool hall in Bogota, according to the *Latin American Herald Tribune*.

☞ The Max Stern estate, which consist of heirs of the German-Jewish art dealer and which works to recover paintings lost as a result of Nazi looting, planned to unveil the return of two more artworks at the University of Toronto in Berlin. One of those paintings was found in the collection of German Chancellor Konrad Adenauer, according to a press release on *PRNewswire*. *CanWest News* reported that, in 2007, a US appeals court ruled that German baroness Maria-Louise Bissonnette would have to return *Girl From the Sabine Mountains* by Franz Xaver Winterhalter since its forced sale in 1937 was viewed as a theft.

☞ *Yale Daily News* said that Peru filed a lawsuit against Yale University in the United States District Court for the District of Columbia. The lawsuit came after negotiations fell through that would have returned some of the artifacts excavated by Hiram Bingham III back to Machu Picchu.

☞ The case of *Saher v. Norton Simon Art Museum* made news as Attorney Lawrence Kaye of New York argued to the US Ninth Circuit Court of Appeals that an action by Marei Von Sahers to recover Adam and Eve, a diptych painted by German artist Lucas Cranach the Elder, should be reinstated after it was dismissed. *Metropolitan News-Enterprise* reported that the diptych ended up in the personal collection of Herman Goering, a member of Hitler's leadership circle. The US Army recovered the diptych and first returned it to Munich and then to the Dutch government as part of a policy by President Harry Truman to repatriate looted World War II art, argued Attorney Fred Rowley who represents the Norton Simon Art Museum. Kaye countered that "this [case] has nothing to do with

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

December 2008 (cont'd)

foreign policy.”

Gallery Biba in Palm Beach, Florida retrieved two Picasso etchings after they were stolen by a thief in May 2008. The works, worth \$450,000 were allegedly taken by Marcus Patmon, who smashed a window in the gallery to grab the etchings. Patmon was arrested after he tried to contact a California art dealer about the works. *The Palm Beach Post* said that Patmon was also under investigation for thefts of a Picasso and a Chagall in Washington, DC.

The Korean Times reported that Seoul Metropolitan Council member Boo Doo-wan and Buddhist monks will travel to the Boston Museum of Fine Arts to retrieve a reliquary (the Lamaist Stupa) that contains Buddha and other monks, which is claimed to have been stolen during Japanese rule of Korea during the early part of the 20th century. “We will visit Boston to see the item first and are considering filing a suit with a local court for its return,” Boo said. “We are also planning to visit the United Nations headquarters to talk to Secretary-General Ban Ki-moon and meet with South and North Korean delegates to ask for their support,” according to the *Times*.

Reuters UK told how the Iraqi military arrested seven men and seized 228 artifacts bound for illegal export out of the country. Some of the statutes, plates, and jewelry recovered were looted from Iraq's National Museum and bore the stamp of the museum.

Iranian Foreign Ministry spokesman Hassan Qashqavi held a press conference calling for the return of Iranian inscriptions from American institutions. The *Mathaba* news agency did not clarify what inscriptions were at issue, but reported that Qashqavi opposed cooperating with American archaeological projects if the ancient inscriptions were not repatriated.

Reuters reported that Italian authorities recovered a 9th century bust of the Greek goddess Hecate, which was stolen in 2007 from a home after thieves drugged the owner's family. The bust was found in a store in Rome.

Several items were stolen from the gallery at the Capitol Arts Center in Kentucky. *WBKO* stated that “[i]t was first discovered when cleaners found parts of art sculptures in the men's restrooms Saturday morning.”

A report by *ABC* out of Hammond, Indiana said that four paintings were stolen from the former Mercantile National Bank Building where they were being stored for an exhibition. The artworks are worth \$51,000.

Interpol Tracking Task Force to Fight the Illicit Trafficking of Cultural Property Stolen in Iraq met in Lyon, France. As part of its recommendations, the task force called on Interpol member states to pay particular attention to identifying funds obtained from the illicit trading of Iraqi cultural property, identifying violations relative to money laundering, taxation, import/export regulations and the funding of terrorist or other criminal activities and disseminate the information to the intelligence and law enforcement community.”

Rocky Road Covered Bridge, a painting by local artist Carol Hutson and valued at \$2,000, was stolen from the Frederick Arts Council in Maryland, said the *Frederick News-Post*. The police are searching for it, and anyone with information should contact Officer John Pigott at 301-600-1256.

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

January 2009 (cont'd)

~ The United States and China officially signed a bilateral agreement pursuant to the Cultural Property Implementation Act that bans the import into the US of Chinese artifacts without appropriate documentation from the Chinese government. *The Associated Press* reported that the agreement “covers antiquities dating from the Paleolithic period, starting in 75,000 B.C., through the end of the Tang dynasty, in A.D. 907, and all monumental sculpture and wall art at least 250 years old. Yet it is not as broad as the ban China originally proposed in 2004, when it asked the United States to bar imports on a wide range of artifacts from the prehistoric period through the early 20th century.”

~ The *CBC* learned that the Royal Canadian Mounted Police paid a \$20,000 reward to Martin Weigelt for his help in recovering the Bill Reid jewelry and the Mexican art that was stolen from the Museum of Anthropology at the University of British Columbia in Vancouver. Weigelt has at least 55 criminal convictions, but authorities told *CBC* that he was not a suspect their case.

~ The Natural History Museum in London produced a list of items taken or missing from its museum over the last five years. The items included fossilized dinosaur poop and 167 scarab beetles, according to *The Telegraph*.

~ A Washington State court sentenced art thief William Ellis to work-release and ordered him to pay restitution in the amount of \$21,200. The *Seattle Times* reported that Ellis sold artworks on consignment for the victim, which consisted of paintings by Chagall, Joan Miro and Chihuly. “But Ellis did not pay the victim for some pieces that had been sold and failed to return others,” wrote the paper.

~ There has been active looting of shipwrecks and undersea antiquities by scuba divers since the Greek government in 2003 repealed the ban on scuba diving off the Greek coast, according to archaeologists. *The Guardian* stated: “Until recently divers were allowed access to just 620 miles of the country's 12,000 mile coastline, but in an attempt to boost tourism, the conservative government opened the country's entire coastal waters to underwater exploration in 2003.”

~ Canadian authorities introduced a new art-fraud task force. The *CBC* said that “[t]he special unit is comprised of two officers from Quebec provincial police, an RCMP officer who specializes in copyright and counterfeit money, and a civilian officer with a master's degree in art history. The officers investigate art crimes across Canada. They also work with Interpol and the Canadian Border Services Agency to track alleged crimes with international reach.”

~ Prized drawings of warships stolen from the St. Petersburg's Museum of the Military and Naval Engineering Institute in 1992 were returned by the Swedish government to Russia after the watercolors were discovered at an auction at Stockholm's *Auktionsverk* in 2008. *The Local* reported: “‘Today is a very important day for Russia,’ said Russia's ambassador to Sweden, Alexander M. Kadakin, at a signing ceremony at the Russian Embassy where the works were formally handed over by the auction house.”

~ The heirs of Jewish banker Victor von Klemperer have asked the Museum of Fine Arts in Ghent, Belgium to return a painting by famed Viennese artist Oskar Kokoschka. They claim, according to *Bloomberg*, that the Nazis forced their grandfather to sell the artwork under duress.

~ Peruvian authorities returned cuneiform tablets to Iraq that police seized at Lima's airport in 2008. *The Associated Press* mentioned that the tablets were bound for the United States.

~ *The New York Times* reported that the Italian trial against former Getty curator Marion True resumed. After four years of litigation, the January installment of the case focused on Robert Hecht's

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

January 2009

role in the alleged trafficking of antiquities.

☞ *Hostages in Germany*, a photo exhibition depicting smuggled artifacts from north Cyprus, was launched by Greek Cypriot Archbishop Chrysostomos II. He explained, as quoted by *Observer Cyprus*: “The photographs depict church relics which were found in 1997, when the German police and Interpol swooped into the apartments of the well known Turkish antiquities dealer Aydin Dikmen in Munich. A German court decided in 2004 that the evidence which had been presented was not enough to prove the Cypriot origin of all the stolen treasures. The court was however convinced about the origin of 169 photographs.”

☞ *BBC News* told how fake Dalis were found in the hands of a Frenchman by Spanish Police. Also discovered were 20 purported certificates of authenticity and perhaps 12 genuine Dali artworks.

☞ Egypt is seeking the return of 212 artifacts located in Sweden's Ostergotlands County Museum. Zahi Hawass, head of Egypt's Supreme Council of Antiquities, alleges that the ancient objects were illegally removed from archaeological sites during the 1920s. *BBC News* went on to say that “Mr Hawass claimed the museum displayed some of the artefacts in its restaurant, which caused damage and neglect. He added that the Smith family has now accused the museum of breach of contract and also wanted the pieces returned to Egypt.”

☞ Egypt returned a bronze statue to Iraq that had been smuggled out of that country. *The Associated Press* reported that “Zahi Hawass said an Egyptian man working in Jordan was caught at Nuweiba port trying to smuggle the statue into the country.”

☞ Reuters reported that Ali Aboutaam was arrested in Bulgaria on an Egyptian warrant after having been tried *in absentia* in Egypt in 2004 for smuggling artifacts out of Egypt. An Egyptian court sentenced Aboutaam to 15 years in prison. The Bulgarian court, said *The New York Post*, eventually denied Egypt's extradition request.

☞ *MSNBC* noted that Italian police seized more than 500 illegally removed archaeological artifacts that a man attempted to sell on *eBay*.

☞ The Augusta Museum of History experienced a theft of US Civil War objects, said *WJBF* in Georgia. The museum has a list of some of the stolen civil war era items.

☞ The FBI returned Pre-Columbian artifacts to Panama, according to a press statement issued by the agency. “The artifacts include a number of pottery pieces and gold works, including jewelry. Experts date many of the objects to the pre-Columbian period of 1100-1500 A.D. The FBI's investigation revealed that the widow of an amateur archeologist was storing the items in and around Klamath Falls, Oregon. The investigation showed that the individual acquired many of the items while working as a teacher on a US military base in Panama during the 1980s. It was also during this time that he married his wife, then a Panamanian citizen. The two brought many of the items with them when they moved back to the US in the late 1980s. Over the years, the couple sold some of the items at various markets and on the Internet. The Klamath Falls man died of natural causes in October 2004. No charges are expected.”

☞ Tico Torres of the band *Bon Jovi* told *MTV* that three of his artworks were stolen right before they were to be placed in a gallery in the Hamptons.

☞ According to the *BBC*, thieves stole from a Berlin art gallery, the Fasanengalerie, more than 30 artworks by Pablo Picasso, Henri Matisse, and other artists and valued at \$250,000.

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

January 2009 (cont'd)

~ *The Associated Press* reported that Massachusetts authorities recovered 27 *New York Giants* Super Bowl rings stolen last June as part of a \$2 million heist from E.A. Dion Inc., an Attleboro jewelry manufacturer. The *AP* said that “[p]rosecutors said 22-year-old Kristen Sullivan, who allegedly rented the box, was being held on a charge of receiving stolen property and would be arraigned Wednesday.”

~ *KCTV5* said that thieves stole several thousand dollars' worth of items from the KCK museum in Kansas. “Police arrested one suspect ... and recovered some of the museum's missing items, including a set of slave chains, antique lamps and a Singer sewing machine.”

~ According to *The Associated Press*, a federal grand jury in South Dakota indicted five men for excavating and trafficking in archaeological resources and trafficking in Native American cultural resources, including “copper arm bands and bracelets, beads, stone knives, bone tools, pipes, pottery, bone fish hooks, antler arrow points, hammers, cannonballs, British and French gun flints.” Taking items from public and Indian land can be reported by calling 866-NO-SWIPE.

~ Customs and Border protection seized eleven Fabergé ornaments worth over \$250,000 from two British nationals at JFK Airport in New York. *CBP.gov* said that one of the men, an art dealer “stated that he was transporting the merchandise to an auction house in Manhattan.”



“Girl with Goat,” Cristian DeFrancia

NAZI-ERA ART CLAIMS IN THE UNITED STATES: 10 YEARS AFTER THE WASHINGTON CONFERENCE

By David J. Rowland

Introduction.

Nazi-era looted art in US museums is an important issue which continues to preoccupy the courts and catch headlines. Just this winter a case involving two Picasso paintings at the MoMA and the Guggenheim museums in New York settled on the courthouse steps just as it was about to go to trial. Why is it that more than 60 years after the Nazi regime came to an end we are still dealing with this issue?

The loss of property including art in the Nazi-era is an important moral issue. Jewish families were decimated by the Holocaust. Many

families were scattered to the winds as was their property. Today these families want to reconnect with their past and obtain back property which was lost in confiscations and forced sales.

In 1998, 44 countries came together in Washington for a conference on Holocaust looted assets to address the issue of Nazi-era looted art in museums throughout the world.

As a result, the participants in the Washington Conference agreed upon 11 principles regarding Nazi looted art. Primary among these principles is that museums would research their collections and post the provenance of Nazi-era artworks on their websites for the public to see. Another encouraged claimants who lost Nazi-era artworks to come forward. And finally museums were to seek "fair and just solutions" to Nazi-era claims when claimants did come forward. Some have

called these principles "softlaw" because they are morally based but are not enforceable in court.

Each country was encouraged to pass laws and set up art commissions in their own country to carry out the principles of the Washington Conference recognizing that each country is different and has its own unique legal system and administrative bodies.



With respect to how this should be carried out, Stuart Eizenstat the co-chair of the Washington Conference and then Under Secretary of State of the United States, stated the following:

We can begin by recognizing that as a moral matter, we should not apply rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.

In other words, Nazi-era losses occurred under special circumstances which must be dealt with on a basis which takes into account the circumstances of the loss, the fact that these profoundly illegal acts took place over 60 years ago, and should not simply be dealt with by applying the common law, including statutes of limitation and laches defenses, as if the events in question happened only recently in a normal society.

NAZI-ERA ART CLAIMS 10 YEARS AFTER THE WASHINGTON CONFERENCE (CONT'D)

The reason why an event such as the Washington Conference was necessary was to highlight the fact that these losses occurred on an unprecedented scale and to a great extent have not yet been remedied.

The International Response

Different countries have responded to the Washington Conference in different ways. Some have called this “restitution roulette,” since one country's response could be very different from another, which would mean that the same loss might be treated differently, depending on where the artwork ended up.

For example a Nolde artwork looted from a Jewish family in Germany in 1939, which a Swedish museum bought at auction from an art dealer in Switzerland in the 1960's, was treated in the following manner: The claimants contacted the museum on several occasions to ask for the return of the painting. The museum responded by acknowledging that the artwork had been looted from the family in Germany in 1939, but refused to return it claiming that “there was no legal basis” to do so. Appeals to the Swedish Ministry of Justice and the Swedish Cultural Ministry were to no avail, until the family brought the matter to the press. Finally, after the press became involved, the Swedish government announced that it had assigned the task of resolving the matter to the museum under the principles of the Washington Conference.

Although finally acknowledging that it was a signatory of the Washington Conference and taking some limited action, the Swedish government failed to pass any restitution law or establish a national art commission to handle the claim in a neutral manner. Instead it acted only on an ad hoc basis and only after it had received considerable criticism in the press.

Contrary to the Swedish example, Germany responded to the Washington Conference by

issuing guidelines to its museums based on German restitution principles. This included the presumption that sales of Jewish property in Germany between 1933 and 1945 were under duress unless it could be shown that the sales price was for the fair market value and that the seller had free control over the purchase proceeds. The presumption of a forced sale was even stronger following the enactment of the Nuremberg racial laws in 1935. After that date, the presumption of a forced sale could only be overturned if the sale was for a fair price and would have taken place anyway in the absence of the Nazi regime, and the buyer paid the purchase price in such a manner that the seller could have free access to it outside of Nazi controls.

Germany also set up an art commission called the “Limbach Commission” to decide cases where the claimant and museum could not agree on whether an artwork should be restituted. So far the Limbach Commission has issued 4 advisory opinions, 3 of which have recommended the return of or compensation for the loss of the artwork.

Some of the artworks which have been returned by German museums in cases in which the author's law firm was involved include: *The Watzmann* by Casper David Friedrich which was sold by the Brunn family to the National Galerie in Berlin in a 1937 forced sale. And Ernst Ludwig Kirchner's *Berlin Street Scene*, which was also sold in a forced sale in Cologne in 1937. Last year a case study called the “Story of Street Scene” was published regarding the return of this artwork.

Similar to Germany, Great Britain, France, Austria and the Netherlands each have either passed specific laws or have set up an art commission to issue advisory opinions in response to the responsibility they undertook under the Washington Conference to resolve

NAZI-ERA ART CLAIMS 10 YEARS AFTER THE WASHINGTON CONFERENCE (CONT'D)

Nazi-era claims in a fair and just manner. Although sometimes the decisions of the art commissions set up in each country have been questioned, in all of these countries claims are reviewed on their merits taking into account the circumstances of Nazi oppression under which they occurred. (In a recent case in Germany, a German Advisory Commission decision that recommended the museum reject claims for the return of a poster collection looted during the war was challenged in the State Court of Berlin. The court held that the posters were to be returned to the heirs, thus indicating that the advisory decision was wrong.) None of these countries applies a statute of limitations or laches defense, which would in effect blame the claimants for not coming forward earlier and deny them their day in court based on a technical defense. And each country has set up a system where a neutral decision maker issues the advisory decision rather than leaving the decision of whether to restitute solely to the discretion of the museum.

US Response to the Washington Conference

So far, the United States has not passed any legislation or set up a national art commission in response to the Washington Conference. The sole exception is a California statute which eliminated the statute of limitations defense until December 31, 2010. The California statute has been challenged on constitutional grounds and is being reviewed on appeal at the Ninth Circuit Court of Appeals.

Instead, the American Association of Museums (AAM) and the Association of American Museum Directors (AAMD) came up with guidelines as to how museums should deal with Nazi-era artworks in their collections. This includes reviewing the provenance of artworks in the museums collection and posting this information on the museum's website. In addition, a self-policing system was created

whereby museums are supposed to resolve Nazi-era art claims "in an equitable, appropriate, and mutually agreeable manner." Under the AAM and AAMD guidelines, US museums are also supposed to "seek methods other than litigation", that they "consider using mediation" and that they "may elect to waive certain available defenses".

The AAM and AAMD guidelines also instruct US museums to seek out heirs who may have Nazi-era claims in order to enter into discussions with them and resolve such claims in an appropriate manner.

Nowhere however in the AAM and AAMD guidelines does it say that museums are supposed to bring suit against claimants who may come forward with their morally based claims under the Washington Conference. However, that is just what some US museums have done.

In January 2006 two museums, the Toledo Museum of Art and the Detroit Institute of Art, filed suit against the heirs of Martha Nathan, a Jewish woman from Frankfurt am Main, Germany, who was from a wealthy banking family and who owned an important art collection. After the Nazis came to power, Martha Nathan's family was persecuted by the Nazis who wanted to take over their bank, the Dreyfus Bank, one of the largest private banks in Germany at that time. Eventually the bank was aryanized and Martha Nathan was forced to flee Germany. After first selling all of her assets in Germany and paying exorbitant exit taxes, in November 1938, just after *Kristallnacht* (the night of the broken glass), Martha Nathan sold 4 works of art which she was keeping in Switzerland to a consortium of three art dealers, Justin Thannhauser, Georges Wildenstein and Alex Ball.

Following the sale, the artworks were shipped to New York by the art dealers who promptly

NAZI-ERA ART CLAIMS 10 YEARS AFTER THE WASHINGTON CONFERENCE (CONT'D)

sold them for a profit of about 300%. One of the artworks, a painting by Paul Gauguin *Street Scene in Tahiti*, was bought by the Toledo Museum of Art and another artwork, a Van Gogh painting, *The Diggers*, was sold to a private collector who later donated it to the Detroit Institute of Arts.

After seeing the artworks posted on the museums' Nazi-era websites, the heirs contacted the museums to discuss their Nazi-era provenance. Shortly thereafter, during a meeting between the heirs and the museum directors, both museums simultaneously filed suit to quiet title against the Martha Nathan heirs in the respective local federal district courts where the museums were located. The heirs responded with *replevin* claims for the return of the artworks. However, the museums refused to waive their statute of limitations and laches defenses, as provided for under the AAM and AAMD guidelines and instead asserted them as affirmative defenses. Eventually both federal courts ruled that the heirs' *replevin* claims were barred by the statute of limitations. The federal court in Toledo found that the statute of limitations expired no later than four years after the Washington Conference in 1998 (although the artworks were first posted on the museum's website and were first discovered there by the heirs at a later date), and the Federal Court in Detroit found that the statute of limitations expired four years after the 1938 sale of the artworks.

A much different result occurred in two very similar cases handled by art commissions in Europe. Only one year before the *Martha Nathan* suits were filed, the Advisory Commission in Germany issued a recommendation to return artworks to the heirs of Julius Freund. Similar to the *Martha Nathan* case, Julius Freund was forced to leave Germany with his family in 1939. After he died in 1941 his wife sold part of their

collection at the Fischer auction house in Luzern because she was in serious financial difficulties due to her persecution by the Nazis. In the *Freund* case the advisory commission recommended that the museum return the paintings.

After the *Martha Nathan* cases were decided, another very similar case was decided by the Restitutions Committee in the Netherlands, involving the Flersheim family, who were forced to flee to the Netherlands from Frankfurt am Main, Germany in 1937. While in exile from Germany, because the Flersheims lacked funds to support themselves after being stripped of their property in Germany, they sold an artwork at under fair market value to an art dealer, who promptly sold it to a museum for a large profit. In the *Flersheim* case the museum also opposed the return of the artwork, however the Restitutions Committee determined that the artworks were sold due to Nazi persecution and had to be returned.

Although treated entirely differently in the US, there is essentially no material difference between the facts of the *Martha Nathan* case and the facts of the *Julius Freund* and *Flersheim* cases. All three cases dealt with Nazi victims who were persecuted in Germany, were then forced to flee to another country where they sold artworks under value in order have funds to sustain their existence.

Following the *Martha Nathan* decisions, US museums have continued to bring declaratory judgment actions against Nazi-era victims who have come forward with their morally based claims under the Washington Conference, although no other country which is a signatory of the Washington Conference has permitted its museums to initiate such suits.

Recently, the MoMA and Guggenheim museums filed suit in New York to quiet title

NAZI-ERA ART CLAIMS 10 YEARS AFTER THE WASHINGTON CONFERENCE (CONT'D)

against Professor Schoeps, an heir of the Jewish Berlin banker Paul Mendelssohn-Bartholdy. Professor Schoeps came forward to submit claims after those museums posted the provenance of two Picasso artworks which had been sold during the Nazi-era by the Mendelssohn-Bartholdy family in Switzerland in response to Nazi pressure. However, in the *Schoeps* case, the museums were not so lucky as in the *Martha Nathan* case. In *Schoeps*, the statute of limitations had not yet run, due to New York's three year demand and refusal rule. Judge Rakoff also refused to dismiss the claimant's *replevin* claims and denied the museum's motion for summary judgment based on the equitable doctrine of laches, finding that the elements of laches (unreasonable delay and prejudice) was a fact issue for trial. Professor Schoeps' claim for the return of the artworks therefore would have been decided on the merits, and rather than undergo this risk, the museums who instigated the lawsuit undoubtedly hoped that the *replevin* counter-claims would be dismissed based on laches, ended up settling the case on the courthouse steps just prior to trial.

Reforming the US Response to the Washington Conference

Although *Schoeps* showed that in some cases the technical defenses of statutes of limitations and laches can be overcome, the real issue is should such defenses be permitted at all in Nazi-era looted art cases. Since the Nazi-era occurred over 60 years ago, it goes without saying that the deck is stacked against Nazi victims who come forward with their morally based softlaw claims under the Washington Conference, especially if US museums are permitted to intimidate claimants (who the Washington Conference principles encourage to come forward) by using

declaratory judgment actions as a sword, while at the same time asserting the statute of limitations and laches defenses as a shield against the claimant's *replevin* counter-claims.

A much more fair and responsible approach would be to eliminate the defenses of statute of limitations and laches for a policy of having all Nazi-era claims be decided on the merits rather than permitting *replevin* claims to be dismissed based upon technical defenses, which seek to establish blame on the part of the claimant for not coming forward earlier with the claim.

Another alternative to insure that Nazi-era art claims be decided on their merits, would be to establish a national art commission with exclusive jurisdiction over such claims to insure that they be decided by a neutral decision maker on the merits. Such a solution would bring the United States closer to the European model which involves a review by a commission of neutral experts, applying internationally recognized standards on the merits, without the possibility of denying the claims based on technical defenses.

In short, the United States needs to reform its response to the Washington Conference to insure that Nazi-era art claims be decided on their merits. The statute of limitations and laches defenses should be eliminated where Nazi-era art claims are litigated in US courts. Alternatively, a neutral national art commission should be established with exclusive jurisdiction to decide Nazi-era art claims on their merits.

This paper was presented to the Federal Bar Council 2009 Winter Bench and Bar Conference in Los Cabos, Mexico.

US SIGNS BILATERAL AGREEMENT WITH CHINA (CONT'D FROM FIRST PAGE)

empowered to seize, forfeit and return to China any of the listed materials upon entry into the US unless those materials are accompanied by an export permit or other appropriate documentation that shows that they left China before the effective date of the agreement. The agreement will last for five years and may be renewed.

Time will tell if the argument of some collectors that this agreement will have little effect on the illicit market is correct or not. For example, one difficulty with the new agreement is that its implementation depends on customs officials being able to recognize the prohibited categories of objects, many of which are unfamiliar to non-specialists. For example, how is a customs official to discern if a Paleolithic chipped stone arrowhead is Chinese or not? However, the Department of Homeland Security has done an admirable job educating its personnel about the equally complex prohibited categories of objects from past bilateral agreements, and the State Department has reported many seizures under these agreements (see <http://culturalheritage.state.gov>).

The implementing legislation introduced several requirements not found in the UNESCO Convention, including that the requesting country must show that it is taking steps to guard the heritage for which it is requesting aid. Those opposing the agreement had argued that China was not doing enough to safeguard its heritage, pointing to examples such as the failure of the

Chinese government to devote enough resources to salvage archeology in preparation for the Three Gorges Dam project, which submerged more than 1,000 archeological sites.

In reaction to these concerns, Article II of the new agreement specifies several duties for China. These include a promise that China will devote more money to stopping looting and illegal export, with special attention to preventing materials from reaching illicit trade hot-spots of Hong Kong and Macao. China will also increase public education about the importance of preserving its heritage, enact restrictions preventing Chinese museums from acquiring looted material, and consider allowing the legal export of more categories of artifacts. China also promises to pursue more bilateral import restriction agreements, in addition to the agreements it has already concluded with Greece, India, Italy, Peru, and the Philippines. Lastly, China promises in the agreement to allow more loans of archeological material to US museums. Previously, these had been notoriously difficult loans to secure.

In summary, the 2009 agreement seems to be a promising step in preserving Chinese cultural heritage. The Committee looks forward to tracking the agreement's success in terms of objects confiscated and promised reforms implemented by the Chinese and US governments.

