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Art, Cultural Institutions and Heritage Law

Newsletter of the International Bar Association Legal Practice Division

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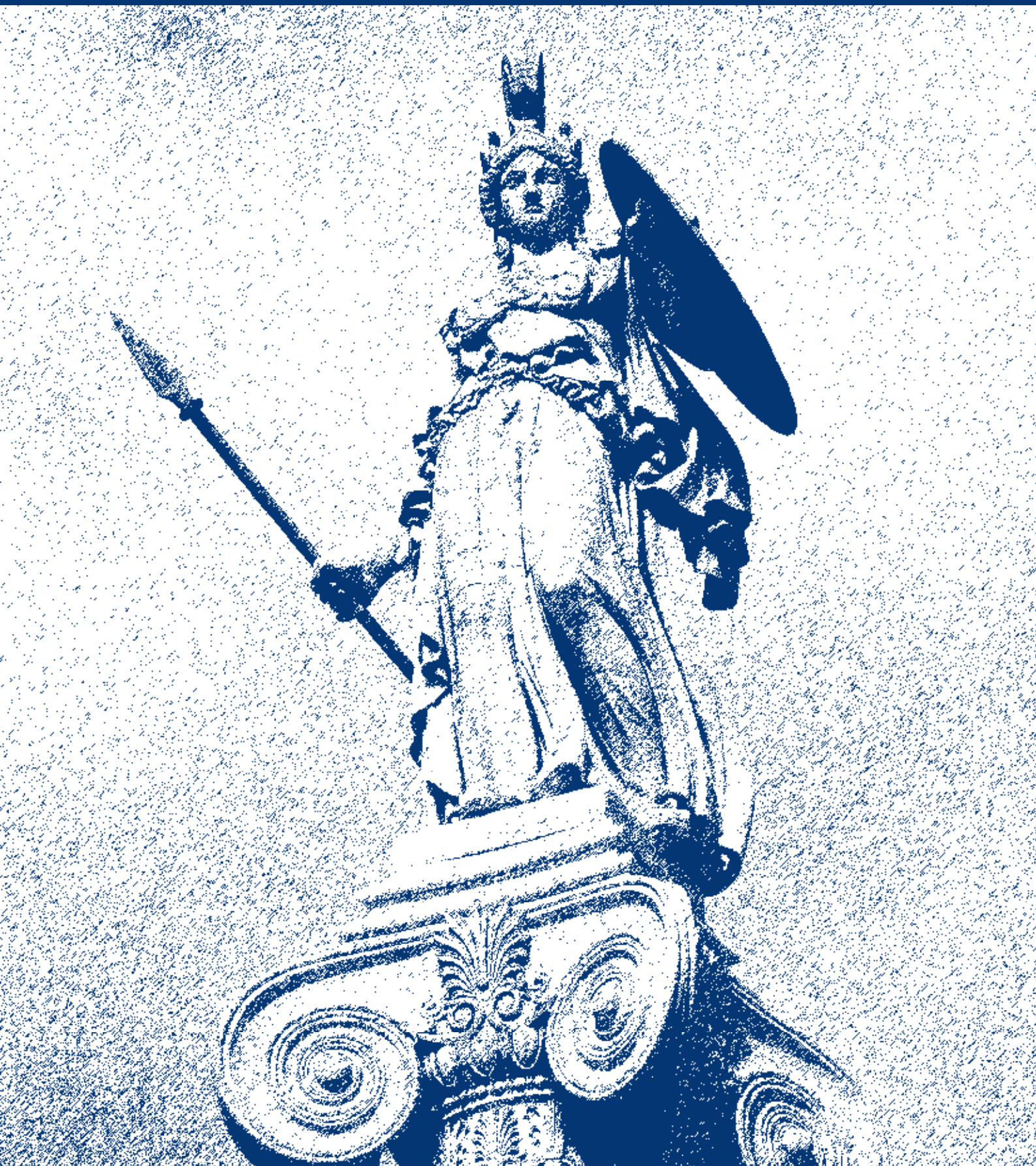

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IBA 2017 Sydney

8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

The 2017 IBA Annual Conference will be held in Sydney, Australia's leading global city. Recognised internationally as a future-focused and innovative business centre, Sydney provides headquarters for almost 40 per cent of the top 500 Australian corporations.

The city combines natural beauty with buzzing urban villages and a city centre that's home to some of the world's most recognisable and iconic structures such as the Opera House and Sydney Harbour Bridge.

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- Hear from leading international figures, including officials from the government and multilateral institutions, general counsel and experts from across all practice areas and continents
- Acquire a greater knowledge of the role of law in society
- Be part of the debate on the future of the law

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IN THIS ISSUE

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From the Chair

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We are pleased to present the newsletter of the Art, Cultural Institutions and Heritage Committee of the IBA.

I look forward to welcoming you to our sessions in Washington, beginning with a committee meeting on Sunday 18 September 2016 at the offices of Sullivan & Worcester, located at 1666 K Street, NW Washington, DC 20006. Please join the committee between 11am and 1 pm to informally meet other members and officers to discuss upcoming events and ideas for the future.

In addition, on the Wednesday of the annual meeting we will be sponsoring an exciting panel entitled 'Are Museums For Sale? – The Role of the Private Collector And Corporate Sponsor.' Another roster of specialists from around the world will present on issues such as deaccessioning, corporate sponsorship and donor/museum relations.

From the Editor

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Welcome to the latest newsletter by the Art, Cultural Institutions and Heritage Committee of the IBA. This edition addresses a wide array of topics ranging from a recap of last year's annual meeting, the law of private foundations, international protocols for the return of cultural objects, regulations on the movement of cultural property, restitution of Nazi-looted art and contracts as they relate to auction sales. An array of experts have provided thoughtful analysis in this issue, online we also provide access to the papers that were available last year on our committee website.

The annual meeting sessions in Vienna last year were a great success and we look forward to welcoming you to Washington, DC in September. Stay tuned for other events and gatherings happening in and around Washington. We hope to see you there.

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The International Bar Association's Human Rights Institute (IBAHRI), established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI undertakes training for lawyers and judges, capacity building programmes with bar associations and law societies, and conducts high-level fact-finding missions and trial observations. The IBAHRI liaises closely with international and regional human rights organisations, producing news releases and publications to highlight issues of concern to worldwide media.

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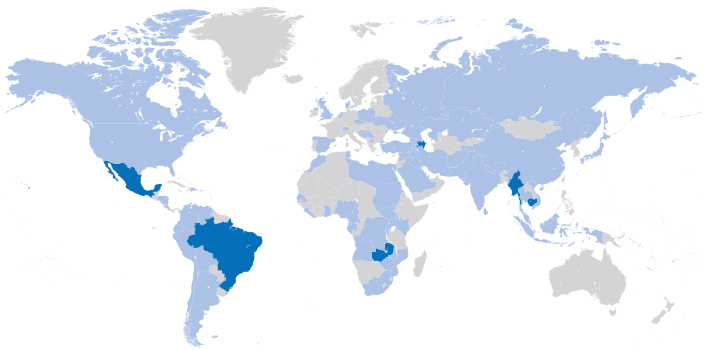
To read more on IBAHRI activities, download the IBAHRI Annual Review 2015 at **http://tinyurl.com/IBAHRI-AnnualReview2015**.



Our work around the world

Work carried out in 2015 Work carried out prior to 2015

IBA2016 18–23 SEPTEMBER WASHINGTON DC

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Arts, Cultural Institutions and Heritage Law Committee sessions

Monday 1045 – 1230

Around the tables, breakfast and a taste of hot topics in the Intellectual Property, Communications and Technology Section

Presented by the Intellectual Property, Communications and Technology Section

The format is interactive networking, and topics are selected to be of current interest and likely to stimulate a lively debate. Moderators on each table introduce the topic and the participants do the rest.

Background knowledge or experience within the areas for discussion is not required. You will have the opportunity to discuss four topics: at scheduled turnover times the participants move around the tables to the next topic of their choice.

Our menu will include hot and 'late breaking' topics in the areas of intellectual property law, internet law and mobile technologies, technology contracting and dispute resolution, arts law and space law.

The discussion is usually around the interface between law, business and technology with a global focus. Many topics for discussion are often the subject of considerable topic and media interest and this will be the case again. By participating in the table topics you will gain a greater insight into these areas and be able to add your own comments. In addition, a 'degustation' breakfast buffet will be hosted in the room so that no time is wasted for those who want to boost their energy levels before or during the session. The session will provide you with a great opportunity to meet many other lawyers and discuss topics of mutual interest with them: don't forget your business cards. We welcome new participants in these discussions. We will also be soliciting your views about your areas of interest and other suggestions, to enable the Section to programme future activities accordingly.

Monday 1430 – 1730

Digital life after death. Now is the time to think about your post-mortem digital assets

Presented by the Intellectual Property, Communications and Technology Section

This always dynamic and well-attended session enables you to select from a menu of hot topics in the IP, communications, media and technology sectors and participate in roundtable discussions.

The format is interactive networking and topics are selected to be of current interest and likely to stimulate a lively debate. Moderators on each table introduce the table topic and the participants do the rest. Background knowledge or experience within areas for discussion is not required. You will have the opportunity to discuss four topics. At scheduled turnover times the participants move around the tables to the next topic of their choosing.

Our menu will include hot and 'late breaking' topics in the areas of intellectual property law, internet law and mobile technologies, technology contracting and dispute resolution, arts law and space law.

Discussion is usually around the interface of law, business and technology, with a global focus. Many topics for discussion are often the subject of considerable public and media interest and this will be the case again. By participating in the table topics, you will gain a greater insight into these areas and be able to add your own comments. Each topic will be the subject of a report, which will be published on the Section web page. The session will provide you with a great opportunity to meet many other lawyers and discuss topics of mutual interest with them: don't forget your business cards. We welcome new participants in these discussions. We will also be soliciting your views about your areas of interest and other suggestions to enable the Section to programme future activities accordingly.

The following topics will be discussed during the session, with the help of the respective moderators identified for each topic:

1. a) What you call my name: naming rights are becoming a driving force in the museum economy because rich people are prepared to pay large sums to have their name linked to a part of or a whole museum. The roundtable discussion will explore the legal intricacies of this subject, involving delicate issue of personality rights, trademark and contractual issues, accompanied by a good number of cases on the subject.

b) Your artwork is my billboard: people writing racist sentences on a major sculpture of Anish Kapoor in Versailles is the last episode of a long tradition of artist (or non-artist) using someone else's artwork to create a new one, or as a political statement, or otherwise. We also have a good collection of cases, and the legal issues are very numerous: moral rights, freedom of speech, defamation issues, insurance claims, etc.

2. a) non-geostationary orbit satellite services and their implications on radio communications regulations;

   b) extraterritorial mining in the light of the US Commercial Space Competitiveness Act 2015 and Luxembourg's proposal on the international intellectual property regime;

3. free trade or a free ride… are limitations on grey market goods legitimate?
4. the wild, wild west – like plugging a hole in a dam wall - online counterfeiting and some strategies to combat it;
5. minions and merchandising – the big business of licensing behind blockbuster movies;
6. Alice down the rabbit hole – drawing the line on business method patents;
7. media misuse of confidential information – from WikiLeaks to the Panama Papers;
8. Hulk Hogan v Gawker – sex, lies and videotape. Where to draw the line in defining the public interest?
9. the web – where and with whom should the power of control lie?
10. the discriminating algorithm, or how to discriminate without really trying;
11. autonomous driving;
12. Is your home smarter than you are? Global experiences and what has Apple got to do with it?
13. Privacy Shield or blindfold? and
14. legal professionals in the cloud.

Wednesday 1430 – 1730

Are museums for sale?

Presented by the Art, Cultural Institutions and Heritage Law Committee and the Individual Tax and Private Client Committee

New issues relating to museum financing and management and the competing vision of museums, private donors and corporate sponsors.

Our public cultural institutions and museums are coming under ever increasing financial pressure.

In coping with this issue, some museums have begun to extend the boundaries of how they conduct business – selling items from their public collections; having corporate sponsors on the board; extracting assignments of copyrights and donations in return for making contemporary artwork available for exhibition in their institutions; and cooperating with the commercial art markets in other ways.

At the same time, private collectors still seek a lasting legacy in public museums for their personal passions.

When new landmark buildings, wings or major exhibitions can often only be realised with the aid of wealthy, influential donors, where does the balance of power lie?

This session will analyse the latest trends from both ethical and legal perspectives with the participation of museum experts, artists, collectors and their advisors. We will compare legal frameworks in which public institutions, such as museums, operate and discuss their competitive position compared to private museums. We will also explore how private collectors may safe-guard their collection for posterity in the public space and whether they are further assisted by the public purse though tax breaks.

Panel 1: Will de-accessioning be the new normal?

Panel 2: The new corporate support: from sponsor to partner

Panel 3: Art is no enough: what else do donors want from museums?

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Washington2016.aspx**. Further information on accommodation, tours and excursions during the conference week can also be found at the above address.

ARTICLES

Bust of Diana – restitution to the Republic of Poland

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In a festive ceremony at the Royal Łazienki Palace in Warsaw, the bust of Diana set in white marble, by Jean-Antoine Houdon (Versailles 1741-1826 Paris) was handed over to the government of the Republic of Poland.

There were numerous media reports worldwide about the story of the sculpture. However, the legal view is to be directed to the remedy *interim injunction* that was sought to prevent the sale of the Diana bust. Following an application by our office at the court in Vienna for an injunction the proprietress of the Diana bust voluntarily returned the artwork to the Polish state. But first things first:

The Diana bust was looted in 1939, in violation of international law, eg. Hague Regulations, from the collection of the Republic of Poland by the German occupiers. The injunction pursued the goal to secure the property of Poland as well the resulting claim for restitution of the artwork.

The Austrian proprietress had received the Diana statue by her mother through inheritance. Last year, she commissioned an Austrian auction house to sell the bust.

The auction catalog contained the statement:

'Provenance: shortly after the Second World War acquired in the art trade; since then in Austrian family ownership'

Regarding the dating of the bust on both the chest belt and the arm as well the Polish provenance the auction catalog stated:

'In the older literature on works by Houdon a Diana bust is mentioned with double dating. It was once owned by the last Polish King, Stanislaw August Poniatowski, who has been an admirer and collector of French art. In Poland, the Diana was exhibited at the bathing pavilion of the palace Lazienki in Warsaw, until it was finally requisitioned in 1940 by the German occupying forces. After that, the trail disappears. That this bust, as described in recent literature although without mentioning the chest belt, is our Diana sculpture, is not sure, but as well cannot be excluded.'

Until the compulsorily shipment by the German occupation forces in 1939, the Diana bust was over more than a century in the collection of the Republic of Poland, which until then in the Łazienki Palace had its location.

After the Diana bust was lost for more 75 years, representatives of the Polish Ministry of Culture and National Heritage became aware of its whereabouts from the auction catalog. The Ministry sent a letter to the auction house with the request to withdraw the bust of the auction. At the same time the history of the bust, the ownership of the Republic of Poland and the registration with Interpol were displayed. Subsequently Lot 0886 was withdrawn from the auction.

After that the auction house sent the message, the proprietress would agree to the restitution to the Polish state only against compensation. Her grandfather had acquired the Houdon sculpture 1946 in Warsaw. The proprietress had inherited the artwork. As a result of acquisition in good faith, she was the owner. Moreover the auction house informed that it had conducted negotiations on a sale / purchase of the Diana bust by Houdon with several domestic and foreign customers. The auction house had disclosed the whole history, the provenance of the artwork and of course the fact that it is qualified by the Republic of Poland as stolen in the war, and asked for offers under a restricted private auction. It would expect a successful conclusion in the coming ten days.

Our application for issuance of the injunction countered on behalf of the Republic of Poland as follows:

- Pursuant to ownership the applicant has the claim for return of the Diana bust against the opponent;
- The opponent is contracting authority and therefore authorized to give orders to the auction house. The opponent may prohibit

the sale and demand hand over the bust by the auction house;
- The ownership of the Polish state must be assumed at the time when it came to the seizure by the German occupying power. Since the auction house itself states that the sculpture was stolen after the invasion of the German occupying forces in Poland, it is clear that the bust of the Łazienki Palace palace as described by the literature, is identical with the sculpture now offered for sale;
- Likewise it must be assumed that today's Republic of Poland is the legal successor of the former Polish state and has remained unchanged the owner of the Diana bust. An extinction of ownership has not occurred;
- In 1946, Warsaw was a completely destroyed city. There was no orderly art trade;
- A valuable sculpture as the Diana bust was not to buy at this time and in this place under reputable circumstances. Soviet soldiers or plunderers come into consideration as sellers. The grandfather of the opponent could in no way purchase in good faith under these circumstances. Likewise it must be assumed that the opponent and her mother were aware of the conditions in the Warsaw of 1946.

Austrian procedural law allows injunctions to secure claims other than monetary claims. It must either be a risk that otherwise the legal enforcement of the claim would be frustrated or considerably more difficult. Or the injunction must be necessary to avert an imminent irreparable damage. Concerning the Diana bust, the requirements were met.

If someone had purchased the Diana bust through the auction house, the danger of lapse of the ownership of the Republic of Poland would have existed. Because the Diana bust belongs to the national cultural heritage of Poland. The non-pecuniary damage could not be made good by pecuniary compensation. In the case of handing over to a buyer probably would have been no way to determine the whereabouts of the sculpture or to prevent the removal wherever.

With regard to the danger of losing of ownership by the Republic of Poland, we have recalled that the auction house had conducted negotiations with several domestic and foreign clients on a sale/purchase of the Diana bust. And it was expected a successful conclusion of the private auction within ten days.

The injunction was aimed to:
- prohibit the proprietress, from now on to transfer the artwork inter vivos, for consideration or not, to whomever;
- command the proprietress, from now on to keep the artwork and not to change its location, and to refrain from any adverse actions or changes.

Finally a compulsorily enforcement by the court was not necessary, because at last the proprietress gave her consent to the return of the bust to the Republic of Poland without any compensation.

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Franz West and an invalid last minute transfer of his artistic property; lessons learned?

Franz West was a world famous Austrian artist with a known interest and sometimes fairly peculiar view as to what constitutes an original work of authorship. Some of his works he disassociated himself from when he decided to no longer 'like' them, works of other artists, he fancied, he occasionally appropriated and portrayed as his own. Perhaps no coincidence then that his work should turn out to be at the heart of a copyright dispute, though for very different reasons.

Many years ago, West set up an (Austrian) non-profit corporation, 'Archiv Franz West', which was to take care of the artistic work of the artist during and after his lifetime. While still alive the Archiv Franz West ('AFW') was financed by the artist himself. For the time thereafter, Franz West had granted to AFW exclusive copyright licenses in several of his

works, including the famous furniture works and photo rights, which were meant to allow the publication of *catalogues raisonnés* and similar scientific publications by AFW.

A few days before Franz West passed away in the summer of 2012 and only minutes before being brought into intensive care, Franz West was led to set up a private foundation, Privatstiftung. This includes all of the artistic property of Franz West, worth at least a very hefty double digit million Euros, was attributed through a notarial deed. The foundation included, in one of its boards, a former director of the Gagosian gallery, Franz West's last gallery during his lifetime.

Soon after Franz West had died, Privatstiftung claimed to own all of Franz West's rights, including to furniture works and photos. Both AFW as well as the widow and his children separately sued the Privatstiftung with a view to invalidate the last minute transfer to Privatstiftung. While the case of the estate is still being argued at trial level, the case of AFW made its way through the court system up to the Austrian Supreme Court, Austria's highest court , who handed down, in April of 2016, a landmark decision: The last minute transfer was invalidated and the court held, that Privatstiftung never had acquired any of the artistic rights of Franz West; photo and furniture rights were confirmed to be the exclusive property of Archiv Franz West.

While this decision marks the end of a long battle, given that Privatstiftung had sold furniture works and granted photo licenses which are now confirmed to be illegal, this is but the beginning of further litigation against Privatstiftung and very likely against galleries and other distributors of Franz West' work since his death. Says *Peter Polak* of Fiebinger Polak Leon Attorneys at law in Vienna/ Austria, who acts for Archiv Franz West: 'While we need to and will continue to claim for accounting and damages at this point, the real aim of Archiv Franz West has always been to promote the work of the artist in the most beneficial environment one could have. And irrespective of the fact that copyright infringements, in the end, will be be just a footnote in the story of Franz West, it is nevertheless to be hoped that other artists and their advisors and family will be more prudent in setting up the infrastructure which is to take care of their commercial and artistic legacy after death.'

Scaling the walls: the reform project of Italian law on circulation of artworks

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A group of Italian and international intermediaries has recently submitted an important project on art market reform to the Italian government, with the aim of modernizing the current cultural heritage legislation. Italian law sets forth several limitations to the circulation of artworks to the detriment of the art market, collectors and the Italian art ecosystem at large. The scope of the reform project that was presented to the Italian Government and the Ministry of Cultural Heritage is to align the Italian regulation with other European countries in order to boost the Italian art sector.

The current Italian legislation concerning the circulation of artworks is anachronistic and highly protectionist.

The main legal framework is the Legislative Decree of 22 January 2004 no. 42 ('Cultural Heritage Code'), which traces its origins to a law enacted in 1909.

In particular, the Cultural Heritage Code sets forth the following limitation to the circulation of artworks:

- the State is entitled to declare any artworks made by a non-living artist that were created over fifty years ago as objects of 'cultural interest' (art. 13 of Cultural Heritage Code). The declaration of cultural interest

prevents the owners of 'notified' artworks from exporting them from the national territory and consequently, severely affects their commercial value. Furthermore, the State is entitled to exercise a right of preemption anytime a notified artwork is sold;

- anyone wishing to export (whether permanently or temporarily) an artwork needs an export license (*attestato di libera circolazione,* if the exportation is intended to be made to a European country), with the only exemption being for works created either by living artists or by dead artists less than fifty years ago. There is currently no monetary threshold exempting the exportation of artworks whose value is below the threshold from the license requirement (art. 65 paragraph 3 (a) and (b) and art. 68 of the Cultural Heritage Code.) Monetary thresholds are indicated in the EC Regulation No. 116/2009 for the exportation of cultural goods outside the European Union and are applied by French and U.K. laws.

In deciding whether to grant or deny an export license, the exportation offices of the Ministry follow subjective discretional criteria, which are based on a Circular that was issued by the Public Education Ministry in 1974 (*Circolare del Ministero della Pubblica Istruzione, prot. n. 2718.)*

In accordance with the aforesaid Circular, the exportation offices may decide to deny an export license by simply alleging that an artwork is 'rare' or is of 'high quality', thereby preventing the owner from exporting the work.

Export denials frequently do not provide the private collector with an adequate motivation, in particular in relation to the specific interest of a certain artwork for the national cultural heritage.

The high level of subjectivity that is evident in the criteria governing the protection of Italian national heritage, together with the lack of monetary thresholds that should be applied to exportation, has led to administrative congestion. Consequently, both Italian and foreign collectors prefer to buy art abroad and keep their collections outside the country, thereby ensuring that the artworks they buy can circulate freely.

Furthermore, many people choose to transfer their artworks abroad when the works are near their 50th anniversary in order to avoid the risk of having them declared to be of public interest. Once exported, the artwork will most likely be sold abroad to foreign collectors. This leads to a twofold negative effect: one with respect to the internal art market and another with respect to national cultural heritage itself.

The abovementioned issues demonstrate why a change in the regulatory system that governs the Italian art market is crucial.

The above-outlined Italian regulation has been widely criticized and has led the main art market intermediaries (including Sotheby's, Christie's, Artcurial, the Italian Antique Dealers Association, the Italian Auctioneers Association, the Antique Book Dealers Association, the Italian Association of Modern and Contemporary Dealers and other Italian auction houses) to join forces and present to the Government a reform project aimed at creating a level playing field with respect to the other European art markets.

The key aspects of the reform are as follows:

- the application of the monetary thresholds set forth in EC Regulation No. 116/2009 (i.e. works before the following thresholds should not need an export license: euros 15,000 for drawings, maps and photographs; euros 30,000 for watercolors and manuscripts; euros 50,000 for sculptures, euros 150,000 for paintings, while no monetary thresholds are provided for archeological objects). The introduction of such thresholds will help the Italian export offices to become more efficient in protecting the national cultural heritage: only the most relevant artworks that are above the monetary threshold should be submitted to State control and this should diminish the administrative congestion.
- The review of the 50-year term should be extended to at least 70 years. The time extension would help foster the modern and contemporary art market, which according to economic data, is the one generating the highest revenue both at domestic and international levels. Today all artworks created before 1966 need to be submitted to the Export Offices, including works by artists such as Lucio Fontana and Piero Manzoni, which have a significant presence in Italian private and public collections. The art market demonstrates that sales of these artists reach extremely high results in London and New York. On the one hand, there is no reason why the Italian art market should not obtain the same results for the sale of works by such

artists. On the other hand, there are several minor artists who could enjoy greater international exposure if they could more easily reach an international marketplace.
- A new administrative procedure for exports, established by a new administrative regulation, should be clear and uniformly applied throughout the country. In particular, the new regulation should provide for the license to be issued in a manner similar to the French 'passport' model, as this document will follow the artwork in all of its transfers of property and will avoid the necessity of a new import certificate until its date of its expiration (5 years.)

The new regulation should also provide for the review of the criteria for declaring artworks of cultural interest and the denial of export licenses.

The criteria set forth by the 1974 Circular are too vague and leave too much discretion to the export offices.

Export offices frequently motivate the denial of an export license on a highly subjective artistic assessment of the quality of the work, without giving any further reasons that demonstrate the historical importance of the artwork for the national cultural heritage. It is essential that the Ministry issue a new regulation including new guidelines: these should balance the interest of private property and free movement of goods in Europe with the protection of cultural heritage; such guidelines should also indicate more precise criteria governing the declaration of cultural interest. In particular, the competent authorities should consider the presence of similar works in private and public collections and that a more rigorous motivation should be required when the artwork is by a foreign artist or belongs to the national heritage of a different nation.

The abovementioned reform project is endorsed by the Italian Cultural Heritage Minister Dario Franceschini and is expected to be approved by the Italian Parliament in 2016.

Recap of Art, Cultural Institutions and Heritage Committee sessions in Vienna

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The Art, Cultural Institutions and Heritage Committee held two panel discussions at last year's Annual Meeting, in addition to the table discussion it contributed to the Intellectual Property Section, Communications and Technology Section's 'Around the Tables' session on Monday morning.

The Arts Committee's session took place on Tuesday and was entitled 'Art and the Digital'.

The first panel discussion addressed to the creation and exploitation of art on the internet by artists, authorship, exploitation and intellectual property rights. Bogotá Artist Miltos Manetas began by discussing his own creative work. He was an early adopter and collector of digital art, what he called the 'Electronic Orphanage Collection.' He presented at Gagosian in 2000, but continued to gravitate to more elemental themes. He rented a Chinatown storefront, with monitors visible from the street. Later, anticipating many fair use issues of the present day, he incorporated the familiar image of the Evian mountains, without the brand logo. This progressed to what he called the 'Newspressionism.'As these images accumulate over time, he considers the viewer to be what he calls 'human data machines'.

The panel then moved to a legal discussion moderated by Massimo Sterpi (Jacobacci & Associati, Rome), who posed alternating questions to Nicholas O'Donnell (Sullivan & Worcester, Boston) and Olivier de Baecque (de Baecque, Paris), seeking to identify common threads in US and Continental law.

The second panel of the day concerned art online, database issues, the creation of virtual galleries, and bringing museum collections online, moderated by Guiseppe Calabi (CBM & Partners, Milan) and Yoshifumi Ondera (Mori Hamada & Matsumoto, Tokyo).

Gilane Tawadros is Chief Executive Officer of DACS, London. Tawadros suggested that digital issues are affecting art less in terms of the law, surprisingly so, even. It is important to discuss disrupting space and commodification, as well as ownership. Most artists' work is not digital and the median artist's income is less than minimum wage.

Mariska van Zelst-de Wit (Rijksmuseum) addressed digital initiatives at that museum. There were 8,500 objects on display as of April 2013. She explained that the museum's goal is to share these images and to be open, to create a 'private moment with the *Night Watch*.' The quality of the image allows a visual experience literally not possible in person. The initiative also allows visitors to create impermanent combinations to enhance their understanding. She closed by addressing what she called the 'paradox of the Internet.' Not all images can be cleared for copyright. Many artists are even happy for the attention. She suggested that the law would be improved by allowing museums to share more without risk.

Stephen Clark (J Paul Getty Trust) began by discussion the various parts of the Getty. The Getty Trust is actually the only 'Getty' entity with legal existence, but the enterprise covers the museum, the research institute, conservation, and philanthropy. Its mission, as he called it, is simple: the diffusion of artistic and general knowledge. Initially in the modern era, the 'primacy of the original' drove much of the approach, with things like low resolution images and watermarks. As part of the Getty's Open Content Program, however, more than 100,000 images are now available online. This signifies a shift in the philosophy of control.

Now, the Getty sponsors an exhaustive array of digital resources: the Union List of Artist Names, the Getty Foundation Online Scholarly Catalogue Initiative, the Arches open source project (in combination with the World Monuments Fund).

The third and final panel of the day concerned marketing and sales of art on the Internet, including private sales, dealer offers, auctions, studio sales, valuations, applicable laws, legal issues concerning sales ,guarantees, fakes and frauds and IP and database issues. The panel was moderated by Pieter Ariëns Kappers (Bavelaar & Bavelaar Advocaaten & Rechtsanwälte, Amsterdam) and Pieter Polak (Committee Vice Chair, of Fiebinger Polak Leon Rechtsanwälte, Vienna).

Jacqueline Nowikovsky (Bonham's, Vienna) addressed the movement to online activity in art sales. Bonham's now streams all auctions live, she said. Transparency, visibility, and information are the goals. These are also effective means of spreading the word.

Anne-Sophie Nardon (Borghese Associés, Paris) spoke about the legal issues of buying and selling art on the Internet. Contract clauses are typically accepted by the buyer when requested. Liability will typically fall on the seller. This creates an interaction between consumer laws and mandatory laws. The problem arises in questions of diligence, and the seller's responsibility for 'authorship.' As an example, Nardon cited lithographs. She rightly pointed out that where the value is less than $10,000 or so, that low amount is a deterrent to legal action, making enforcement difficult. The expanding problem of fakes in the market only compounds the issue.

Turning to the law of the forum, Nardon cited Brussels Convention Article 17 (choice of law). A recent controversy involving someone posting an image of *L'Origine du Monde* on Facebook created a row over Facebook's (California) forum selection clause and the French court's view of the Facebook user as a consumer, refusing to enforce the forum clause.

Katherine Garbers-von Boehm (CMS Hasche Sigle, Berlin) closed the days event with an overview of IT and IP legal issues. The marketing and sale of art on the Internet is complicated in particular by copyright. Reproductions are necessary to market the works. German law, for example, has a specific exception allow that reproduction in the course of a sale (US law would not). The promotion has to be proportionate and must come down after sale. The Bern Convention has the principle of 'Natural Protection' Exclusivity is covered by the law in which protection is claimed.

Droit de Suite, or resale royalty rights, were introduced in Germany in the 1970s. The UK was more reluctant, there are no such rights in Switzerland, the US or China. Those latter countries fear a less competitive advantage. Where is a sale on the Internet for these purposes, however? Transaction of ownership is governed by the law of where the property is. Data protection laws will also have to be considered under these choice of law provisions.

Art Repatriation and Cultural Genocide

Along with the Human Rights Law Working

Group, the Committee participated in a second session on Thursday afternoon. Federica D'Alessandra (Vice Chair of IBA War Crimes Committee, and resident at Public Law & Policy Group, Harvard University) moderated the panel. She gave an initial example of the International Criminal Court investigation into the looting and destruction in Mali for the possibilities of enforcement.

Mark Stephens (Arts, Cultural Institutions and Heritage Committee Chair, Howard Kennedy in London) spoke next. He described an instance involving Maori representations in London. Reburial in their native land was critical to correct the original dispossession. Likewise, examples involve aboriginal persecution in Tanzania, Cambodian sculptures and of course the Parthenon marbles. The UK has added a layer of cultural property export restrictions. He cited a sea change, particularly with respect to human remains.

Thaddeus Stauber (Nixon Peabody, Los Angeles) described his role as a 'defender of the current owners.' Stauber represents the Thyssen-Bornemizsa Collection Foundation in Madrid and the Republic of Hungary, in restitution litigations in the United States, among others. He addressed issues of jurisdiction that have been hotly contested. When it comes to private property claims, the 'rubber hits the road' when it comes to who makes that decision. He argued that his clients' view is that their own laws should apply. Stauber argued that 'astronomical values' have turned 'what was a human rights conversation into a business conversation.'

Stephens chimed in the query where it all stops. Without any other limitation, first world museums would lose considerable parts of their collections. He returned to the question of remains and sacred objects, identifying two issues: 1) when integral to living belief, they should go back; but physical control is more complicated; and 2) how they were acquired is more complicated.

The panel discussion closed with a discussion about possible international alternatives. The closest thing to consensus among panelists and attendees was that new forums or alternative dispute resolution mechanisms seemed unlikely. There was more disagreement about why that is, but it seems to be the status quo.

Both days' sessions were well presented and attended. It was another lively and informative annual meeting for the committee.

Portuguese Law – introduction of specific rules on movable cultural property

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Further to a long period – 14 years – of non-specific regulation regarding movable cultural property, Decree-Law no. 148/2015 was published on 4 August 2015 and came into force on 1 September 2015 ('Decree-Law'). This Decree-Law establishes the regulations under Law no. 107/2001 of 8 September 2001 (the Portuguese base law applicable in general to all cultural property matters) – ('LQPC'), insofar as it relates to movable cultural property, introducing specific provisions on the classification, inventory and circulation of this type of cultural property.

The most important features of the new regulations are:
i) Definition of the procedural steps to be followed regarding the administrative processes of classification and inventory of movable cultural property. In contrast with the 'summary' legal framework established in the LQPC, the new Decree-Law specifies the deadlines, official entities involved, investigative process and effects of classification and inventory of movable cultural property. By way of illustration, the new Decree-Law:

a) Makes express reference to the viability of the preliminary refusal order within 20 days of filing of the request for classification;
b) Specifies the new criteria for the assessment of cultural movable value to make it possible to decide whether or not to classify the property as being of national interest ('national treasure') or public interest. These new criteria are the state of conservation of the property, the processes used to create the property and the actual need to protect and value the property;
c) Requires a mandatory opinion of the National Cultural Council; and
d) Prohibits the breaking up and dispersal of integral parts of any property, sets or collections classified as being of national interest. In turn, the breaking up or dispersal of integral parts of property, sets or collections classified as being of public interest requires the prior authorisation of the competent cultural heritage authority.

ii) Regarding the circulation of movable cultural property, the main issues are that the Decree-Law:

a) Sets a period of 60 days to take the decision on the authorisation for temporary or permanent export or dispatch of classified movable cultural property, or movable property in the process of being classified as being of national or public interest. As an exception, a period of 120 days applies to the permanent exportation or dispatch of cultural property classified as being of public interest;
b) Specifies that the cultural heritage authorities may not refuse a request for temporary or permanent exportation or dispatch of catalogued cultural property, unless it is deemed that the cultural property in question is capable of being classified. In this case, the cultural heritage authority must begin the classification process immediately. The deadline for the decision on such an authorization is 60 days;
c) Provides that when authorisation is given for classified or inventoried cultural property to leave the country definitively, the registration of this property in the respective classification and cataloguing register will be cancelled;
d) Provides that the requirement for prior communication (and not an authorisation request) at least 30 days before the movable cultural property leaves the country applies to:
   i) situations involving movable cultural property that is not classified or inventoried, or which is not in the process of being classified or inventoried, and to
   ii) property classified of being of municipal interest.

However, the new Decree-Law determines that this requirement for prior communication does not apply in two situations: i) movable cultural property that was created less than 50 years old (except in the case of collections and specimens from zoological, botanic, mineralogy and anatomical collections, and of collections of historical, paleontological, ethnographic or numismatic interest); and ii) when the exportation or dispatch in question relates to cultural property directly owned by the respective author, regardless of its age, but as long as the exportation and dispatch are carried out by the author or by any representative.

e) sets the period of 15 days as from the date of the prior communication (30 days, as mentioned above) of a given situation of exportation or dispatch for the cultural heritage authority to assess the cultural value of the property in question. The authority may place a preliminary ban on the exportation or dispatch of the property as a provisional measure that must be communicated to the interested parties. If the period of 15 days passes without the cultural heritage authority issuing any decision, the exportation or dispatch is deemed to be lawful;
f) Expressly provides for the exportation licence rules contained in Implementing Regulation (EU) no. 1081/2012, of the Commission, of 9 November 2012 to be applicable;
g) Makes it clear that movable cultural property may not (without the consent of the owner) be classified as being of national or public interest until 10 years have passed from the date of the permanent importation or admission;
   iii) Regulation of the modus operandi applicable to the re-evaluation of previous forms of protection of cultural movable property (in particular, regarding forms of protection determined by the Portuguese public cultural authorities in the 1930s and 1950s).

Under this process of re-evaluation, it is now expressly legally possible to amend the level of cultural interest, to cancel the registration of a classification or of any other type of legal protection, or for the property to come under the inventory rules. This process of re-evaluation must be completed within four years of the date the Decree-Law entered into force.

Conclusion

There are two main aspects to highlight in this new legal framework: One involves a tendency to give greater weight to the right of private property regarding some types or conditions of ownership of cultural movable property. This is achieved by introducing a rule of free circulation of movable cultural property when that property was created less than 50 years or, regardless of its age, as long as the movable cultural property is circulated by its own author or by any representative (and this is almost in line with the recommendations of Implementing Regulation (EU) no. 1081/2012, of the Commission, of 9 November 2012).

The other, relates to the legal framework applicable to the re-evaluation of previous forms of protection of cultural movable property (as described above).

Show me your contract! A look into the legal relationships at art auctions

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Art auctions are a fascinating marketplace, gathering collectors from across the globe and offering collectibles for sale which would otherwise only be displayed in museums. Not only for market actors, but also for lawyers auction sales are a unique way of dealing. An auction sale generally involves three parties if not more, commissions on both the consignor's and the buyer's side, and specific warranties and disclaimers of liability. Simply characterising the legal relationships that arise at art auction sales may be a challenging endeavour. A recent decision by the Swiss Federal Court shows that the specific circumstances of a consignment may change the characterisation of the legal relationships between the parties. This article provides some insights into the legal relationships that bind the auction house, the consignor and the purchaser at auction.

Legal relationship between the consignor and the auction house

An auction house and a consignor are generally bound by a consignment agreement. Under US law, this relationship is typically one of agency. Under Swiss law, the characterisation of the consignment agreement very much depends on the specific conditions the parties have agreed to. Generally, an auction house and a consignor enter into a commission contract, by which the commission agent maintains the right and obligation to close a contract for the principal's account against a commission. However, the characterisation of the consignment agreement may differ when auction houses divert from their standard practice. As an illustration, auction houses offer some consignors a more attractive arrangement in order to secure their consignment. In particular, the auction house may forego its seller's commission, or agree to a guaranteed sale price.

In a dispute between an auction house based in Geneva and a consignor who had agreed to sell an important collection of stamps with the auction house, the Swiss Federal Court had to characterise the agreement both parties had entered into. As part of the agreement, the auction house offered the consignor to waive its seller's commission and a guaranteed sale price of 1 million euros. The parties also agreed to a date for the delivery of the collection to the auction house. The collector then signed a further agreement which specified

that if he withdraws from the consignment after the delivery of his property to the auction house, he will owe payment of the buyer's commission calculated on the basis of the estimate price. The legal dispute arose when the collector did not deliver the collection at the set date, and instead sold it to a third party for 1.5 million euros. The auction house brought a lawsuit against the collector claiming for the payment of 400,000 euros in damages, corresponding to a buyer's premium of 20 per-cent based on a hypothetical hammer price of 2 million euros. The dispute reached the Swiss Federal Court which decided in the collector's favour.

The Court held that the characterisation of a consignment agreement can differ according to whether the auction house offers its services against a seller's commission or for free. The Court further specified that under Swiss law, the consignment agreement is a commission contract if the service is provided against payment by the principal, whereas if not, the parties have entered into a simple agency contract. The difference between both contract types resides essentially in the auction house's entitlement to a commission, which is not due in the event of a simple agency contract. Moreover, according to statutory law, a commission agent is entitled to such a commission even if the sale did not take place for a reason attributable to the principal. In the present case, the Court characterised the consignment agreement as a simple agency contract considering that it was free of charge to the consignor.

The Court then assessed the auction house's right to compensation under the given circumstances. Statutory law allows either party to an agency contract to terminate the contract at any time without any reason, which is exactly what the stamp collector did. However, if the termination is ill-timed, the party terminating the contract must compensate the other for any resulting damage. The Court pointed out that this statutory remedy does not allow the agent to claim for the loss of profit resulting from the sale's cancellation. Since the auction house did not establish any costs that resulted from the cancellation, but entirely based its claim for damages on loss of profit, the court rejected the auction house's case.

Also, the auction house arranged in its general terms of business that the consignor owes the buyer's premium should he cancel the consignment, but only upon delivery of the consigned property. As the collection had never been handed over to the auction house, the Court concluded that this contractual penalty fee did not apply. Major auction houses generally foresee a penalty in their business terms in the event the consignor decides to withdraw his property from the sale. Such a contractual penalty complies with Swiss law as long as it is not calculated on the basis of the commissions that the auction house would have received upon the sale's performance.

Parties to the sale agreement

Auction houses purport themselves to be a sole intermediary in a transaction that is concluded exclusively between the consignor and the buyer. In fact, major auction houses clearly stipulate in their conditions of sale that they act as agent for the seller, and that the sale contract is directly concluded between the seller and the buyer. The auction houses' confidentiality policy protecting the consignors' and the purchasers' identity causes some difficulty in determining which parties are bound by the sale agreement. The main question resides in establishing whether an auction house can validly conclude a sale agreement on behalf of an unnamed consignor and remain unbound by it. In the US, case law shows that the auctioneer remains outside of the sale contract if the contract expressly and clearly says so. Therefore, neither the consignor nor the purchaser can hold the auction house responsible under the sale contract.

Under Swiss law, controversy exist as to whether an agent can or cannot conclude a contract in the name of an unidentified party. Some scholars hold the view that an agent may validly conclude a sale contract on behalf of a principal if the principal's name is disclosed after the contract's conclusion, or if the third party did not care with whom he made the contract. Other scholars suggest that disclosure is a mandatory requirement for the valid conclusion of a contract on behalf of an unnamed principal, failing which the contract is concluded directly between the agent and the third party. In the auction context, this scholarly view means that the buyer enters into the sale agreement with the auction house, not the consignor.

Legal relationship between the auction house and the buyer

A closer look into the art auction sale process shows that auction houses generally hold

the authority to act as agent of both the consignor and the purchaser for the same sale transaction. More specifically, auction houses may act as the purchaser's agent for specific purposes, such as when placing a bid on the purchaser's behalf and when drafting and signing the memorandum of sale. Hence, auction houses also operate as the purchaser's agent for limited purposes, which carries the risks of conflict of interests.

Conclusion

Despite being a well-established marketplace, generating a huge amount of transactions each year, art auctions are still a cause for debate among specialists. The characterisation of the legal relationships arsing at auction is mostly determined by the auction houses' general terms and conditions of sale. Nonetheless, the wording of these clauses may differ from the factual and legal situation actually present at the time of sale, and have an impact on the legal characterisation of the relationships between the parties. Hence, the idiosyncrasies of the art auction market suggests that reading the clauses of a contract may not suffice, but require a careful analysis of the clauses in light of the auction houses' practices.

The reform of the Cultural Property Protection Act (Kulturschutzgesetz) in Germany

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There is currently a bill under way in Germany which will have far-reaching consequences for exporting works of art and other cultural assets from Germany. In the following article, *Rechtsanwältin* Katharina Garbers-von Boehm explains the aspect of preventing the removal of cultural property (*Abwanderungsschutz*), which has serious implications for companies and private collectors'.

The issue of protecting cultural property can basically be broken down into two areas. One area is the return of cultural property. This concerns cultural goods from illegal excavations which the states of origin can demand to have returned based on the Act on the Return of Cultural Objects. The other area which is of particular relevance for collectors and institutions is protection against removal. This area concerns 'cultural goods of national significance' which should not be removed from Germany if at all possible. The Cultural Property Protection Act has provided the legal basis for this since 1955. The Federal Commissioner for Culture and the Media, Professor Monika Grütters, would like to combine these two areas into a uniform law. The bill mentions inter alia Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State as the basis for the planned consolidation of the law on protection of cultural goods. However, this directive only covers the issue of returning cultural objects, not preventing removal. There is thus no compelling reason to reform the law on protection against removal. This presents a paradox since the core of the bill addresses protection against removal of cultural objects.

The most important regulation in the bill

If the governmental bill is passed in the version of 4.11.2015, in the future an export licence will have to be obtained in advance to export a work of art which exceeds a certain age (currently 70 years) and a certain value (currently 300,000 euros for paintings, the value is lower for other techniques). This would even apply to exports within the EU. A licence will not be issued if the work is a 'valuable cultural asset of national significance', the removal of which would constitute a loss for Germany. In practice, this regulation would mean that each time an application is submitted for an export licence the state authority would have to consider whether the work of art is of

national significance to the country. If the authorities decide that it is, then the work of art would have to be placed on the register of cultural property of national significance, and it is no longer possible to export the object. This could have severe consequences for collectors: Exporting cultural goods without an export licence is punishable by imprisonment of up to five years or a fine. A preliminary version of the explanatory memorandum on the bill stated that this mechanism aimed to prevent countries from having to buy works of art back from foreign countries at high prices. This passage which (perhaps too openly) articulates the legislator's reasoning has since been deleted from the explanatory memorandum.

What will change? The legal situation today and after the reform

Under Directive EU 116/2009, an export licence is already required for exporting art from the EU, depending on how old the work of art is (50 years) and its value (for paintings: 150,000 euros). Such licences are issued by the federal states. In Berlin, for example, such licences are issued by the Kultursenat, in Bavaria by the Bavarian State Painting Collections Bayerischen Staatsgemäldesammlungen). Within the EU internal market an export licence is not required to export from Germany to date unless a work of art is listed in the register of cultural property of national significance. In practice this means that in many situations the competent authorities never find out that an unregistered object leaves Germany, and consequently the authorities do not check whether such objects are of national significance.

The aim is to close this alleged loophole and protect works of art from being removed.

A minor amendment with potentially major consequences

A seemingly minor change, namely to apply the rules which apply to exports outside of the EU anyway, within the EU internal market, and to continue to 'fill' a list which already exists, would have drastic practical implications. In the future, the state would be informed of all planned exports of cultural objects which exceed the value of 300,000 euros (for paintings) or are more than 70 years old, and could then decide whether or not to prevent the 'removal' of these objects. If an object is regarded as 'nationally significant' and its export is subsequently denied, and the owner moves to a foreign country, the object cannot leave the country. It can only be sold on the domestic market to a buyer who is willing to accept the export restriction. In many cases objects which cannot be exported can factually become unsaleable, or only achieve a fraction of the price they would have on the international market. Minor compensation for this monetary loss is only provided for in cases where the owner of such a work of art is in an emergency situation. In all other respects, there is no compensation for the loss of value. The bill does not even provide for a pre-emptive right for the state, whereby the object can be exported after a certain period has lapsed. In other jurisdictions such as France or the UK it is possible for the state to purchase a work of art which has been designated as nationally significant within a certain period of time. If the time period expires and the state does not purchase the work of art, then it can be exported. The BKM Federal Ministry for Culture has rejected such a pre-emptive right thus far. Grounds: Protection of cultural goods which is dependent on the cash-flow situation is not desired.

Terminology and practical handling, limited legal measures

Inclusion in the register, and consequently a permanent export restriction, are both linked to the vague term 'nationally significant'. The issue of deciding what is 'nationally significant' has not been dealt with uniformly under the previous law. This results in legal uncertainty. The new definition does not provide any sufficient clarity. When is a work 'particularly significant for the cultural heritage of Germany, the federal states or one of its historical regions and therefore of significance for the identity of Germany's culture'? When would its removal be deemed a 'significant loss for German cultural heritage'? Were the works of art auctioned by the NRW Casino for approximately 60 million euros and 80 million euros depicting Marlon Brando or Elvis Presley significant for preserving the identity of Germany? Is a charcoal drawing by Kirchner of which there are numerous similar versions (currently on the register in Berlin) of significance for the identity of Germany or Berlin? It is symptomatic that this is currently already handled differently by the federal states. For example, to date cultural

goods in the visual arts on the list have almost exclusively been Gothic or renaissance works in Baden Württemberg, whereby a collection with works by Günther Uecker is registered in Mecklenburg-Vorpommern. This heterogeneity leads to further legal uncertainty. It is hardly possible to have legal certainty during the registration procedure.

As the decision to commence the registration procedure does not yet constitute an administrative act, it cannot be contested as such. A period of uncertainty can be expected each time a work of art exceeds the thresholds on value and age. The risk that the work is listed on the register shifts to varying degrees depending on the circumstances and the quality of the work of art.

Practical implications of the new act

What are the practical implications for art-collecting companies and entrepreneurs if the law passes the Federal Parliament? As stated above. the most important implication is that each object which exceeds a certain value or age will be confronted with the registration process before it can leave Germany permanently, for example if it is going to be sold to a buyer in London or New York. Since the government will be informed of many more works of art (of greater or less significance) the number of registration procedures will most likely increase. If an export licence is not granted, the object cannot be sold on the international market. The potential number of buyers for a work of art which cannot be exported is clearly very limited. The object would then be less valuable, or factually unsaleable. In future, the valuation of art within a company will also be more difficult. It can be expected that the registrations in the federal states (what belongs on the list?) will continue to be just as heterogeneous after the envisaged reform. This results in legal uncertainty. For collections presented in Europe or worldwide, the fact that exports are subject to a licence means that it will no longer be an uncomplicated measure to permanently relocate objects from one place to another.

Need for modification

Several aspects need to be modified from the view of art collecting companies and entrepreneurs. Only the most important issues are pointed out here:

The mechanism of making exports within the EU subject to a licence has to be done away with. This mechanism contradicts the principles of the internal market and would unnecessarily complicate cross-border transactions with works of art.

The definition of 'nationally significant cultural goods' should be specified. It should be clarified that this specification only applies to truly unique works.

Furthermore, presumed approval should be introduced to prevent delays: If a decision is not made on an application to export within two weeks, the export licence should be deemed granted. If a decision is not made on a registration procedure within six months the work should be labelled not registrable and the export licence deemed granted without the possibility of suspending the deadline.

A temporary pre-emptive right for the state would lessen the financial implications for owners: If the state does not decide to purchase a work of art which has been designated as nationally significant within six months, then it should be possible to export it.

Outlook and recommendation

There is a risk that the bill will be enacted before parliament's summer break.

It has become apparent that collectors with collections in Germany are considering, or have already begun, removing works of art from Germany. This consideration is understandable, however it should be thought through carefully. Whether or not it is feasible to relocate art abroad depends on several factors including the jurisdiction and practice in the country of destination. For works of art which are loaned out to museums the question arises of whether it is possible to terminate such loans. Caution is advised, as the list already exists. Each situation has to be evaluated individually. In future for permanent loans the loaner can decide whether or not to make the loan subject to the regime of the Cultural Property Protection Act for the duration of the loan.

For foreign buyers the act will mean that in the future before buying a work of art located in Germany it must be certain that the work of art can be exported.

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The return of cultural objects between European countries

The Member States of the European Union had until December 18, 2015 to transpose the directive 2014/60/EU of May 15, 2014, on the return of cultural objects unlawfully removed from the territory of a Member State of the European union. The aim of the Directive is to enable each Member State to secure the return on their soil of 'national treasures' illicitly exported or stolen, regardless of the property rights or good faith of the holder or possessor of such objects.

France has been, for once, notably diligent in doing so, with the 2015-195 law of 20 February 2015. This new law is expected to have a significant impact on the regulation of the art market, because for the first time since the Napoleonic code, it reverses the burden of proof on the good faith possessor. So far, the good faith of the possessor of a cultural object was presumed, in accordance with article 2274 of the Civil Code stating 'good faith is always presumed, and he who alleges bad faith must prove it'. With the directive of 15 May 2014 and the transposition law of 20 February 2015, the possessor of a cultural object declared as a 'national treasure' will have to prove his good faith. This obligation is all the more important as the French legislator has also extended the definition of 'national treasures'.

From a procedural point of view, the new law extends the period of time to initiate proceedings and strengthens international cooperation through the use of the Internal Market Information system.

Why reform ?

The 15 May 2014 Directive is a recast of directive 93/7/EEC which had, with the creation of the European internal market in 1993, established between Member States a system of return of cultural objects unlawfully removed. This system involved certain cultural property, classified as 'national treasures'. Several evaluation reports-as well as the study on the prevention and the fight against illicit traffic of cultural property in the European union[2] had demonstrated the limits of the system, little used and little known. Between 2008 and 2011, there has only been six requests for return based on article 5 of the Directive:

- The Czech Republic has filed four claims, three against Austria for 17 statues and two reliquaries, and one against the Netherlands for a statue of St Anne;
- Italy has filed one claim against Germany for a bronze helmet;
- Lithuania has filed a claim against Austria for a sculpture 'The risen Christ'.

The scope of the Directive

The scope of the 2014 Directive is extended to any cultural object classified or defined as 'national treasure' according to the laws of each State. Any references to the 1993 annex, listing certain categories of objects with thresholds related to their age or financial value, is suppressed.

In the case of France, the legislator has also widen the definition of 'national treasure' to include all public archives and movables objects placed in public listed or registered buildings. This extension is especially important for the art market since the qualification of 'national treasure' may be given to the cultural property before or after its unlawful removal from the territory of that State. Article 2 of the Directive defines 'Cultural object' as an object '*which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State…*'. A physical or legal person can therefore be found in possession of a cultural object that had not been declared 'national treasure' at the time of its exportation from the territory of a State Member, and which is later defined as such. This must be kept in mind when advising our clients or drafting sales agreements.

A more effective procedure

The 2011 report from the Return of Cultural Objects Working Group, set up in 2009 with representatives of the national authorities under the auspices of the Committee on

the Export and Return of Cultural Goods, concluded that Directive 93/7/EEC needed to be revised in order to make the procedure more effective. The majority of members were in favour of extending the time-limit of one year for bringing return proceedings and the time-limit of two months for the competent authorities of the requesting Member State to check the nature of the cultural object found in another Member State.

The 2014 Directive has followed the Return of Cultural Object Working Group's suggestions and extended the time-limit for bringing return proceedings to three years from the day the competent authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder. The time limit for a member state to check whether the cultural object found in another Member State is a national treasure is extended to six months. Time will tell if these changes will make the procedure more effective.

The emphasis on due diligence

A person found in possession of a cultural object considered as 'national treasure' may be ask to return it, provided of course that it has been illicitly exported. However, it will not be enough for the holder to say that he has not been aware of the illicit origin of the property, he will have to prove that he sought and verified this origin. Article 10 of the 2014 Directive states that in determining whether the possessor exercised due care and attention, consideration shall be given to all circumstances of the acquisition, in particular the documentation on the object's provenance, the respect of export and import regulations, the quality of the parties, the price paid, the consultation of any accessible register on stolen cultural property, and more generally all the circumstances surrounding the sale of the property.

It must be noted that objects received in inheritance or donation are subjected to the same rules, since the holder cannot have more rights than his donor.

The fight against illicit traffic has brought a major increase on the obligations imposed on the possessor of a cultural object who has to prove that he exercised «due diligence». If the possessor of the cultural object manages to prove his good faith, he will be forced to return the property, but will obtain a 'fair compensation' from the requesting State. This requirement of 'due diligence' to obtain a fair compensation was already present in article 4 of the 1995 UNIDROIT Convention. So far, France had signed the convention but refused to ratify, notably because of the principle of good faith of article 2274 of the Civil Code. The need to fight illicit trafficking has finally prevailed, at least for national treasures.

Notes

1 See the fourth report on the application of Council directive 93/7/EEC on the return of cultural goods unlawfully removed from the territory of a Member State of the 30.05.3013

2 Study on the prevention and the fight against illicit traffic of the cultural in the European Union carried out by the CECOJI on behalf of the Affairs DG of the Commission - October 2011