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BOOK REVIEW

Sabine Boos, *Kulturgut als Gegenstand des grenzüberschreitenden Leihverkehrs (Cultural Property as Objects of Transnational Loans)* pp. 328. Duncker & Humblot, Berlin, 2006. ISBN 3-428-12034-5.

Reviewed by Kurt Siehr*

Almost every important art exhibition also exhibits art objects on loan from domestic or foreign institutions or private owners. Recently, this lending policy has been severely threatened by third parties trying to attach art objects on loan from foreign countries and claiming to be the rightful owners of these objects, which were expropriated many years ago by the Nazis or stolen, converted, or confiscated abroad. Also, creditors of lending institutions may try to get hold of these objects and liquidate them. The Schiele affair,[1] the Malewicz case,[2] and the Russian-Swiss controversy about loans to the Fondation Pierre Gianadda at Martigny, Switzerland, from the Pushkin Museum in Moscow illustrate these dangers.[3] Therefore, any study dealing with these problems and offering solutions for preventing or mitigating such clashes of interest is welcome. Boos devoted her research for a doctoral thesis, submitted to the University of Düsseldorf, Germany, to these problems, mainly those of a return guarantee given to the foreign lending institution with respect to art objects on loan for a local exhibition.

After inspecting the relevant national, international, and supranational sources and nonbinding codes of ethics (pp. 36–123), the author's first, extensive chapter deals with loans from foreign countries without any binding return guarantee (pp. 124–232). She discusses problems of domestic and of private international law mainly from the perspective of German and European law. Several pages are devoted to the application of foreign export restrictions in domestic courts. This problem has already been extensively discussed with respect to illegally exported art objects intended to be located permanently outside the country of origin. The leading British case is *Attorney General of New Zealand v. Ortiz*.[4]

In other European countries, foreign export regulations with respect to cultural object have not been enforced: neither in Germany,[5] nor in Italy,[6] nor in Switzerland.[7] Because Switzerland has implemented the UNESCO Convention of 1970[8]

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and under the Swiss implementing statute recognizes foreign export prohibitions, it is unlikely that Swiss courts will recognize such prohibitions of noncontracting states.[9] The same argument will be put forward in other countries. The author, however, does not deal with *permanent* exports for any change of title (auction abroad, sale to foreign collector, etc.). She is concerned with *temporary* exports without the required export licence of the country of origin. There may be short-term loans for special exhibitions and permanent loans. In cases of *short-term loans*, it is unlikely that the country of origin will file a lawsuit for return of the art objects in the country were the exhibition takes place. Recently, the Albertina of Vienna loaned five valuable Dürer watercolors (i.e., *Hare*, *A Blue Roller*, *Self-portrait at Thirteen*) for the exhibition, "Dürer, Masterpieces from the Albertina" (Alberto Durero, obras de la Albertina), in the Museo del Prado in Madrid (March 8 to May 29, 2005); but the Austrian Bundesdenkmalamt (Federal Authority for Cultural Property), for reasons of conservation, had not given the required permission for any transportation and exhibition abroad. Finally, the permission was given and even extended to the entire time of the exhibition and not only for four weeks.[10]

The problem of foreign export policies may be different with respect to *permanent* loans. The famous painting *Christ's Entry into Brussels in 1889* (1888, exhibited since 1929) of James Ensor (1860–1949) may serve as an illustration. It was exhibited in the Koninklijk Museum voor Schone Kunsten of Antwerp, Belgium, from 1947 to 1983 before it was given by the private owner to the Kunsthaus Zürich as a permanent loan (1983–1987); it was finally sold in 1987 to the J. Paul Getty Museum in Malibu, California.[11] Could Belgium have enforced its export rules in Switzerland if the painting had left Belgium in 1983 without a Belgian export licence? The author discusses several solutions. If the loan contract was null and void for lack of an export licence, the lending person could recover the painting. The same would be true if the lending person could terminate the loan prematurely for the same reason. But what about the Kingdom of Belgium, which is no party to the contract and wants the painting returned to Belgium? Could it enforce Belgian export policies in Swiss courts? The author proposes, at least for Germany, that such enforcement should be granted because of the superior interest of Belgium in protecting its own cultural heritage. This is correct between member states of the European Union and of the European Free Trade Association, because these states are obliged to return unlawfully removed art objects under the national statutes implementing the Council Directive 93/7/EEC of March 15, 1993, on the return of cultural objects unlawfully removed from the territory of a member state.[12] It is, however, unlikely that these member states would do the same without any codified international or supranational obligation. Of course, a state may provide expressly—as it is done in Article 90 of the new Belgian *Code de droit international privé* of 2004[13]—that the claim for return is governed either by the *lex originis* (law of the country of origin) or by the *lex rei sitae* (law of the country of location), whichever may be more favorable for the return claim.

The main focus of the thesis is concerned with the export guarantees given by the country of the borrowing institution to the owner of the art object on loan. If state galleries are involved, execution immunity under public international law has been granted to the art objects and arrest or seizure has been prohibited or lifted.[14] But what about private institutions that do not qualify as entities enjoying any kind of immunity under customary public international law or immunity treaties? If no return guarantee is granted, no art objects are given on loan and the planned exhibition fails, as has already occurred.[15] Therefore, several countries enacted immunity statutes providing that third parties cannot raise claims concerning the objects; and any other claims of recovery, attachment or seizure, and confiscation or sequestration are prohibited. Few legislatures in North America[16] and few countries in Europe have introduced immunity statutes or, as it is also often called, provisions on return guarantees.[17] After a comprehensive discussion of the legal situation in Germany under the new provision on return guarantees (since 1998), the author turns to the problem of international law: whether immunity violates the basic right of access to justice. There is no such violation because there is access to justice in the country of origin where the lending institution is located. If this is not the case, such as with respect to looted German art objects withheld by Russia and by some other successor states of the former Soviet Union as "restitution in kind," no return guarantee will be given by German authorities.

Another conflict may arise with international conventions providing for the return of an art object to somebody other than the institution having given the loan. May the gallery receiving the loan and guaranteeing its safe return refuse to do so because a local provision based on an international agreement obliges the receiving state to return the object to a third party? Let us assume the Berlin National Gallery received Schiele's *Portrait of Wally* as a loan from the Leopold Gallery in Vienna, and Germany guaranteed the return of the painting to the Leopold Gallery. Would this guarantee also be valid if Germany and Vienna ratified and implemented the UNESCO Convention of 1970 and the painting was illegally exported from Switzerland? Because the UNESCO Convention is not self-executing and gives a wide discretion to the state parties, the convention does not prohibit any national return guarantee.[18] This would be different under the UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects.[19] This convention is self-executing and does not give any discretion to the state parties about whether or not they may return stolen or illegally exported objects. They must return even if a return guarantee was given to a foreign institution. This may be an obstacle to ratification of the UNIDROIT Convention.

Within the European Union, a national return guarantee cannot supersede the recovery claims raised under national statutes implementing the Council Directive 93/7/EEC of March 15, 1993.[20] Illegally exported art objects have to be returned to the member state in which they have been illegally exported, and the directive does not allow any exceptions for loans from member or nonmember states. Therefore, a return guarantee should not be given to objects that may have

been unlawfully exported from a member state because the guarantee could not be enforced and would lead to government liability. This could only be changed by the European Union. With respect, however, to loans from non-European countries, every country can pass a statute on return guarantees to meet certain obstacles of cross border loans of art objects. How this can be done is well described by Ms. Boos.

ENDNOTES

1. *United States v. Portrait of Wally*, 105 F.Supp.2d 288 (S.D.N.Y. 2000).
2. *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298 (D.D.C. 2005).
3. Cp. "Wirbel um zunächst zurückgehaltene Bilder," Neue Zürcher Zeitung November 17, 2005, and decision of the Swiss Federal Council of November 16, 2005.
4. [1984] 1 A.C. 1, 35 (H:L.).
5. Bundesgerichtshof June 22, 1972, 59 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) p. 82 (*Nigeria case*), and in 73 *International Law Reports*, p. 226. This case did not enforce foreign export prohibitions and did not order the return of smuggled art objects.
6. Cass. November 24, 1995, no. 12199, *Foro italiano* 1996, I, 1, p. 907, and *Rivista di diritto internazionale* 80 (1997): 515 (*Governo di Francia c. De Contessini*).
7. Appellationsgericht Basel-Stadt, August 18, 1995, *Basler Juristische Mitteilungen* 1997: 17 et seq., at p. 21; and *Schweizerische Zeitschrift für internationales und europäisches Recht* 7 (1997): 492.
8. Cp. the Federal Act of June 20, 2003, on the International Transfer of Cultural Property, in force June 1, 2005. Cp. the English translation in *International Journal of Cultural Property* 12 (2005): 467–476, with comments by Marc Weber, "New Swiss Law on Cultural Property," International *Journal of Cultural Property* 13 (2006): 99–113.
9. Bundesgericht April 8, 2005, 131 III *Entscheidungen des Schweizerischen Bundesgerichts* p. 418 (*Union de l'Inde c. Crédit Agricole Indosuez (Suisse) SA*). Kurt Siehr, "Das Kulturgütertransfergesetz der Schweiz aus der Sicht des Auslandes," *Aktuelle Juristische Praxis* 2005, pp. 675 et seq., at p. 680–681.
10. "Das grosse Hasenstück. Madrid und Wien im Streit um Dürer," *Neue Zürcher Zeitung* March 5, 2005, and press release of the Austrian Federal Ministry of Education, Science and Culture of March 11, 2005.
11. Patricia G. Berman, *James Ensor. Christ's Entry into Brussels in 1889*, Los Angeles: J. Paul Getty Museum 2002, pp. 91–97.
12. *Official Journal of the EEC* 1993, No. L 74, p. 74, and *International Journal of Cultural Property* 6 (1997): 387.
13. Code of July 16, 2004, *Moniteur belge* of July 27, 2004, p. 57344; and *Yearbook of Private International Law* 6 (2004): 319 (English translation). Cp. also Kurt Siehr, "Chronicles." *International Journal of Cultural Property* 12 (2005): 568 (translation of Article 90).
14. Cp. Tribunal civil de la Seine, July 12, 1954, *Journal de droit international* 82 (1955): 118 (*Keller c, maison de la Pensée Française*); Swiss Federal Council, *supra* n. 3;
15. The *Neue Galerie* of New York was asked to lend paintings of the "Serge Sabarsky Collection" to the Historical Museum of the City of Vienna and the exhibition "Serge Sabarsky, a collector in New York." Because Austria could not guarantee the safe return of the paintings to New York, the exhibition could not take place. *Frankfurter Allgemeine Zeitung* May 19, 2003, p. 48; *International Journal of Cultural Property* 12 (2005): 128.
16. Cp. e.g., the U.S.-American Immunity from Seizure Act 1965, 22 U.S.C. § 2459; the New York Arts and Cultural Affairs Law § 12.03, McKinney's Consolidated Laws of New York Annotated, book 3B; the British Columbia Law and Equity Act 1979, R.S.B.C., c. 224, section 55 as amended by the act R.S.B.C. 1996,. c. 253. Similar immunity statutes are in force at least in the Canadian provinces of Alberta, Manitoba, Ontario, and Quebec.

17. Cp. the Austrian Bundesgesetz of December 30, 2003, über die vorübergehende sachliche Immunität von Leihgaben zu Ausstellungen in Bundesmuseen, *Bundesgesetzblatt* 2003 I, p. 1831; Belgian Code judiciaire Article 1412[ter]; the French Loi no. 94–679 of August 8, 1994, Article 61, *Journal officiel* of August 10, 1994, p. 11668; the German Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung of July 8, 1999, § 20, *Bundesgesetzblatt* 1999 I, p. 1755; Swiss Federal Statute on the International Transfer of Cultural Property Articles 10–13, supra n. 8.

18. Therefore, the Swiss implementing statute of 2003 (supra n. 8) could provide the Swiss return guarantee in Articles 10–13.

19. *International Journal of Cultural Property* 5 (1996): 155.

20. *Supra* n. 12.