Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title

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Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title

Norman Palmer*

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I. INTRODUCTION

It has long been accepted that art loans are a cardinal form of modern cultural exchange. To some they are also a notable element in the "soft power" exerted by civilized states. In recent years, however, the lending of cultural objects across frontiers has been hindered and destabilized by a steep rise in third party claims. Such claims normally seek to curtail the loan and dispossess the borrower by asserting a superior right of possession in the claimant. Many claimants rely on an original theft of the work and the inability of any later alienation to extinguish the claimant's title. But claims can originate in events other than theft. Some claimants are states, who assert that their domestic laws grant them superior rights of possession over undiscovered portable antiquities or other cultural...
objects unlawfully removed from their territory. Some claimants are victims of persecution whose dispossession, though morally repellent, may not on strict definition be theft.

The purpose of this Article is to show how modern law responds to such challenge. In particular, it examines the means by which common law systems manage the return of unlawfully removed cultural objects to dispossessed parties, and the implications of those means for international loan agreements. Regard is paid to the remedies that may be available in the aftermath of a claim, and the “self-help” devices that are available to lenders and borrowers. Some of the measures examined are peculiar to cultural objects, but others are general. Some have no direct relation to law, but work on voluntary regulation. All of them contribute in some degree to the tension that exists between vindication of rights of ownership and encouragement of cultural exchange. This Article begins by surveying the general landscape against which cross-border loans are conducted, and then descends to measures peculiar to loans.

II. ART LOANS: A SITTING DUCK?

There are many reasons why cross-border loans are particularly vulnerable to litigation. Public exhibition exposes cultural objects to widespread scrutiny, alerting potential claimants. The volume of art borrowing is vast and many borrowing museums lack the capability to research title for themselves. It can be diplomatically difficult to require a lender to give assurances about title, and museums may be tempted to avoid this. The risk of being sued is particularly strong where chattels have substantial value and an eventful or mysterious past, marked by gaps in provenance or unanswered questions. A

8. This assertion of a national right of possession may (in some cases) purport to cover objects removed by, or with the consent of, the person formerly entitled to possession.

9. Or their alleged successors in title.

10. Examples of art loans that have given rise to World War II-related claims are the exhibitions of Schiele, Macchiaioli, and von Kalckreuth works at New York, London, and Florence, respectively. See NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 14-19 (2000) [hereinafter MUSEUMS AND THE HOLOCAUST]. For a claim that would appear (if substantiated) to have involved a simple theft of the work, see the claim by Mrs. Mercedes Matter against Mr. Robin Judah. Maev Kennedy, Court battle over key Pollock painting: Collector Defends Ownership of Canvas as Friend of the Late Artist Claims the Pivotal Work was Stolen from Her Home, THE GUARDIAN (London), Nov. 24, 2000, at 5; Norman Palmer, commentary, Repatriation and Deaccessioning of Cultural Property: Reflections on the Resolution of Art Disputes, 54 CURRENT LEGAL PROBLEMS 477, 479 (2001).

11. Compare the history of some of the works in the Burrell Collection at Glasgow, Scotland. See Norman Palmer, Memory and Morality: Museum Policy and
possessor may not know whether an older work was loaned or given, which can undermine resistance to claims.\(^{12}\) A stolen object may not have been claimed in its "home" state because the law there is uncongenial to claims; the law of the borrowing state may be more congenial.\(^{13}\) Artworks can be subject to intersecting interests,\(^{14}\) and not all interested parties may have agreed to the loan. Some ulterior interests may be hard to detect: for example, a partner's interest in family assets, or a creditor's interest under a title retention clause; many such interests are not registered or otherwise published.

Such circumstances can place the borrower in a serious dilemma. Many claims are morally compelling; to oppose them can seem callous or wanting in merit. Some claimants are elderly and unlikely to outlive a protracted voyage through the judicial system. Resistance by museums can imperil valuable relationships,\(^{15}\) particularly where defensive arguments are perceived as casuistic or technical. Moreover, the consensual resolution of third party title claims (for example, by arbitration or mediation) cannot be provided for in advance; there is, by definition, no prior agreement between the borrower and the third party claimant. Without prolonged research, the borrower may have no way of knowing whether the object is stolen, or whether the title of an original theft victim has survived, or whether the claimant is the party entitled to possession, or whether a lender who himself borrowed the work had authority to sub-loan it. All these are matters that bear heavily on parties to cross-border loans.

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\(^{12}\) See In re Escot Church, [1979] Fam. 125 (U.K.), discussed in ART LOANS, supra note 4, at 172.

\(^{13}\) Compare to the claim by Mrs. Maria Altmann against the Republic of Austria with respect to certain Klimt paintings that had belonged to her aunt and uncle, Adele and Ferdinand Bloch-Bauer, while they were resident and domiciled in Austria. Austria v. Altmann, 541 U.S. 677 (2004); see E. Randol Schoenberg, Whose Art is it Anyway? (June 2004) (unpublished paper delivered at the Institute of Art and Law Seminar, Law and the Holocaust) (on file with author).

\(^{14}\) For example, by way of security or co-ownership. See, for instance, the array of interested parties in Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990) (providing an example of an array of interested parties).

\(^{15}\) For example, with fellow lenders, sponsors, political interests, community groups, and the public at large.
III. A Word on ‘Loans’

A. General

The word “loan” is used more liberally in the museum context than a strict regard for its common law meaning would allow. In fact, the concept of “loan” is merely one of the several forms that a temporary disposition of cultural objects for purposes of exhibition or research can assume. In each case the underlying legal relationship is one of bailment, which denotes the relation that arises when one party is voluntarily in possession of goods that belong to another. But the type of bailment, and its legal incidents, may vary according to circumstance.

B. Museum Bailments as Contracts

While it is common for museum agreements and other documentation to designate transfers of possession of cultural objects as loans, many such deliveries are not strictly loans but some other form of bailment. The true chattel loan is a gratuitous bailment that benefits only one party, viz the borrower and bailee. The lender derives no advantage from the bailment, and grants possession solely as a favor to the borrower. It follows that the simple lending of a chattel involves no contract at common law, because the borrower supplies no consideration.

While the orthodox language of lending and borrowing is sometimes appropriate to describe museum bailments, many bailments both from and to museums are in fact supported by contracts. Inherent in the agreement will be reciprocal promises and benefits which fulfill the contractual requirement of consideration.

17. ART LOANS, supra note 4, at 17–30.
18. NORMAN PALMER, BAILMENT 26–31 (2d ed. 1991) [hereinafter BAILMENT].
21. For example, where private individuals bail objects to museums for no reason other than a desire to promote the aims of the museum or benefit the public.
22. Indeed such reciprocal undertakings may be expressly designated as constituting consideration.
The bailment of an antiquarian object by a private collector or investor to a university for research, for example, may yield valuable benefits to both the lender and the borrower: higher pecuniary value on the one side, enhanced learning on the other. While the label that the parties have applied to the transaction may be persuasive as to its legal character, it cannot prevail over the factual substance of the transaction. Nor will a court necessarily assume that a word which has a settled legal meaning was used in that legal sense within the particular transaction. In short, a bailment may be a contract though labeled a loan.

It must be emphasized that this question is not merely academic. The existence of a contract between lender and borrower can decisively influence the outcome of numerous legal questions: for example, the governing law of the transaction, the implication of terms into the transaction, the ability of the lender to recall the chattel at will, and the identity of the party having the immediate right of possession for the purpose of certain claims in tort.

C. Bailment other than for Exhibition

Cultural objects may of course be bailed for purposes other than public exhibition, and their bailment may involve entities other than museums. Recent claims involving bailments to auction houses offer guidance on the position of museums that receive stolen art on loan. Particular debate surrounds the taking of possession of displaced cultural objects by museums that designate themselves as museums of refuge or museums of temporary resort. The policy underlying such deposits is that a responsible museum should shelter displaced cultural objects until their place of origin becomes known, or until changed conditions render it safe to return them to a known place of origin. Such a policy is viewed by some as preferable to the rejection of such objects and their resultant loss to scholarship. The subject is controversial because the handling of looted material (and in particular, its direct commercial acquisition) can involve not only civil


For example, in its supporting documentation. An agreement for the lending of a chattel can specify its legal nature. It may do so by stating explicitly that it shall take effect as a contract between the parties, though such a statement alone might not be effective if there is in fact no consideration on the borrower's part. Alternatively, the agreement might declare that the lending and borrowing of the object are to take effect in consideration of the mutual undertakings contained in the agreement.
and criminal liability but a violation of published ethics. There exists, moreover, a substantial body of professional opinion that condemns outright any act by a museum which, regardless of motive, can reasonably be expected to encourage the pillaging of art or antiquities. The arguments are complex and cannot be expounded at length within the present confines. But to the extent that the recipient museum is knowingly and willingly in possession of property that belongs to another, it seems appropriate to characterize it as a bailee of the party entitled to possession, if not a bailee by way of loan.

D. "Loan" as a Colloquial Term

In the following analysis, unless the context otherwise requires, the expressions "loan," "lender," "borrower," and kindred terms should be taken to refer to all types of bailment, regardless of whether both parties benefit from the transaction. Such nomenclature may not be strictly accurate, but it corresponds with the colloquial usage in this sphere and makes for ease of exposition.


27. An endeavor to address the question of a causal link between the looting of cultural objects and the acquisition of such objects by overseas museums is made by the (U.S.) Association of Art Museum Directors. See ASS'N OF ART MUSEUM DIRECTORS [AAMD], REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART, § II.E (June 10, 2004), available at http://www.aamd.org/papers/documents/Junel0FinalTaskForceReport_001.pdf (providing guidelines for incomplete provenance). Guideline E speaks to a situation where, even after rigorous research, a museum is unable to determine whether the acquisition of the particular object would conform both to the Guidelines and to the applicable law. Id. It contemplates that museums will use their professional judgment in deciding on the acquisition of such material. Id. Among the circumstances to which a museum might properly pay regard in exercising its judgment are the risk of destruction or deterioration facing the object, its accessibility to scholarship once acquired, its exhibition and publication history, and whether it has been absent from its probable country of origin for a sufficiently long time that its acquisition would not provide a direct, material incentive to looting or illegal excavation. Id. In the latter regard, the commentary to the guideline recommends that members do not acquire before a period of ten years' absence from the country of origin has elapsed, while recognizing that it is ultimately for each museum to decide its own policy in regard to the period of absence and appropriate documentation. Id.

IV. THE LEGAL LANDSCAPE

A. Some Recent Trends in England and Wales

The past four years have seen a greater number of initiatives to vanquish the illicit trade in cultural objects than the preceding four decades. In particular, significant progress has been made in criminalizing improper conduct. Such progress can be seen in the enactment of the Dealing in Cultural Objects (Offences) Act 2003 and the Iraq (United Nations Sanctions) Order 2003. The campaign is fortified by the Proceeds of Crime Act 2002, a general statute which penalizes those who possess or deal in "criminal property" and confers extensive powers of confiscation over such property. Such legislation is highly relevant to the lending and borrowing of art, because much of it fastens on possession, or the transacting of possession, as the relevant criminal act.

More recently, however, national policy seems to have lost something of its newfound impetus. This decline can be seen in the official abandonment of the concept of a national database of unlawfully removed cultural objects, and in the temporary suspension of the policy of using the export control system to retard outflow from England and Wales of cultural objects unlawfully removed from other jurisdictions. Moreover, even within the field of modern criminal policy there is inconsistency of treatment between the new statutory measures. One example is the lack of coordination between the Dealing in Cultural Objects (Offences) Act and the Iraq Order in Council in regard to the burden of proof of the core mental element of the respective offences. Another is the selective abandonment of the requirement of dishonesty. It is not altogether easy to collect a coherent and integrated policy from such discrepancies.

29. Under the Dealing in Cultural Objects (Offences) Act, 2003, c. 27, § 2(a) (U.K.), the core mental element is the accused's knowledge or belief that the cultural object is tainted. This element of the offence is (in common with the elements of knowledge and belief in regard to the offence of handling stolen goods under the Theft Act, 1968, c. 60, § 22 –24 (Eng.)) a matter for proof by the prosecution according to the normal criminal standard of proof. Under the Iraq (United Nations Sanctions) Order, 2003, S.I. 2003/1519 (U.K.), the relevant offences are committed unless the accused did not know and have reason to suppose that the object was unlawfully removed from Iraq after August 6, 1990. These are matters for the accused to prove according to the normal civil standard of proof. Norman Palmer, Cultural Objects in the Criminal Law: The Recent U.K. Experience (June 2005) (unpublished paper delivered at the Europol Conference at Budapest) (on file with author); Richard Harwood, Dealing in Cultural Objects (Offences) Act 2003, 8 ART ANTIQUITY & L. 347 (2003); Kevin Chamberlain, The Iraq (United Nations Sanctions) Order 2003: Is it Human Rights Act-Compatible?, 8 ART ANTIQUITY & L. 357 (2003).

30. This is present in the Dealing in Cultural Objects (Offences) Act 2003, but not in the Iraq (United Nations Sanctions) Order, for no apparent reason.
Accompanying these developments is a more helpful acceptance that the propagation of crimes is not the only (nor perhaps the most effective) way of countering the illicit market.\(^\text{31}\) Increased emphasis is being placed on the use of recovery and confiscation orders under modern statutes governing criminal property,\(^\text{32}\) on the imposition of non-criminal penalties like the abatement of rewards payable under the treasure system,\(^\text{33}\) the withholding of public indemnity from loaned objects that lack a sufficient provenance, and on the judicial molding of non-statutory law to encourage vigilance on matters of provenance and title. Disparate legal disciplines sometimes intermesh, so that (for example) recent legislation on money laundering and the proceeds of crime\(^\text{34}\) has influenced the civil law on recovery of cultural objects.\(^\text{35}\) Sometimes, however, the different strands of law seem to pull in different directions, suggesting an imperfectly coordinated approach.\(^\text{36}\)

With these considerations in mind, this Article will undertake a specific analysis of the modern civil, criminal, and treaty-based law that regulates the conduct and management of art loans.

\section*{V. THE POSITION IN LAW}

\subsection*{A. The Common Law of Conversion}

It is useful to begin by visualizing a typical claim and the legal mechanics that underpin it. Such a claim might arise, for example, where an object loaned to an English museum by a collector in


\hspace{1cm} 32. Principally, the Proceeds of Crime Act, 2002, c. 29 (Eng.).


\hspace{1cm} 34. Principally, the Proceeds of Crime Act, 2002, c. 29 (Eng.).


\hspace{1cm} 36. An example is the uneasy relationship between (1) the recent vein of common law authority which recognizes that the paramount quality of a possessory title to chattels extends even to those who are in possession of objects that represent (or are likely to represent) the subject or proceeds of crime, thereby enabling former possessors of such property to recover it from the police where, for example, no prosecution takes place, \textit{see}, \textit{e.g.}, Costello v. Chief Constable of Derbyshire Constabulary, [2001] EWCA (Civ) 381, [2001] 1 W.L.R. 1437; Gough v. Chief Constable of the W. Midlands Police, [2004] EWCA (Civ) 206, and (2) modern legislation such as the Proceeds of Crime Act, which confers wide confiscatory powers in relation to criminal property.
California is claimed during the term of the loan. The claim might be brought by a museum, which alleges that the object was stolen from its collection two decades ago, or by a state, which claims that the object was illegally excavated within its territory, or exported in violation of its law. The borrowing museum is unresponsive and the claimant decides to sue. Immediately, the claim raises potential issues as to the quality of the claimant’s alleged entitlement, the applicable limitation period and the effect on title of any transaction concluded under an intermediate legal system, such as Switzerland. In any consequential litigation between the lender and the borrower, questions might arise as to the system of law that governs both the loan agreement and any supporting transaction such as state indemnity or commercial insurance.

Before the English court the claimant will sue in tort. A claimant who seeks to recover a work of art that is currently on loan to a borrower in England and Wales will almost certainly sue for the tort of conversion.37 He or she may argue that the act of conversion consisted in the borrower’s original reception of the work on loan, but that alone may not suffice to constitute the tort where the receiver had no notice of any title ulterior to that of the lender.38 It is more likely that the claimant will first demand the delivery up of the object from the borrowing museum and then found a claim for conversion on the borrower’s refusal.39 The remedy that is most likely to be sought will be an order for delivery up of the object,40 perhaps combined with an order for damages for its detention41 or for payment of a reasonable hiring charge.42


38. Marcq, [2003] EWCA (Civ) 731, [2004] Q.B. 286 (recognizing that the mere possession of another’s chattel without that other’s consent does not amount to conversion). Query, however, whether this proposition necessarily exonerates a borrower who, in taking and holding possession without the consent of the true owners positively asserts a right of possession over the subject chattel, inimical to that of the owners; a fortiori, where the possessor takes possession under an unauthorized contract of hire. The Marcq decision is criticized on various counts by A.H. Hudson in Auctions and Conversion, 10 ART ANTIQUITY & L. 201 (2005).


40. Torts (Interference with Goods) Act, 1977, c. 32, § 3(2)(a) (Eng.) (which may be combined with an order for consequential damages).

41. Id. There are alternative forms of order. Id. §§ 3(2)(b),(c).

Some museum officials have publicly contended that, because the true contest lies between the two purported owners and the borrowing museum has only temporary dominion, the borrowing museum should be immune from a claim in conversion. That does not represent the law. A claim for conversion can be brought against any person (legal or natural) who is in possession of the chattel, and by any person who has the immediate right to possession of the chattel. Moreover, the borrowing museum’s liability to a third party claimant might endure beyond the period of its possession. In certain circumstances a borrower who has already returned the object to the lender can be sued in conversion by the third party claimant. Such liability might arise where the bailee had already before returning the chattel performed further acts of interference with it, impairing the bailor’s right of possession; or where the bailee had notice of the third party’s adverse claim to the chattel before returning it to the bailor. Such liability cannot, of course, result in an order against the defendant to return the chattel, but it might sound in damages calculated according to the value of the chattel, or the payment of a reasonable hiring charge might be required, or both.

To an extent, the borrower’s plight reflects the general principle *nemo dat quod non habet* (Nobody can give what he or she does not have). Loans of cultural objects are subject to the general law, including the paramount rights of third parties with superior rights of possession to exert those rights against unauthorized possessors, and the general powers of seizure or prohibition that the courts enjoy over unlawfully-removed material. Contractual obligations between lender and borrower (for example, an unequivocal promise by the borrower to return the object to the lender) cannot, therefore, ordinarily override general rights of ownership in third parties or the

43. Arguments to this effect were voiced, for example, at the Council of Europe symposium on Holocaust-related Art held at Vilnius, Lithuania, in October 2000.
44. In certain circumstances the bailee can interplead and withdraw from the contest.
46. For example, where the possessor has taken security over the chattel by way of pledge. See *Torts (Interference with Goods) Act* § 11(2); cf. *Marcq v. Christie, Manson & Woods Ltd.*, [2003] EWCA (Civ) 731, [2004] Q.B. 286 (Eng.).
public laws that regulate cultural heritage. It follows that no term in a loan agreement can give the borrower greater rights than the lender has, or divest a third party of pre-existing rights to the chattel. That limitation governs the bailee's contractual promise to return the loaned object to the bailor at the end of the loan, as it governs any other express obligation. Any return of a loaned object must be subject to law.

Three consequences appear to follow. First, a borrowing museum does not necessarily acquit itself of responsibility simply by returning the object to the lender in the face of a third party claim. On the contrary, the act of return may increase the borrower's liability to a third party claimant if the borrower had (or, more precisely, cannot show that it did not have) notice of the third party's adverse claim. Secondly, the borrower does not necessarily incur liability to the lender by withholding the object contrary to his or her own promise to return it to the lender. A lender's claim for damages based on such retention might, according to circumstances, be resisted on grounds of mistake, frustration of contract, or the lender's own breach of some contractual term, releasing the borrower from its own obligations. Moreover, the borrower might be entitled to retain the chattel for a reasonable time in order to determine the validity of the claim and identity of the party entitled to possession. Thirdly, the borrower might be entitled to damages from the lender, to compensate for losses sustained through the lender's lack of right to bail the object, or through the resulting disturbance of the borrower's quiet enjoyment at the hands of the third party claimant. Conversely, a borrower might be liable to the lender for failure at the time of the loan to warn that the object is entering an unsafe legal environment, or for failure to take reasonable steps to protect the


51. The location of the burden of proof on the defendant was accepted by Jack J at first instance in Marcq v. Christie, Manson & Woods Ltd., [2002] EWHC (QB) 2148, [2002] 4 All E.R. 1005 (Eng.). Nothing in the judgment of the Court of Appeal, which upheld Jack J generally, appears at variance with this proposition.

52. Id.


54. Though that defense may be rebutted by showing that the event was foreseeable at the time of the loan, so that the parties contracted with reference to it, or that its occurrence was the responsibility of the borrower. See generally Ewan McKendrick, FORCE MAJEURE AND FRUSTRATION OF CONTRACT (2d ed., 1995).


56. Supply of Goods and Services Act, 1982, c. 29, § 7(2) (Eng.). This supposes of course that the bailment is one of hire.
lender's interests in the aftermath of a claim. But without explicit definition on this point, there is an appreciable risk that the lending museum will be liable for breach of its warranty of quiet possession.

VI. DISTRIBUTION OF LOSS BETWEEN LENDER AND BORROWER

There are numerous provisions that bear upon the relative liability of lenders and borrowers for untoward events that occur during a loan. There follows a brief account of the principal measures.

A. Terms as to Title and Quiet Possession

1. Express Terms

Express terms that spell out the borrower's entitlement on matters of security of tenure can be valuable for two reasons: they not only (if properly framed) reduce the risk of quarrels between borrower and lender in the aftermath of a third party claim, but they also indicate which party must perform the advance task of checking matters of title and securing compliance. Where a cultural object is bailed pursuant to a contract, the prudent bailee will therefore stipulate for undertakings from the bailor as to his security of possession of the object. According to circumstance, the bailee may extract an undertaking from the bailor that the bailor has the right to bail the object for the period of the bailment, and that the bailee will have quiet enjoyment of the object for the period of the bailment. Undertakings to this effect correspond substantially with those implied by statute into contracts for the hire of chattels, and, of course, a bailment that qualifies as a hiring will attract those very terms. A bailee who requires additional protection might stipulate that the object is free from any charge or encumbrance not disclosed or known to the bailee at the time of the contract, or that the bailor has disclosed in full to the bailee any expression of doubt or other adverse reservation previously voiced by any person concerning the

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57. Ranson v Platt, [1911] 2 K.B. 291 (U.K.); BAILMENT, supra note 18, at 809.
58. Supply of Goods and Services Act § 7(2).
60. Supply of Goods and Services Act § 7(2); ART LOANS, supra note 4, at 101-12; BAILMENT, supra note 18, at 1214-49.
61. Cf. Sale of Goods Act, 1979, c. 54, § 12(2)(a) (Eng.); Supply of Goods and Services Act § 7(2) (a term implied by statute into sales but not directly reflected in the statutory terms implied into hirings).
bailor's title or right to bail. A bailee might alternatively impose a general stipulation that the bailor will indemnify him against all costs losses and expenses caused by third party claims.

2. Implied Terms

Where the bailment contains no enforceable express terms as to the bailee's security of tenure, the bailee's rights against the bailor in the event of a third party claim depend on the nature of the bailment. Under English law, where the bailment qualifies as one of hire, statute implies two terms in the bailee's favor. In every contract for the hire of goods there is (1) an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment, and in the case of an agreement to bail, he will have such a right at the time of the bailment, and (2) an implied warranty that the bailee will enjoy quiet possession of the goods for the period of the bailment, except so far as the possession may be disturbed by the owner, or other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made.

Terms similar to those implied by Section 7 of the Supply of Goods and Services Act 1982 might be implied at common law into a contract of bailment that is not, for some reason, characterized as a contract of hire for statutory purposes. A court might also be persuaded to recognize that these common law terms have the same status as under the statute, so that a bailee whose bailor had no right to bail the goods might be entitled to treat the breach as repudiatory and set aside the contract, recovering all sums paid. Where the bailment is a purely gratuitous bailment, on the other hand, and the borrower gives no consideration in return for having possession of the chattel, the absence of contract would appear to preclude the

64. That is, for present purposes, a contract under which one person bails or agrees to bail goods to another by way of hire, other than an excepted contract. Supply of Goods and Services Act § 6(1). For excepted contracts, see Section 3 of the Supply of Goods and Services Act. For the purposes of the Act a contract is a contract for the hire of goods whether or not services are also provided or to be provided under the contract, and (subject to the definition of an excepted contract, supra) whatever is the nature of the consideration for the bailment or agreement to bail by way of hire. § 6(3).
65. § 7(1).
66. § 7(1).
67. Bailment, supra note 18, at 1215–16.
implication of terms in favor of the bailee, including terms as to the security of possession. In that event the bailee might have a claim for negligence if the bailor's lack of title, or failure to warn the bailee of his possible lack of title, can be attributed to a breach of duty on the part of the bailor, but success on this ground appears speculative. Alternatively the bailor might be liable only for those defects in title that were known to the bailor at the time of the contract and were not communicated to the bailee. At the lowest level, the bailor might be liable only in tort for fraud.

B. Unsafe Legal Environment

Cultural objects that are bailed to museums in overseas countries may become entangled in legal proceedings other than claims based on title. For example, the legal system into which an archaeological object is loaned may have import laws, or laws protecting the rights of indigenous peoples, that render unlawful, or otherwise expose to judicial scrutiny, certain acts that constitute or are related to the loan. Modern artworks may be vulnerable to local obscenity laws or to health and safety regulation. In such an event the object might be arrested and confiscated, to the loss of both lender and borrower. Questions will then arise as to the distribution of that loss.

At first sight such incursions on the borrower's quiet possession of the object might appear actionable by the borrower against the lender. Such a result would seem plainly indicated where the bailment constitutes a contract of hire, and might conceivably follow

68. ART LOANS, supra note 4, at 23–26.
70. A liability based on knowledge, as opposed to reasonable foreseeability, would correspond with older case law on the lender's liability for injury or damage caused by the unsafe condition of the loaned chattel. See, e.g., Coughlin v. Gillison, [1899] 1 Q.B. 145 (U.K.); BAILMENT, supra note 18, at 631–65. It is unclear, however, whether this low level of liability has survived the modern development of the tort of negligence, or whether either level of liability (knowledge or negligence) is appropriate to claims that are essentially claims for economic loss suffered through a defect in the lender's title. See generally ART LOANS, supra note 4, at 101–12.
73. E.g., Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (Austl.).
via an implied common law term where the bailment is accompanied by some other type of contract. It is to be noted in this context that the statutory terms in contracts of hire are subject to no express exception that allows for any contrary intention of the parties. But in many cases the obvious defence for the lender will be that the borrower and not the lender was the expert on the in-loan legal system and that, far from being cast as a claimant in the aftermath of the litigation, the borrower should be responsible: either by virtue of some implied term that the in-loan environment was legally secure or through a duty of care on the bailee's part to discover and warn of potential grounds of legal arrest and confiscation. To that the borrower might reply by alleging contributory negligence, as indeed might the lender in reply to any direct claim by the borrower.

VII. THE BENEFITS OF ADVANCE PROVISION

A. General

International loan agreements can anticipate and deal with the perils of potential seizure under the legal process of the borrowing state in a variety of ways. A lending museum could carry out independent research into such risk, or require assurances from the borrower that all necessary research has been done. An undertaking by the borrower that there is no provision of local law that would justify seizure during the period of the loan would not only compensate the lender if seizure occurred, but offer a strong incentive for the borrower to conduct all necessary research before giving the undertaking. A more limited provision might require the borrowing museum to undertake that it is unaware of any matter including claims by third parties that might prevent, hinder or delay the return of the object to the lender.

B. State Indemnity Schemes

State indemnity has become a common feature of modern art loans. In its simplest form it comprises an undertaking by a relevant authority in the borrowing state to compensate for harmful events

occurring during the loan period. The undertaking may be given to
the lender or owner of the work of art, or to the borrower. An
undertaking to the borrower may be expressed to be for the benefit of
the lender or owner.

It is highly unusual, if not wholly unknown, for national
indemnity schemes to protect lenders against the financial
consequences of title claims. Indeed, the U.K. national indemnity
scheme expressly excludes from its protection losses arising from title
disputes, as do some overseas indemnity schemes. Commercial
insurance appears a more reliable source of protection against this
species of risk and several insurers offer it. Contracts for such
insurance might be taken out by either lenders or borrowers: at
common law a borrower has the necessary insurable interest, which
is not confined to those who own the relevant chattel.

C. Anti-seizure Laws

An alternative and perhaps ideal safeguard for the lenders of art
is the existence of an anti-seizure law in the borrowing country. A
borrower may decide to lend only to countries with an anti-seizure or
safe conduct statute, purportedly guaranteeing the work against
seizure by a court throughout the period of the loan. Such statutes
vary in form and are the subject of much contemporary debate. But
at present they exist only in a minority of states, and their invocation
may be subject to narrow restrictions or onerous conditions. There

77. U.K. Government Indemnity Scheme [GIS], c. 4.4 (1998), available at
HEME.htm.

78. BAILMENT, supra note 18, at 384–394. The U.K. Government Indemnity
Scheme covers loans to both national and non-national institutions.

79. See generally Weller, supra note 3; MUSEUMS AND THE HOLOCAUST, supra
note 10, ch. 4; ART LOANS, supra note 4, at 109–12, app. VIII.

80. Countries having general anti-seizure statutes include the USA (federally),
the states of New York, Texas and Rhode Island, the Canadian provinces of British
Columbia, Ontario, Manitoba, Quebec and Alberta, and (in Europe) France, Germany
and Belgium. The New York legislation has extensive advantages over the U.S. federal
legislation, as noted in the Egon Schiele claim. In re Museum of Modern Art, 93
1999); In re Museum of Modern Art, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998); United
States v. Portrait of Wally, 2002 US Dist. LEXIS 6445 (S.D.N.Y 2002); Martha Lufkin,
Whistling Past the Graveyard isn’t Enough: US May Seek to Confiscate Painting Lent
by Austrian Museum which Allegedly Knew it was Nazi Loot, 7 ART ANTIQUITY & L. 207
limited legislation exists in Australia and Ireland. Switzerland enacted the 1970
of Cultural Property (Cultural Property Transfer Act) (June 20, 2003), available at
www.kultur-schweiz.admin.ch/arkgt/files/kgtg2_e.pdf. Section 4 (articles 10 to 12) of
the Cultural Property Transfer Act extend a “Guarantee of restitution” in certain
is, moreover, doubt as to whether particular anti-seizure measures are vulnerable to impeachment under the European Convention on Human Rights or for incompatibility with other treaty obligations, such as those that arise from the European Directive or the UNIDROIT Convention. A further problem might be the inefficacy of particular statutes to exclude claims for damages or unjust enrichment, as opposed to litigation seeking the specific return of works of art.

Lenders sometimes extract an undertaking from the borrower that all requirements to activate the protection available under local anti-seizure laws have been met. Such terms normally require that all appropriate documentation to that effect be supplied to the lender in advance. Such duties might be reinforced by a more general undertaking from the borrower that there does not exist (or that the borrower is unaware of) any legal provision or other circumstance that might inhibit the due redelivery of the object to the lender.

D. State Immunity

In exceptional cases, a cross-border art loan might receive protection from sovereign or state immunity or from some similar doctrine. The principle on which such protection relies is that acts performed by a state in exercise of its sovereign authority attract sovereign immunity. Since the conduct of foreign relations is a

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supreme example of acts in exercise of a state’s sovereign authority, such acts cannot be the subject of adjudication by a foreign court.

It is generally agreed that, in the context of art loans, sovereign immunity is a narrow and precarious path to protection. Most museums are not government departments but separate entities with their own legal personality, whose activities do not constitute an exercise of sovereign authority. The act by which one museum bails a cultural object to another is in general an act that could be performed equally by a private person.

Even so, the doctrine may not be without value in this context. If the loan were arranged, not through a museum-to-museum arrangement, but under the umbrella of an intergovernmental agreement concluded between the “lending” state and the “receiving” state, immunity might follow. A former Deputy Legal Adviser to the Foreign and Commonwealth Office has described the process:

Under such an agreement the two governments would agree to the loan of the exhibit and the two museums concerned would be appointed by each government as their agents to implement the agreement. The transaction (i.e. the loan of the exhibit) would be transformed from a private arrangement between the two museums into an act entered into by both governments in exercise of their sovereign authority. A museum that was sued, for example for the tort of conversion by a person claiming to be the rightful owner, would then be able to argue that it was holding the exhibit, not in any private capacity, but as agent of the ‘receiving’ State under the intergovernmental agreement. Although the museum would be a “separate entity” it could be argued that it would be entitled to immunity since it would be engaged in an activity in exercise of sovereign authority, i.e. in implementation of the foreign policy of the ‘receiving’ State. It would also fulfil the second condition for the immunity of a separate entity that if the activity had been carried out by the State itself it would have attracted immunity.


83. Cf. Malewicz v. City of Amsterdam, 362 F. Supp.2d 298, 313–14 (D.C. Cir. 2005) (holding that the relevant loan did not attract immunity under the Foreign Sovereign Immunities Act). It may nevertheless occur that, where the loaned object belongs to a foreign state, the borrowing museum would have some protection against an attachment under, for example, a freezing order. That is because of the stricter rules governing enforcement against the property of a foreign state. But there can be no guarantee of this result, which would depend on the law of the state where the claim was brought.

E. Ad Hoc Responses; Handling Claims “On the Hoof”

A bailee who becomes the target of legal action concerning the borrowed object, but has made no advance provision for that event, might exert certain ad hoc remedies. In an extreme case the borrower could apply to interplead, but that may be considered inappropriate among members of the professional community. The bailee, having evaluated the competing claims, might resist the return of the object to the bailor and propose to surrender it to the third party. That solution could founder on the principle of the bailee’s estoppel, and expose the bailee to injunctive relief. The bailee could defend the third party claim on the authority of the bailor and apply to join the bailor as a party to the claim, or conversely, defend the bailor’s claim on the authority of the third party and apply to join the third party. But of course neither process will guarantee success in the claim itself because the outcome will depend on the better right to possession. It is doubtful whether any of these ad hoc remedies offers a universally secure solution or a satisfactory substitute for advance provision.

VIII. Litigating Against Possessors: Transparency and Confidentiality in Tension

Art loans are seldom conducted on conditions of public anonymity, though the undisclosed lender is commoner than one might imagine. Where a third party claims an object that has been bailed on such terms, a question might arise as to whether the claimant can compel the borrower to disclose the lender’s identity. Some indication as to the court’s preference can be found in a recent decision involving a different form of bailment, that of chattels for auction.

In Rachmaninoff v. Sotheby's, a claim was brought by descendants of the composer to recover the autographed manuscript of his Second Symphony in E Minor (Opus 27) which had been entered for sale at Sotheby’s and had an estimated value range of £300,000-£500,000. The case was shrouded in mystery. The last date on which Rachmaninoff was proved to have had possession of the manuscript was 1908, shortly before he sent it from Dresden to

85. CIV. PROC. RULES, sched.1, RSC Order 17 (U.K.).
86. Torts (Interference with Goods) Act, 1977, c. 32, § 8 (Eng.).
87. [2005] EWHC (QB) 258, at [1]-[3] (Eng.).
88. Id. at [2].
Leipzig to be engraved. The case had a pronounced international tenor: among the countries involved in the history of the work were Germany, Switzerland, Russia, Finland, and Hungary. There was no direct evidence that, aside from the delivery to the engravers at Leipzig, Rachmaninoff had voluntarily parted with the score. The claimants were content to leave open the circumstances in which the composer ceased to have possession, acknowledging that theft was only one of the possible causes. Sotheby’s did not contest the absence of positive evidence of any transmission of title from Rachmaninoff or his successors to anyone else, but they argued that the only available evidence indicated a voluntary disposal on his part. They advanced six circumstantial reasons in support of their version of events and invited the court to infer that the composer gave the score to an unnamed person some time between 1908 and 1917, when he escaped from Russia through Finland “carrying one small suitcase.” In their contention there was no affirmative evidence of enduring title and some evidence of a cessation of the original title.

It was in reliance on these and associated arguments that Sotheby’s applied to strike out the claim under CPR Rule 24.2 as having “no realistic prospect of success.” In addition to the dearth

89. The judge (Tugendhat J) cited, without apparent dissent, the remark in Sotheby’s catalogue that the score had “probably” been returned to Rachmaninoff at Dresden from the engravers at Leipzig. Id. at [1].

90. Id. at [25]

Theft of the manuscript is one possible explanation which is consistent with the claimants still retaining title to it. But, as appears from the way they have framed their claim, that is not the only, or even the primary, basis for it. It is possible that the manuscript was left in Russia or Germany and came into the possession of Sotheby’s principal through a person who had originally received it for safekeeping and who intended that it should be returned to the composer one day. There is evidence from the composer’s sister in law, in the form of a letter, that the manuscript of the First Symphony was left in his desk in Russia and entrusted to a housekeeper.

91. These reasons were:

(i) there are a few instances relating to other manuscripts which the composer can be shown to have given away (six examples are given, out of a total of very many manuscripts); (ii) he left a large number of other manuscripts behind in Russia, which include a printed proof copy of the Second Symphony; (iii) the manuscript does not appear to have been in the suitcase with which he left Russia; (iv) a number of his autograph manuscripts, especially relating to works written prior to his departure from Russia are unaccounted for; (v) in a collection of over 1000 letters of his in the US Library of Congress there is no reference to the manuscript let alone any suggestion that it was stolen; (vi) there is no record of his having complained that the manuscript was stolen or lost by him.

92. Id. at [4], [22].
of evidence, they pointed to the likelihood that the applicable limitation period had expired, and to the potentially destructive effects, both on auction sales and on traders who were trying to sell at auction, of allowing third party title claims to proceed without a direct and positive factual basis.

The expiry of the limitation period was, in the judgment of Mr. Justice Tugendhat, a matter inappropriate for summary determination. He held that no secure view could be taken on the time bar until all the facts were out, because “[t]ime bar points can only sensibly be considered by a court that is confident that it has to hand all the relevant factual information as to where and when this manuscript might have been.”

As to those “wider considerations” which justice required him to examine, Tugendhat agreed that the matters cited by Sotheby’s should cause the court to approach cautiously any claim for an injunction that would stop or seriously delay the sale of an important cultural object. He accepted that the objections voiced by Sotheby’s stemmed not only from a concern to protect the financial interests of the auction house itself, but from a desire to shield vendors from harassment by unworthy claims, as well as from the unavoidable but unmeritorious withdrawal of individual contested objects from sales and even (where the contested object is important) the cancellation of an entire sale. But Tugendhat nevertheless dismissed Sotheby’s application to strike out, holding that the justice of the claim required that the claim be allowed to proceed. As to the plea by Sotheby’s that third-party title claims could be fatally destructive to sales and vendors, and that Sotheby’s were justified in withholding the names of vendors, Tugendhat said:

Another consideration goes the other way. There is a dark side to the confidentiality surrounding the identity of an auctioneer’s principal. The public and the law have increasingly come to recognise the potential for abuse by criminals of works of art, and of those who deal in them (consciously or unconsciously), for money laundering, and for disposing of the proceeds of crime. The less the legal risks involved in committing a work for auction, the more attractive the market in works of art and manuscripts becomes for criminals. The policy of the law, both in this jurisdiction and elsewhere, is to look more sceptically than would have been proper in the past upon those who have very valuable property for which they have no provenance.


It is, we submit, highly significant that the judge in Rachmaninoff placed transparency above confidentiality in his evaluation of the relative rights of the parties, and supported this order of priority by reference to general modern legislation dealing with money laundering and the proceeds of crime. Both of these factors suggest that any perception of the fine art trade as one attracting special privileges or immunities is, at best, becoming outmoded.

A. The Alternative “Faineant” Policy

The impetus towards active inquiry and positive candor on matters of provenance that appears to emerge from Rachmaninoff should, however, be kept in perspective. On one view, the policy of Tugendhat’s judgment offers an uneasy contrast with the decision of the Court of Appeal in Marcq v. Christie Manson & Woods Ltd. There a leading fine art auction house successfully defended a claim brought against it by the alleged owner of a stolen painting, which a third party had consigned to the auction house for sale. The auction house had unsuccessfully offered the painting for sale at auction in July 1997 and had some months later returned it to the consignor in the Netherlands. The auction house redelivered the work to the consignor despite the fact that it had been recorded throughout by the Art Loss Register as stolen from the claimant, and had been sold by the auction house under a different name several times over the past century. The alleged owner claimed, inter alia, that the auction house owed him a duty of care to check whether the work of art belonged to the consignor before returning it to the consignor unsold.

Interestingly, the auction house defended the claim, not on the ground that it had conscientiously discharged any duty of care that it owed to the dispossessed owner, but on the ground that it owed no duty as alleged. More particularly, it denied that it bore any legal responsibility under the law of bailment or kindred principles to exercise reasonable care to check for and identify stolen art that came into its possession, or to ensure that it released stolen art only to the person entitled to possession. On the analysis proposed by the auction house, its alleged immunity from duty would not be lost because the work was recorded as stolen on the Art Loss Register, and would be unaffected by any failure on the part of the auction

95. See, principally, Proceeds of Crime Act, 2002, c. 29 (Eng.).
97. Or other possessory relation, such as that of finder or “unconscious bailee.” AVX Ltd. v. EGM Solders Ltd., THE TIMES, July 7, 1982 (Q.B. 1982); see also Parker v. British Airways Bd., [1982] Q.B. 1004 (Eng.).
house to consult the Art Loss Register. The state of the Art Loss Register was irrelevant if the auction house owed no duty to consult it. The claimant, on the other hand, pointed both to recent legislation\(^9\) and to modern ethical guidance\(^9\) indicating that the observance of such a duty of care would occasion no hardship to an auction house and should, in any event, be seen as consistent with contemporary practice. The claimant also relied on modern authority governing the obligations of an "unconscious" bailee.\(^10\)

The Court of Appeal refused to discover the relevant duty. In a short passage, Lord Justice Tuckey expressed the matter thus:

Auctioneers such as Christies must of course take care to avoid dealing with works of doubtful title since they will be strictly liable if they sell on behalf of anyone other than the true owner, but that is not a policy reason for making them liable when they do not sell and simply return the goods to their client in good faith and without notice of the true owner's interest.\(^10\)

It is important to observe the limits of this decision. While upholding the immunity of the defendant on the particular facts, it affords incomplete comfort to auction houses in general, for at least two reasons. First, Tuckey conceded that a bailment between the auction house and the party entitled to possession might arise where the auction house has some means of knowing that the object is the property of the claimant.\(^10\) Some observers might question why the long-standing presence of an object on the Art Loss Register would not afford such means of knowing.\(^10\) Secondly, Tuckey thought that a claim under the general law of negligence (as opposed to the special


\[\text{[n]members undertake not to purchase, sell or offer any item of property that they know has been stolen, illegally exported, or illegally excavated. Member [sic] will not purchase or sell such property unless the irregularity has been corrected. . . . Members have agreed to take appropriate steps if they know, suspect or have reason to believe that they are in possession of stolen property. Such steps may include conducting further inquiries by checking with a registry of stolen art, or reporting the concern to appropriate legal advisers or law enforcement authorities.}\]

\textit{Id.}

\(^{100}\) \textit{AVX Ltd. v. EGM Solders Ltd.}, \textit{The Times}, July 7, 1982 (Q.B. 1982) (U.K.).

\(^{101}\) \textit{Marcq}, [2003] \textit{EWCA (Civ) 731}, at [54], [2004] Q.B. at 308 (asserting that there is no reason for imposing a general duty of care to identify stolen art that comes into the auction house's possession and return it to the party entitled to possession).

\(^{102}\) \textit{Id.}

\(^{103}\) \textit{See} Hudson, \textit{supra} note 38.
principles of bailment or other possessory relationship) might succeed where the auction house had reason to be put on inquiry. In this context, Tuckey appeared to contemplate the existence of a duty irrespective of whether the auction house was subjectively aware of the existence and identity of the ulterior owner.

\[\text{If of course there are circumstances which should put the agent on inquiry then a positive case of negligence on conventional grounds can be alleged.}\]

\textit{Rachmaninoff} and \textit{Marcq} are widely different, not least in that \textit{Rachmaninoff} was concerned mainly with procedural issues, while \textit{Marcq} was a decision on substantive common law.\textsuperscript{105} Even so, it is not hard to detect a contrast in attitudes between them. Those who are concerned with the integrity of the market, the authentic proprietary lineage of cultural objects consigned to auction and the legitimate interests of the victims of art theft may prefer the austere discipline of \textit{Rachmaninoff} to the \textit{laissez-faire} tenor of \textit{Marcq}.

\section*{IX. Advance Protection: Emphasizing the Obvious}

In one sense, cases like \textit{Rachmaninoff} serve only to emphasize the obvious. In the absence of proper safeguards under the general law, all parties to bailments of cultural material should make careful advance provision for the prospect of a third party claim or other legal entanglement in the loan destination. Without such provision, the borrower museum could face difficult decisions and incur the risk of awarding possession to a party not entitled. Borrowers can protect themselves by being selective about their lenders, by checking art loss databases, by asking questions of lenders and by conducting independent research.

\section*{X. Contract as an Aid to Meeting Ethical Commitments}

\subsection*{A. Borrowing museums}

The making of advance provision within the loan agreement for potential claims or controversies regarding title could play a substantial part in enabling a borrowing museum to comply with its

\textsuperscript{104} \textit{Marcq}, [2003] EWCA (Civ) 731, at [54], [2004] Q.B. at 308.

\textsuperscript{105} The claimant in \textit{Marcq} also unsuccessfully alleged a strict liability in the tort of conversion, both at common law and under the \textit{Torts (Interference with Goods) Act, 1977}, c. 32, § 11(2) (Eng.). For criticism of the reasoning of the Court of Appeal on this aspect of the claim, see Hudson, \textit{supra} note 38.
ethical commitments, as well as mitigating the effect of legal action. Many of the ethical obligations undertaken by museums are centered on the verification of title. For example, Clause 5.7 of the Museums Association Code of Ethics for Museums (2002) requires all those who work for or govern museums to ensure that they:

> Exercise due diligence when considering an acquisition or loan. Verify the ownership of any item being considered for acquisition or inward loan and that the current holder is legitimately able to transfer title or lend. Apply the same strict criteria to gifts, bequests and loans as to purchases.106

Supporting provisions, and measures to similar effect, are to be found in clauses 5.8 to 5.16 of the 2002 Code, which would repay a more detailed consideration than the present circumstances allow:

5.8 Reject any item if there is any suspicion that it was wrongfully taken during a time of conflict, unless allowed by treaties or other agreements.

5.9 Reject any item if there is a suspicion that it has been stolen unless, in exceptional circumstances, this is to bring it into the public domain, in consultation with the rightful owner.

5.10 Reject items that have been illicitly traded. Note that the UNESCO Convention (on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property) was finalised in 1970. Reject, therefore, any item if there is any suspicion that, since 1970, it may have been stolen, illegally excavated or removed from a monument, site or wreck contrary to local law or otherwise acquired in or exported from its country of origin (including the U.K.), or any intermediate country, in violation of that country's laws or any national and international treaties, unless the museum is able to obtain permission from authorities with the requisite jurisdiction in the country of origin.

5.11 Reject any item that lacks secure ownership history, unless there is reliable documentation to show that it was exported from its country of origin before 1970, or the museum is acting as an externally approved repository of last resort, or in the best judgement of experts in the field concerned the item is of minor importance and has not been illicitly traded.

5.12 Contact colleagues and appropriate authorities both in the U.K. and overseas for any information or advice that may be necessary to inform judgement regarding the legitimacy of items considered for acquisition or inward loan.

5.13 Comply not only with treaties which have been ratified by the U.K. Government, but also uphold the principles of other international treaties intended to curtail the illicit trade, if legally free to do so.

5.14 Report any suspicion of criminal activity to the police. Report any other suspicions of illicit trade to other museums collecting in the same area and to organisations that aim to curtail the illicit trade.

5.15 Avoid appearing to promote or tolerate the sale of any material without adequate ownership history through inappropriate or compromising associations with vendors, dealers or auction houses. Refuse to lend items to any exhibition that is likely to include illicitly traded items.

5.16 Decline to offer expertise on, or otherwise assist the current possessor of any item that may have been illicitly obtained, unless it is to assist law enforcement or to support other organisations in countering illicit activities.107

In addition, clause 5.23 requires museums to:

Have in place procedures approved by the governing body for loans from and to the museum, including historic loans.108

The Museums Association Code corresponds substantially with other codes, such as the revised Code of the International Council of Museums (2001).109 It is complemented by numerous statements of ethics and policy promulgated by individual professions110 and institutions. An example of the latter is the Policy Statement regarding the Illicit Trade in Antiquities published by the Institute of Archaeology at University College London in 1998. The Policy Statement requires compliance with the 1970 UNESCO Convention and the UNIDROIT Convention, and prohibits the Institute from acquiring cultural objects by purchase, loan, gift or exchange, unless it is satisfied that valid title to the object can be acquired, and that in

107. Id. cls. 5.8-5.16.
108. Id. cl. 5.23.
109. ICOM CODE OF ETHICS FOR MUSEUMS, 1986 (amend. 2001), available at http://icom.museum/code2004_eng.pdf. Article 3.1 of the ICOM Code requires every museum authority to adopt and publish a written statement of its collections policy. The policy should include instructions on acquisitions, with conditions or limitations. Article 3.2 prohibits a museum from acquiring any object or specimen, whether by purchase, gift, loan, bequest or exchange, unless the governing body and responsible officer are satisfied that a valid title to it can be obtained. Every effort must be made to ensure that the object has not been illegally acquired in, or exported from, its country of origin, or from any intermediate country in which it may have been owned legally (including the museum's own country). Due diligence should be exercised, before a decision is made to acquire any object, to establish its full history from discovery or production. This obligation appears to override all academic considerations founded on the importance of the research to be conducted or the value of any information collected.
particular it has not been acquired in, or exported from, its country of origin (or intermediate country in which it may have been legally owned) since 1970, in violation of that country's laws. This obligation also applies to objects that may be temporarily borrowed for exhibition in-house. The Policy Statement also provides that work must not be undertaken (except on behalf of the police, courts or government of origin) on objects where there is insufficient information to establish a licit provenance or where the material is known to be illicit. Before agreeing to study, analyze or conserve material, staff must exercise due diligence in establishing that the material has not been illegally excavated, acquired, transferred and/or exported form its country of origin since 1970.

B. Lending Museums

Advance provision might also enable lending museums to meet their ethical obligations. Clause 10.2 of the Museums Association Code of Ethics 2002 requires museums to “keep up to date with developments in the law, museum practice, social policy and public expectations.” The duty to keep abreast of legal developments might reasonably be thought to extend beyond a sufficient acquaintance with the law of the United Kingdom to a working knowledge of the law of any overseas country into which the object is to be loaned. That would be a prudent interpretation where a museum contemplates a cross-border loan, because a museum cannot make secure loans from its collection without knowing the legal as well as the physical environment to which it is exposing them.

The advance appraisal of overseas law would appear all the more important where a museum's governing statute expressly requires it to pay regard to relevant risk when exercising the power to loan. An example is Section 4 of the British Museum Act 1963, which refers to “any risks” to which the object “is likely to be exposed.” It is submitted that, properly construed, this expression includes legal or forensic risk as well as physical risk. The statutory obligation might, in proper circumstances, be discharged by exacting appropriate assurances from the lender.
A further ethical obligation that might be satisfied through the application of legal safeguards is that stated in Paragraph 5.15 of the Museums Association 2002 Code, that a museum should refuse to lend to any exhibition that is likely to include illicitly traded items. A museum might find it hard to show that it satisfied the spirit of this requirement without positively assuring itself that loans from other sources were checked for provenance. A standard term in a museum out-loan agreement might usefully require the borrowing museum to undertake that it has no reason to believe that other objects in the exhibition were stolen or illegally imported or exported.

The main lesson (again) is that museums should think through the potential hurdles and pitfalls in advance: research the legal environment, measure the local risk, allocate the responsibility for legal and physical security, define the response to an adverse event, involve any relevant local communities before the material leaves the lender, activate other safe conduct procedures, and put proper dispute resolution procedures in place.

XI. ETHICAL OBLIGATIONS OUTSIDE LAW

A. Cultural Objects Displaced During the Period 1933–1945

In certain circumstances, claims by the dispossessed owners of cultural objects may be legally defunct through expiry of the limitation period or other factors, but highly compelling in moral terms. The events of 1933 to 1945 probably afford the most vivid illustration of such claims. While some claims from that era are for the return of objects by museums that have purported to acquire by purchase or gift (and so purport to have ownership) others are against museums which are mere borrowers (and so purport to have only a right to possess). While some claims are resolved by claims

114. MUSEUMS ASS'N CODE OF ETHICS, supra note 106, cl. 5.15.
116. Art loans can of course also be disrupted, and borrowers placed in difficult quandaries, by claims based on episodes other than those of 1933 through 1945. Typical claimants can range from victims of the Soviet art dispossessions in or after 1917 to the creditors or former partner(s) of an artist seeking to seize his work for non-payment of debts. They might include a country from whose territory antiquities have been looted, and the private victim of an earlier theft, who has only just discovered that the work is in the borrower's possession.
117. For examples of claims made against museums and universities, see MUSEUMS AND THE HOLOCAUST, supra note 10, at 14–21; Stephen Clark et al., Chronological Check List of Significant Developments, Publications and Cases Regarding Holocaust Period Art in the United States, in CLAIMS FOR THE RESTITUTION OF Looted Art, supra note 4, at 241; Herrick, Feinstein LLP, Resolved Stolen Art
advisory panels, private mediation or simple compromise between the parties, some are settled only after legal proceedings have been threatened or commenced.\textsuperscript{118}

\section*{B. A Collective Response}

The exceptional circumstances of such claims have produced a particular response from government and the museum community. That response has concentrated on devising solutions that are more resourceful and merciful to claimants than those that could be reached through the application of strict law. There are now in existence two sets of guiding principles, which require museums to seek out possible objects from the 1933-1945 era, publish their findings, and take a proactive and responsive attitude to claims. These sets of obligations apply in an attenuated manner to borrowings as well as to outright acquisitions.

The National Museum Directors' Conference\textsuperscript{119} (NMDC) and the Museums and Galleries Commission\textsuperscript{120} (MGC) have both drafted

\textit{Claims: Claims for Art Stolen during the Nazi Era and World War II, Including Nazi-looted Art and Trophy Art, in CLAIMS FOR THE RESTITUTION OF LOOTED ART, supra note 4, at 255.}

\begin{itemize}
  \item \textsuperscript{118} In 2000, the U.K. government established the Spoliation Advisory Panel which has the power to advise the individual parties to disputes involving works held in public collections. The panel can recommend (a) the return of the object, (b) the payment of compensation, (c) the payment of an \textit{ex gratia}, or (d) the display of an account of the history of the object along with negotiations. \textsc{Spoliation Advisory Panel, Constitution and Terms of Reference \textsection 8, available at http://www.culture.gov.uk/cultural_property/spoliation_ad_panel.htm?properties=archive%5F1998%2C%5F2C (last visited Oct. 2, 2005). Further, the Panel has a more general power to advise the Secretary of State in relation to general matters which have been raised by a particular claim. To date the Panel has made recommendations in three cases. See \textsc{Dep't for Culture, Media \& Sport, Report of the Spoliation Advisory Panel in Respect of a Painting Now in the Possession of the Tate Gallery, 2000–1, H.C. 111 (concerning the painting "A View of Hampton Court Palace" by Jan Griffier the Elder [c. 1645–1718] ["the Griffier case"]; \textsc{Report on Glasgow City Council Painting, supra note 11 (concerning "the Burrell claim"); \textsc{Dep't for Culture, Media \& Sport, Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library, 2004–5, H.C. 406 (concerning "the Benevento claim").}

  \item \textsuperscript{119} The National Museum Directors' Conference is a U.K.-wide voluntary association of certain national cultural institutions which receive central government funding. \textsc{Nat'l Museum Directors' Conference [NMDC], Spoliation of Works of Art During the Holocaust and World War II Period: First Progress Report on Provenance Research for the Period 1933–1945, Statement of Principles and Proposed Actions, \textsection 1.2 (1998), available at http://nationalmuseums.org.U.K./spoliation_statement.html [hereinafter NMDC Statement of Principles]. This association includes 20 museums, the three national libraries as well as the Royal Botanic Gardens at Kew and Edinburgh and the Public Record Office. \textit{Id.}

  \item \textsuperscript{120} The Museums and Galleries Commission was the principal advisory body on museums for the Government and for the museums themselves. In 2000, a new body
statements of principles relating to the procedures which should be performed by museums to ensure that they are not in, or do not come into possession of works of art spoliated during the period 1933–1945.121

1. Non-national Museums

In accordance with standard good practice, non-national museums seeking to borrow objects should exercise due diligence in satisfying themselves that the lender has good title to the object.122 They should take reasonable steps to satisfy themselves that the object has not been wrongfully taken,123 stolen, or illegally exported.124 Where a museum is seeking to borrow an object and believes that the object is the subject of a claim, or is likely to become


121. NMDC STATEMENT OF PRINCIPLES, supra note 119; MUSEUMS & GALLERIES COMM’N [MGC], MUSEUMS AND GALLERIES STATEMENT OF PRINCIPLES ON SPOLIATION OF WORKS OF ART DURING THE NAZI, HOLOCAUST AND WORLD WAR II PERIOD, Statement of Principles (April 1999), available at http://www.lootedart.com/InformationByCountry/United%2OKingdom/Museums,%20Libraries%20and%20Archives/Museums/Galleries/CommissionMGC.asp [hereinafter MGC STATEMENT OF PRINCIPLES]. The NMDC Statement of Principles applies to the 25 national cultural institutions referred to above. NMDC STATEMENT OF PRINCIPLES, supra note 119, ¶ 1.2. The MGC Statement of Principles applies to the MGC itself, as well as to the non-national museum sector. MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 1.2. Neither statement is intended to have legal effect by creating or altering any existing legal right or obligation. Instead the documents are intended as outlining the broad principles and proposed actions agreed by the two organizations. NMDC STATEMENT OF PRINCIPLES, supra note 119, ¶ 1.4; MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 1.4.

122. MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 4.1.

123. For the purpose of these principles, the term "wrongful taking" is taken to mean any act of theft or other deprivation, the legality of which is open to reasonable challenge, and which was committed during the Nazi, Holocaust, and World War II periods. Id. ¶ 1.6.

124. See id. ¶ 4.1. This accords with guidance from the Museums Association and the MGC Registration requirements. Since the MGC Statement of Principles was published, the Museums Association has adopted a new Code of Ethics for Museums. MUSEUMS ASS’N CODE OF ETHICS, supra note 106. The MGC Statement of Principles provides that where the museum is acquiring an object either by way of gift, bequest or purchase the museum should seek from the vendor, donor, or executor "the fullest possible information with regard to provenance, including the years 1933–45." MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 4.1. There is no corresponding requirement of such assurance from the lender of an object. Guidance provided for staff at the institution should include advice relating to information which should be sought from lenders, suggested sources of information and approaches to checking provenance as well as advice relating to the use of warranties. Id. ¶ 4.5.
the subject of a claim, then it should not proceed with the loan. If a museum comes into possession of new information which indicates that an object within its collection was, or is likely to have been, wrongfully taken during the relevant periods and has not been restituted, then such information should be (i) made public and (ii) recorded with the MGC and the Department for Culture, Media and Sport (DCMS) (iii) issued as a press release through the institution’s usual media contacts, as well as to the principal additional media within the U.K. serving any ethnic or national group likely to have a particular interest in the matter.

2. National Museums

The due diligence provisions, together with those that concern the reasonable steps to be taken by the institution to satisfy itself as to provenance, and the information required by vendors, donors or executors in relation to acquisitions, do not appear to apply to loans of objects to national institutions. Where an institution is seeking to borrow an object and believes that object is the subject of a claim, or is likely to become the subject of a claim, it should not proceed with the loan.

125. MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 4.8.
126. Id. ¶ 5.1. This assumes of course that the loan is classified as part of the collection of the museum. This will depend on the definition of the museum’s collection which may well only include property which is vested in the appropriate museum body, rather than merely what is in the possession of the museum. Where there is no express definition of the term “collection”, the length of the loan period may affect the interpretation of the term.
127. Id. ¶ 5.2. Known facts relating to the provenance of the object should also be displayed on object labels and any new publications relating to the object. Id. ¶ 5.3.
128. The NMDC Statement of Principles makes no mention of loans of objects. Compare NMDC STATEMENT OF PRINCIPLES, supra note 119, ¶ 4.1 with MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 4.1. Guidance provided by the museum for its staff, however, should include advice relating to information which should be sought from lenders, suggested sources of information and approaches to checking provenance, as well as advice relating to the use of warranties. NMDC STATEMENT OF PRINCIPLES, supra note 119, ¶ 4.5.
129. NMDC STATEMENT OF PRINCIPLES, supra note 119, ¶ 4.8. “Claim” in the context of the NMDC Statement of Principles appears to refer to claims for title of works of art where there has been or there is an alleged “wrongful taking,” which is taken to mean any act of theft or other deprivation, the legality of which is open to reasonable challenge, and which was committed during the Nazi, Holocaust, and World War II periods. Id. ¶ 1.6.
XII. THE GOVERNMENT INDEMNITY SCHEME—NATIONAL AND NON-NATIONAL MUSEUMS

National indemnity schemes are a form of public insurance devised as a non-commercial support to international art lending. There is an ethical as well as a commercial dimension to such schemes. The policy of the U.K. scheme requires that the benefit of the indemnity scheme be extended only to objects with an accredited provenance. All non-national borrowing institutions that apply for indemnity under the Government Indemnity Scheme (GIS) are required to confirm to the best of their knowledge (i) that the owners of items offered on loan have legal title to them, and (ii) that such items have not been wrongfully taken, stolen or illegally exported. Both national and non-national museums borrowing objects under the GIS are required to ensure that the event is recorded on the terms of the scheme and that it does not cover any third party claims; further, this limitation should be brought to the lender's attention.

XIV. VOLUNTARY DISPOSAL OF OWNED OBJECTS

In certain circumstances the lender of a stolen cultural object might wish to relinquish it to a claimant even though the lender has, at some time after acquiring the object, gained title to it: for example, through the expiry of the applicable limitation period. If the lender museum is a charity, and its governing instrument appears to prohibit it from divesting itself of objects in its collections, it might consider an application for permission to vacate the legal title under Section 27 Charities Act 1993. But this provision cannot be invoked by a national museum which owns the claimed object and whose governing statute prohibits the museum from disposing of objects from its collection. Here as elsewhere, it is better to provide for these risks in advance.

130. See id. (discussing the meaning of "wrongful taking").
131. MGC STATEMENT OF PRINCIPLES, supra note 121, ¶ 2.6.
132. Id. ¶ 4.7; NMDC STATEMENT OF PRINCIPLES, supra note 119, ¶ 4.7.
133. Charities Act, 1993, c. 10, § 27 (Eng.). A decision not to apply under Section 27 of the Charities Act, might be vulnerable to judicial review.
134. A-G v. Trs. of the British Museum, [2005] EWHC (Ch) 1089 (Eng.).
XV. Overseas Laws Regulating the Import of Cultural Objects, and Other Laws That Threaten Seizure

If a cultural object is seized or frozen by judicial action while on loan to an overseas institution, and the loan agreement makes no provision for that event, the distribution of responsibility between lender and borrower can be problematic and costly to resolve. We have seen that the borrower would not necessarily incur liability by failing to return the object in accordance with the agreement, if disabled by legislation, court order, or administrative act from doing so.\textsuperscript{135} A claim for damages by the lender, relying on such failure, could be defended on the ground of frustration of contract,\textsuperscript{136} or could be met by a counterclaim that the lending museum is in breach of a warranty of quiet possession.\textsuperscript{137} Where the borrower museum is faced with two conflicting claims to the object, it might apply for an interpleader order,\textsuperscript{138} though that may be unpopular with the lender or among the professional community.\textsuperscript{139} In particular circumstances the borrower could be liable for breach of its general duty of care as a bailee: for example, through failure at the time of the loan to warn that the object is entering an unsafe legal environment, or through failure to take reasonable steps to protect the lender's interests in the aftermath of a claim. It is far preferable to provide for these risks in advance.

XVI. The Bark Etchings Controversy

The perils of overseas lending without detailed foresight as to the forensic risks are graphically illustrated by a recent episode involving the British Museum. While the case involved exceptional facts it raised issues of general importance. In March 2004, the British Museum and the Royal Botanical Gardens at Kew loaned certain aboriginal bark etchings to Museum Victoria at Melbourne. The lenders complied with all the formalities for importation into and exportation from Australia, as required by the Protection of the Movable Cultural Heritage Act 1986, a federal Australian statute.

\textsuperscript{135} See supra notes 53–55 and accompanying text.
\textsuperscript{136} Though that defense may be rebutted by showing that the event was foreseeable at the time of the loan, or that its occurrence was the responsibility of the borrower. As to the latter, see Lauritzen v. Wijsmuller, [1990] 1 Lloyd's Rep. 1 (Eng.).
\textsuperscript{137} Supply of Goods and Services Act, 1982, c. 29, pt. I, § 7(2) (Eng.).
\textsuperscript{138} CIV. PRO. RULES, sched.1, RSC Order 17 (U.K.).
\textsuperscript{139} Supra text accompanying note 85.
When the etchings arrived at Melbourne, a legal challenge to the Museum's possession under the Aboriginal and Torres Strait Islander Protection Act 1984 (also a federal statute) and an inspector made emergency declarations under Section 21C of that Act. The declarations were later renewed.

The challenge had been mounted at the instance of the local aboriginal community, who sought both an order for the permanent preservation of the etchings under Section 21E of the 1984 Act and an order for compulsory acquisition under Section 21L. The result was to impede the re-exportation of the etchings to England at the end of the loan period (June 27, 2004). The lenders and the borrower agreed while the proceedings were in train to extend the period of the loan agreements to June 2005, though the objects had ceased by then to be publicly exhibited in Victoria.

In the event, the Museums Board of Victoria successfully sought review of each decision to make an emergency declaration and the

140. Aboriginal and Torres Strait Islander Heritage Protection Act, 1984, § 21C (Austl.); Museums Bd. of Victoria v. Carter, No. BC200503257, 2005 FCA 645, at ¶¶ 8–9 (Federal Court of Austl. May 20, 2005) (LEXIS, Australian Unreported Judgments, Combined). The relevant decisions were those making successive emergency declarations under Section 21C of the Act with respect to two bark etchings dated from around 1854 and originating from Dja Dja Wurrung Country in the area around Boort, another bark etching dated from about the 1870s originating from Jupagalk Country in the Lake Tyrell area, and a ceremonial emu figure made from river redgum and decorated with red and white ochres (“the ceremonial piece”). See Museums Bd. of Victoria (LEXIS, Australian Unreported Judgments, Combined) (summarizing the series of emergency declarations regarding these pieces). In the words of Ryan J, upholding the emergency declarations:

It is common ground that the bark etchings were created by members of the Dja Dja Wurrung People and are the only known Aboriginal bark etchings of their kind that have survived to the present day. One of the bark etchings from the Boort area depicting a corroboree scene was made available on loan to the Museum by the Royal Botanic Gardens in Kew in the United Kingdom. The other bark etching from the Boort area depicting a hunting scene was made available together with the ceremonial piece on loan to the Museum by the British Museum. The third bark etching from the Lake Tyrrell area came from the Museum’s own collection. All four artefacts were incorporated by the Museum in an exhibition entitled “Etched On Bark—1854 Kulin Barks from Northern Victoria” which opened on 18 March 2004 and closed on 27 June 2004.

Museums Bd. of Victoria, at ¶ 8 (LEXIS, Australian Unreported Judgments, Combined).

141. See Museums Bd. of Victoria, at ¶¶ 2–7 (LEXIS, Australian Unreported Judgments, Combined) (summarizing and quoting the series of emergency declarations).

objects were returned to the lenders, though almost a year after the agreed date. The tale is nevertheless a cautionary one and certain elements can be identified as worthy of mention. Not least of these is the fact that the lenders appear to have done everything "by the book." There was no suggestion that the original removal of the etchings from Australia was unlawful, and the lending institutions took all necessary measures to obtain the necessary import and export consents under the Protection of Movable Cultural Heritage Act 1986. No doubt they proceeded on the supposition that such compliance guaranteed the immunity of the etchings from governmental interferences and their return when the period of loan ended. And yet neither of these facts shielded the etchings from corrosive legal entanglement. A significant element in that regard was the plainly unexpected effect of the 1984 legislation under which the retention in Victoria was justified. Under that statute, official powers of preservation and acquisition are conferred whenever a significant aboriginal object is injured or desecrated, and an object can be injured or desecrated for this purpose if it is used or treated in a manner inconsistent with Aboriginal tradition.143

The Melbourne claim is far cry from the conventional claims that are brought by states to recover looted antiquities, and yet the issues that it raises are if anything more complex and perturbing.144 It seems likely to have brought closer the time when U.K. authorities formally reconsider the advisability of anti-seizure legislation, perhaps on a reciprocal basis. The episode may also make it worth revisiting certain parts of the Museums Association Code of Ethics 2000. We have observed that clause 10.3 of the Code requires museums to “keep up to date with developments in the law, museum practice, social policy and public expectations” and it seems a reasonable interpretation of that commitment to expect knowledge of relevant foreign legal systems.145 The case for an advisory system that enables museums to avoid the embarrassment of episodes like that of the etchings would appear increasingly persuasive.

143. Aboriginal and Torres Strait Islander Heritage Protection Act § 3(2)(a)(i).
144. For further reflections on the bark etchings case, see infra Appendix.
145. It might be questioned whether the general obligation to keep abreast of law has always been observed, for example, regarding human remains and the Human Rights Act, 1998 (Eng.).
XVII. INTERNATIONAL CONVENTIONS AND OTHER INSTRUMENTS

A. General

The United Kingdom is party to two principal international instruments that govern the treatment of unlawfully removed cultural objects. These are Council Directive 1993/7/EEC of March 15, 1993 as amended (the 1993 Directive), on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State; and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention). While neither of these instruments refers specifically to loans or other bailments, both instruments have a wide potential impact on the parties to such transactions through their general measures governing the restitution of unlawfully removed cultural objects.

B. The 1993 Directive

The 1993 Directive, and the 1994 Regulations that implement it in the United Kingdom, oblige a member state to which a request is made by another member state for the return of an unlawfully


removed cultural object\textsuperscript{149} to comply with the request, provided that the object satisfies the prescribed criteria\textsuperscript{150} and the requesting state follows the prescribed procedures.\textsuperscript{151} Regulation 6(1) grants to every member state a right of action to recover defined cultural objects which have been unlawfully removed from its territory, provided that the removal has not become unlawful from the national territory of the member state at the time the proceedings are initiated.\textsuperscript{152} The obligation to return is confined to objects unlawfully removed from the territory of a member state on or after January 1, 1993.\textsuperscript{153}

The obligation to return a cultural object arises only when a request for return is made by one member state (the requesting state) to another.\textsuperscript{154} The Directive and Regulations give no direct rights of recovery to individuals, or indeed to institutions such as museums, within member states.\textsuperscript{155} Their main relevance to museum loans lies in the fact that the right of action conferred by Regulation 6(1) is a right against the possessor or the holder of the object. A museum that currently holds an object on loan within one member state is therefore (subject to conditions) vulnerable to requests from another member state for the return of the object, and can be divested of the object in favor of the requesting state before the period of the loan has expired. Conversely, a museum that loans to a member state an object that has been unlawfully removed from another member state is vulnerable to a request by the latter member state, which could result in the return of the object to the requesting state and its effective loss to the lending museum. This result would apply regardless of whether the lending museum itself is situated in a member state.

If the requesting state is successful, but the possessor exercised due care and attention in acquiring the object, the requesting state

\begin{itemize}
  \item \textsuperscript{149} See 1993 Directive, \textit{supra} note 80, art. I & annex (defining "cultural object").
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} Return of Cultural Property Regulations, regs. 3(1)(a)-(b), 3(2), 6(4)(a)-(b) (U.K.).
  \item \textsuperscript{152} \textit{Id.} reg. 6(1).
  \item \textsuperscript{153} \textit{Id.} reg. 1(3), art. 13; 1993 Directive, \textit{supra} note 80, art. 13.
  \item \textsuperscript{154} \textit{See} Return of Cultural Property Regulations, regs. 3-4; 1993 Directive, \textit{supra} note 80, arts. 4-5. As to the obligations of the requested State, \textit{see} Return of Cultural Property Regulations, reg. 3(1)-(5).
\end{itemize}
may be obliged to compensate the possessor. While this may afford some comfort to borrowing museums that are dispossessed of objects on loan, such compensation may be difficult to assess, and may be small in scale, where the possessor did not purport to acquire the object by purchase or some other outright disposition, but merely to borrow it for a limited period or purpose. Assessment might depend, for example, on the length of the loan period, the potential power of an exhibited object to generate revenue and the proportion of general exhibition revenue attributable to that object, and whether the borrower had an enforceable right of possession for that period or was in essence a mere bailee at will. A borrowing museum in this position might be better served by enforcing against its lender those title guarantees or other rights of indemnity that are contained in the loan agreement itself, assuming that it had the foresight to incorporate them when negotiating the loan. The lender and putative owner of an object successfully claimed under the Regulations might also, if he could show that he exercised due care and attention when acquiring it, qualify for compensation. The lender would need, of course, to convince the court that he was a “possessor” within the proper construction of the phrase notwithstanding the location of physical custody or dominion in the borrower. But an equation between the lender and possessor may not be hard to sustain, having regard to the civilian flavor of the Directive, and to its use of the phrase “possessor or holder”—an expression which implies that possession may signify a relationship with the object distinct from physical dominion or control. In a claim by the lender and purported owner, the compensation awarded is more likely to reflect (broadly) the value of the object, or the price paid for it, minus perhaps the value of the borrower’s interest.

156. Return of Cultural Property Regulations, reg. 7; 1993 Directive, supra note 80, art. 9. As to the costs associated with return, see Return of Cultural Property Regulations, regs. 3(6), 8.
157. See supra notes 59–63 and accompanying text.
158. But cf. Torts (Interference with Goods) Act, 1977, c. 32, § 8 (Eng.) (entitling the defendant in action for wrongful interference to show that a third party has a better right than the plaintiff); O’Sullivan v. Williams, [1992] 3 All E.R. 385 (Eng.); The Winkfield [1902] P. 42 (Eng.) (holding that a bailee had no claim against the wrongdoer if the bailor as first plaintiff had settled).
C. The UNESCO Convention (1970)\textsuperscript{159}

The UNESCO Convention imposes significant obligations on those states that are "state parties." The most significant of these are contained in Articles 7 and 9.\textsuperscript{160}

1. Illegally Exported Objects

By Article 7(a), states must take the necessary measures consistent with national legislation to prevent museums and similar institutions within their territories from acquiring cultural property\textsuperscript{161} originating in another state party which has been illegally exported after the Convention has entered into force that state. The same Article obliges a state party to inform another state party, wherever possible, of any offer of cultural property illegally removed from that other state party. These obligations apply only in regard to cultural property removed after the Convention has entered into force in both states.\textsuperscript{162}

Article 7(a) is reinforced by Article 9, which enables a state party whose "cultural patrimony" is in jeopardy of pillage of archaeological or ethnological materials to call for assistance from other state parties who "may be affected."\textsuperscript{163} In response to a call for assistance, the state parties who may be affected are required to "participate in a concerted international effort."\textsuperscript{164} Article 9 also requires relevant

\begin{footnotesize}
\begin{enumerate}
\item[159.] UNESCO Convention, supra note 80. See generally PATRICK O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC (2000) (interpreting the UNESCO convention and discussing its impact and discussing its impact).
\item[160.] UNESCO Convention, supra note 80, arts. 7, 9. Note, however, that the UNESCO Convention imposes obligations on potential claimant states, for the safeguarding of their own cultural heritage, as well as on potential recipient states. See, e.g., id. arts. 5, 13.
\item[161.] Id. art. 1 (defining "cultural property").
\item[162.] Id. art. 21.
\item[163.] Id. arts. 7(a), 9. Article 9 does not provide criteria by which to identify the States that may be "affected" by the situation that it contemplates. Id. art. 9. It is, however, reasonable to assume that the category includes states in which there exists a market for the materials in question. See O'KEEFE, supra note 159, at 71–76.
\item[164.] Id. art. 9. It is not clear precisely what is meant by a "concerted international effort" and who would take on the task of organizing such effort. It is understood, however, that the United Kingdom would expect this task to be undertaken by UNESCO as the United Nations agency with primary responsibility for these matters. The UNESCO Convention does not, however, debar individual states, or organizations such as the European Union, from assuming this task. The "concerted international effort," referred to in Article 9, has as its purpose "to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned." Id. Since the EU has
\end{enumerate}
\end{footnotesize}
states parties to take "provisional measures" to prevent irremediable injury to the cultural heritage of the requesting state. The fact that such provisional measures are to be taken "pending agreement"\textsuperscript{165} suggests that a state party need take them only where assistance has been requested by the state party whose cultural patrimony is in jeopardy and the "concerted international effort" has been, or is at least on the point of being, initiated. Nor does Article 9 specifically require a state to impose a ban on imports or exports. The obligation is to take "provisional measures to the extent feasible to prevent irremediable injury". State parties therefore have some margin of discretion as to how they implement this Article. Since the aim of the measures must be to prevent the "irremediable injury" referred to in the Article, the measures themselves do not necessarily have to take the form of an import or export ban.\textsuperscript{166}

2. Stolen Objects

By Article 7(b)(i) of the UNESCO Convention, states parties must prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution after entry into force of the Convention, provided that the property is documented as appertaining to the inventory of that institution. By Article 7(b)(ii), states must, at the request of the state party of origin, take appropriate steps to recover and return any such cultural property imported after the Convention has entered into force in both states concerned. The obligation to return is conditional, however, on the payment by the requesting state of just compensation to an innocent purchaser or to any person who has valid title to that property.\textsuperscript{167} All relevant expenses, together with the furnishing of documents and other evidence, must be borne by the requesting state,

\textsuperscript{165} I.e. agreement on the necessary concrete measures referred to supra note 159.

\textsuperscript{166}\textit{Id.} The obligation of state parties is further qualified by the term "to the extent feasible." \textit{Id.} A state party would not be obliged to take action in cases where it had no legal authority under its internal law to do so, or where to do so would be contrary to its international obligations, such as under the WTO, the EU, or the European Convention on Human Rights.

\textsuperscript{167} The United Kingdom has implemented no requirement to that effect.
although no customs duties or other charges shall be payable on property returned pursuant to Article 7.\textsuperscript{168}

XVIII. OBJECTS LOANED INTO THE UNITED KINGDOM FROM OVERSEAS

A. Legislative follow-up to UNESCO

The U.K. government, acting on the advice of the Illicit Trade Advisory Panel,\textsuperscript{169} concluded in 2001 that the United Kingdom could accede to the UNESCO Convention without enacting any prior legislation. At the same time, however, certain further reforms were acknowledged by both the Advisory Panel and the Department of Culture Media and Sport as constituting important supplementary measures to accession.\textsuperscript{170} In the event, the only legislation that has hitherto been enacted pursuant to the United Kingdom's accession to the 1970 UNESCO Convention has been the Dealing in Cultural Objects (Offences) Act 2003.\textsuperscript{171} This statute imposes criminal liability on those who dishonestly deal in "tainted" cultural objects, knowing or believing them to be tainted.

B. The Dealing in Cultural Objects (Offences) Act 2003

A cultural object is defined for the purposes of the statute as an object of historical, architectural, or archaeological interest.\textsuperscript{172} Broadly, a cultural object is tainted\textsuperscript{173} where it has been the subject of one of the following acts, provided in each case that the act was contrary to the law in force in the place where the act occurred: it has been excavated, or removed from a monument\textsuperscript{174} of historical, architectural or archaeological interest, or removed from a building or structure of historical, architectural or archaeological interest, having once formed part of that building or structure.\textsuperscript{175} The act of excavation or removal can have occurred in England or in any other country.\textsuperscript{176} Dealing includes importing or exporting and disposing or

\begin{itemize}
\item \textsuperscript{168} UNESCO Convention, supra note 80, art. 7(b)(ii).
\item \textsuperscript{170} Id. at 5-6.
\item \textsuperscript{171} Richard Harwood, Dealing in Cultural Objects (Offences) Act 2003, 8 ART ANTIQUITY \& LAW 347 (2003).
\item \textsuperscript{172} Dealing in Cultural Objects (Offences) Act, 2003, c. 27, § 2(a) (U.K.).
\item \textsuperscript{173} Id. at § 2(2).
\item \textsuperscript{174} Id. at § 2(5) (defining "monument")
\item \textsuperscript{175} Id. at §§ 2(2), 4(a), 4(b).
\item \textsuperscript{176} Id. at § 2(3)(a)
\end{itemize}
Acquiring includes borrowing and hiring, and disposing includes lending and leasing out. It follows that a borrowing museum or other bailee that borrows a tainted cultural object knowing or believing that it is tainted, or a lending museum or other bailor that lends such an object with the same knowledge or belief, probably commits the offence.

C. The Iraq (United Nations Sanctions) Order 2003

The Iraq (United Nations Sanctions) Order 2003, made pursuant to a resolution of the United Nations Security Council, creates two criminal offences relating to cultural objects unlawfully removed from Iraq. Those offences are dealing in cultural objects that have been illegally removed from Iraq since August 6, 1990, and being in possession or control of such objects and failing to cause their transfer to a constable. Both of them have a significant potential impact on those persons and institutions that lend and borrow cultural objects.

Dealing is defined in similar manner to the equivalent concept in the Dealing in Cultural Objects (Offences) Act 2003, and therefore includes lending, borrowing, leasing out, and hiring. In relation to each of these offences, the burden is on the defendant to show that he did not know, and did not have reason to suppose, that the cultural object in question was illegally removed from Iraq during the relevant period. The burden of establishing the appropriate mental element comes into operation only when the prosecution has positively proved to the criminal standard of proof that the object is illegally removed Iraqi cultural property and that the defendant has dealt in the object.

177. Id. at § 3(1)(a)
178. Id. at § 3(2)-(3)
179. As to offences by officers of corporations where the corporation itself has committed an offence under the Dealing in Cultural Objects (Offences) Act, see Dealing in Cultural Objects (Offences) Act § 5. As to Customs and Excise prosecutions, see Dealing in Cultural Objects (Offences) Act § 4.
184. Dealing in Cultural Objects (Offences) Act § 3(1)(a)-(c), (2)-(5).
185. Iraq (United Nations Sanctions) Order, art. 8, ¶ 5(a)-(c), 6(a)-(c) (U.K.). See supra notes 171-79 and accompanying text.
186. Id. ¶ 2-3.
or failed to transfer it to a constable, in the terms of the offence. Moreover, the defendant can discharge the burden as to the mental element on the civil and not the criminal standard of proof, i.e., on a balance of probabilities. Even so, this reversal of the burden of proof represents a departure from normal policy in cases of criminal (as opposed to civil) liability for movable property, and might be susceptible to challenge under the Human Rights Act 1998. The Iraq offences are further widened by the absence of any requirement of dishonesty, again in contrast to the position under the Dealing in Cultural Objects (Offences) Act 2003. This omission suggests that an institution that acquires material looted from Iraq after August 6, 1990, (or material suspected as such) with the honest intention of returning it to its source may nevertheless commit dealing or transferring offences if it keeps possession of the material other than momentarily.

XIX. OBJECTS LOANED FROM THE UNITED KINGDOM TO OVERSEAS COUNTRIES

A. Borrowing Country Subscribing to UNESCO Convention

Where an object is loaned from a museum in England or Wales to an overseas country where the UNESCO Convention is in force, the vulnerability of that object to third party claims within the country of temporary location will depend in large part on the measures that country has taken to implement the Convention. Different countries have enacted the Convention by different means. Swiss law, for example, now allows a thirty-year limitation period for the recovery of unlawfully removed cultural objects, whereas the United Kingdom's accession to the Convention was subject to the reservation that existing domestic limitation periods governing

187. See Chamberlain, supra note 29.
189. And, indeed, to the offence of handling stolen goods under the position under the Theft Act, 1968, c. 60, § 22 (Eng.).
190. Note also that there is no provision in the Iraq (United Nations Sanctions) Order, or in the Dealing in Cultural Objects (Offences) Act, 2003, c. 27 (U.K.) equivalent to the Theft Act, 1968, c. 60, § 24(3) (Eng.), by which goods are not to be regarded as continuing to be stolen goods if, inter alia, the person formerly entitled to them has ceased as regards the goods to have any right of restitution in respect of the theft.
191. Loi Fédérale sur le Transfert International des Biens Culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 9(4) (Switz.).
claims for the possession of chattels should continue to apply to cultural objects. In part, this diversity can be attributed to preexisting differences among the legal systems of the ratifying and acceding states, which meant that reform began from different points in different jurisdictions. Lending and borrowing museums would be well advised to distribute in advance the responsibility for ascertaining the state of law in the borrowing country and to prescribe in advance the consequences of third party intervention, whether by individuals or states.

B. Borrowing country Subscribing to UNIDROIT Convention

There is in existence at least one further and major international convention on the return of unlawfully-removed cultural objects, to which the United Kingdom does not at present subscribe. That convention is the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (the UNIDROIT Convention). Part II of the Convention gives a direct right of action to victims of thefts of cultural objects. Article 3(1) of the Convention states that the possessor of a stolen cultural object shall return it, and Article 3(2) defines “stolen” to include objects that have been unlawfully excavated or lawfully excavated and unlawfully retained. Part III of the Convention enables the return of certain unlawfully exported cultural objects, though in this event (as opposed to the case of stolen objects), return can be initiated only on a state-to-state basis, and not by private persons or institutions.

The fact that the United Kingdom has not implemented the Convention does not necessarily mean that lending museums in England and Wales are unaffected by it. An object loaned to an overseas country from England is still vulnerable if it enters the field of control established between two other subscribing countries. That might occur, for example, where an object has been unlawfully excavated within a country that subscribes to the UNIDROIT Convention, then acquired by an English museum, and then later loaned by the English museum to a second country that subscribes to the UNIDROIT Convention. In those events, a claim made by the

192. UNIDROIT Convention, supra note 146. See generally LYNDL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION (1997) (interpreting the UNIDROIT Convention).

193. UNIDROIT Convention, supra note 146, c. II, art. 2 & annex (defining “cultural objects”).

194. REPORT OF THE MINISTERIAL ADVISORY PANEL, supra note 169, at 22, ¶ 45.

195. It is assumed for this purpose that the original unlawful removal occurred after the UNIDROIT Convention had entered into force in the two countries. See UNIDROIT Convention, supra note 146, art. 10.
first "UNIDROIT" country in the courts of the second "UNIDROIT" country might well lead to the return of the object to the first country and the loss of the object to the English museum, regardless of the English museum's honesty or diligence. It is uncertain how far the compensation provisions in Article 4 of the Convention would materially assist the English museum. Again, these are hazards for which the parties to the loan should ideally provide in advance.

XX. CONCLUDING OBSERVATIONS

The practice and management of art lending can play a powerful part in isolating illicit cultural material and extirpating it from circulation. The most obvious precaution is for those who are involved in art lending to make penetrating inquiries about the history of every object considered for loan, and act meaningfully on the replies (or lack of them). Relevant parties for this purpose should include those who insure or provide public indemnities for international exhibitions. Public databases of unlawfully removed cultural objects clearly have an important role to play in this regard.

On one view, it is to the benefit of all parties to explore and exploit the full legal potential of the loan transaction, as a medium through which to ask necessary questions and bind the respondent to the answers. Meticulous inquiry into provenance might, for example, enable borrowing museums to side-step the sorts of controversy that emerge from recent claims against auction houses. Scrupulous investigation of the legal environment into which objects are to be loaned might enable lending museums to avoid replicating the bark etchings experience and other debacles. Those who place as much emphasis on ethical propriety as on legal self-protection would presumably advocate such measures whether they are in the parties' material interests or not. Consistently with this attitude, some lending institutions might also consider it fitting to require assurances about the provenance of objects other than their own that are being considered for loan to the same exhibition, in order to establish the general ethical tenor of the event.

The need for candor and transparency appears especially pronounced in the contemporary loan market, having regard to the understandable focus of modern case law and legislation on the possessors of cultural objects, and the mounting body of evidence that loans and other possessory relationships are becoming a theatre for claims. The time has arguably arrived when a degree of concerted international initiative would reward political investment. Suitable areas for collective examination in this regard might include the uniformization of anti-seizure laws (or at least some common agreement as to national policy), the harmonization and scope of
national indemnities, the responsibility for databases and the case for making consultation of them obligatory, and the role of lenders in keeping multi-national exhibitions free of tainted matter. Those who are tempted to regard such measure as disproportionate might care to reflect on the relative virtues of preventive medicine and roadside surgery.
Article 151 of the European Community Treaty

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
   - improvement of the knowledge and dissemination of the culture and history of the European peoples,
   - conservation and safeguarding of cultural heritage of European significance,
   - non-commercial cultural exchanges,
   - artistic and literary creation, including in the audiovisual sector.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:
   - acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251,
   - acting unanimously on a proposal from the Commission shall adopt recommendations.