

CONSULTATION PAPER ON ANTI-SEIZURE LEGISLATION

Introduction

- 1.1. International exhibitions are playing an increasingly important part in the life of our museums and galleries. Such exhibitions draw together items from collections in many different countries, introducing visitors to different cultures and civilisations, and increasing their understanding of other countries. They make it possible for visitors to study works of a particular movement or artist which are usually scattered across the world, and encourage them to visit the museums or galleries' permanent collections. The United Kingdom has developed as a major exhibition centre not least due to the introduction of the Government Indemnity Scheme in 1980 which made London the exhibition capital of Europe and had a huge impact in the regions. This position is now being placed at risk, because this country - unlike an increasing number of other countries in Europe and elsewhere – does not have legislation granting immunity from seizure to items lent to exhibitions held in the United Kingdom. As such legislation becomes the international norm, other countries are becoming increasingly reluctant to lend to the United Kingdom, . On a number of occasions, requests for loans to exhibitions in this country have been refused on this ground and because the owners consider that objects are now at risk of seizure. The UK is therefore now at a serious competitive disadvantage compared, for example, to New York, Paris and Berlin.
- 1.2. Whilst the 1980s saw third-party seizure become an issue, because of claims made by heirs of works of art expropriated by Communist regimes in Eastern Europe and Russia, most countries were at that time satisfied with a simple letter of comfort explaining the cover provided in the UK by the GIS. Recently this has ceased to satisfy either institutional or private lenders and they are increasingly demanding full immunity from seizure protection.
- 1.3. This issue has come to head since the announced refusal of Russia to make any loans from their collections to any countries which do not have immunity from seizure legislation in place. This affects numerous UK exhibitions,

including those from the Hermitage to the continuing programme of exhibitions at the Courtauld Institute of Art's Hermitage Rooms at Somerset House, to the Victoria & Albert Museum and to The National Gallery of Scotland for an exhibition to coincide with this summer's Edinburgh festival. The Hermitage Rooms at Somerset House face an uncertain future without the UK government providing Immunity against Seizure legislation. They exist as an exhibition space for works of art from the State Hermitage Museum in St Petersburg and the Director, Professor Mikhail Piotrovsky, together with the Russian Ministry of Culture in Moscow, have already stated that future Hermitage Rooms exhibitions are likely to be cancelled if immunity against seizure legislation is not put in place at the earliest possible time.

- 1.4. But the issue is longer standing and more widespread. The Royal Academy has had to undertake lengthy negotiations for various exhibitions, including securing guarantees from the heirs to a particular collection that they would not make claims during a Royal Academy exhibition. The painting *Water Lilies* by Monet was requested for the exhibition "Monet in the Twentieth Century" also by the Royal Academy. Because of the absence of anti-seizure legislation in the United Kingdom, it was not possible to give a guarantee that the work would not be liable to seizure in the United Kingdom. Accordingly, it was withheld from the Monet exhibition, though it could be included when that exhibition was on show in Boston.
- 1.5. Taiwan has refused outright to lend any items in the absence of this safeguard; German lenders now routinely demand a guarantee of the safe return of items. Both the recent Titian exhibition at the National Gallery and the Douanier Rousseau exhibition at the Tate saw works withdrawn because of the fear of seizure while in the UK; Romania withdrew two items from their loan to the Brancusi exhibition at the Tate for fear of seizure; and both Romania and Greece declined to allow loans to the National Gallery's El Greco exhibition to come on from the New York "leg" of the exhibition to London. All predictions are that this practice will increase. It has also become evident that many museums in eastern Europe and Russia are uncertain about the provenance of their collections and will never be able to unravel the complex

history of the objects in their care. This can only result in a reduction of their willingness to lend which is entirely counter to our stated objectives in expanding cultural exchanges.

- 1.6. This paper therefore considers whether it would be appropriate for the United Kingdom to enact anti-seizure legislation protecting items lent for exhibition here, and if so, what form such legislation should take. Our consultations with representatives of our national museums and galleries have illustrated to the Department the need for urgency in developing our proposals for such legislation, and we consider that the limited nature of our proposals justifies the normal consultation period of 12 weeks being reduced to 9 in this case.
- 1.7. It is clear that if the UK does not introduce such legislation to protect lenders during the period of a temporary exhibition in this country, the number of lenders will continue to reduce and the UK's position as a major centre for world class exhibitions will be severely threatened. This is particularly undesirable as London moves to the centre of world attention in the lead up from the 2008 Beijing Olympics up to the London 2012 Olympics. Many of our leading institutions are planning ambitious programmes for this period and the Government wishes to support and encourage them in this.

The Risks Of Seizure

- 1.8. Items lent to an exhibition in the United Kingdom are at risk of seizure in three cases. First, where proceedings are brought in relation to the item, and the claimant seeks interim relief from the court pending the resolution of the proceedings. The claimant may, for example, apply for an order for the detention, custody or preservation of the object, or an order restraining a party from removing the object from the jurisdiction of the court. Such claims may affect objects which were lost during the Nazi era, or earlier (the heirs to the Shchukin and Morosov collections, nationalised without compensation by Lenin following the 1917 revolution, are still actively seeking restitution of objects which formed part of those collections). The same claim may be made in other contexts: governments as well as individuals may lay claim to particular works of art. Even if the claim is eventually unsuccessful,

proceedings in relation to it, which may include various levels of appeals, may lead to the object being retained in the court's custody for several years. A claim brought by Prince Hans-Adam II of Liechtenstein in Germany to a painting on loan to an exhibition in Cologne from the Brno Historical Monuments Office in the Czech Republic led to the painting being sequestered on 17 December 1991, and only returned to the Czech Republic after 9 June 1998, when the interim injunction was finally discharged.¹

- 1.9. Secondly, works of art on loan to exhibitions in this country may be at risk where the owner of the object concerned has heavy debts. They may be seized by creditors seeking to enforce a judgment against the owner, or, where the owner is made bankrupt or gone into liquidation, by the liquidator or trustee in bankruptcy seeking to maximise the return to be made to creditors. This possibility was illustrated when Noga, a Swedish company, was granted a court order in Switzerland for the seizure of 55 Impressionist paintings from the collections of the Pushkin museum which were on loan to an exhibition in Switzerland. Noga sought payment of debts owed to it by the Russian government, alleged to be over \$70 million. In that case the situation was quickly resolved when the Swiss federal government used powers in the constitution enabling it to override the decisions of the court in certain circumstances. No such power exists in this country.
- 1.10. Thirdly, works of art in exhibitions may be at risk of being seized during the course of criminal investigations. Under section 19 of the Police and Criminal Evidence Act 1984, a constable lawfully on the premises of a museum can seize anything on the premises if he has reasonable grounds for believing that it has been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence which he is investigating or any other offence, and that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.
- 1.11. The only existing protection for works of art lent to this country for exhibitions are the procedural privileges afforded to states under the State Immunity Act 1978. This is severely limited. Most obviously, it only applies

¹ See *Hans Adam II v Germany*, ECtHR App 42527/98 12 July 2001.

in relation to property which is owned by a state, that is, by the sovereign or other head of state in his public capacity, the government of that state, and any department of that state. They do not apply to any entity which is distinct from the executive organs of the government of the State and capable of suing or being sued.² Still less does it apply to any property from a private collection. In most cases, museums (including the national museums of a state) would be considered to be separate entities. The Act may be useful in relation to countries such as Russia, where the State does own the national collection, but it is otherwise of limited application.

- 1.12. Even where the Act does apply, it offers limited protection. It provides extensive protection against applications for interim relief (that is relief in the first category mentioned above). The only exception to that relief occurs where the State itself has waived its immunity. However the protection against applications for the enforcement of judgments or arbitration awards is more limited. In particular, it does not apply where the property in question is in use or intended for use for commercial purposes. The definition of commercial purposes is very extensive, and it is far from clear whether works of art or cultural objects on loan to exhibitions in this country would be considered to fall into this category. It is also possible for the State to waive its immunity (as is the case in relation to applications for interim relief).
- 1.13. Protection is also given to diplomatic missions under the Diplomatic Privileges Act 1964, which enacts a number of articles from the Vienna Convention on Diplomatic Relations of 1961 into English law. In particular, Article 22 of that Convention provides that “the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution”. This would protect works of art loaned to the mission, but is of no assistance in relation to works of art lent for exhibition elsewhere.

² See section 14(1) of the 1978 Act.

Is Anti Seizure Legislation Appropriate?

- 1.14. The introduction of anti-seizure legislation would remove a significant disincentive to international loans to exhibitions in the United Kingdom. For lenders, the risk that their works may be seized means not only that they may not be able to obtain the return of those works for a prolonged period of time (which may be several years), but that they may be subjected to significant costs. In addition, where the items being lent are fragile, the risk of seizure includes the risk that the works themselves will be damaged (a particular concern in relation to Noga's execution of the court order for seizure in Switzerland was that the safety of the paintings which had been seized was compromised, as the air-conditioning in their transports was turned off). Court authorities are not necessarily equipped to provide suitable safeguards for works of art. This fear provides a further disincentive to lenders.
- 1.15. Exhibitions are of great value to, and greatly enjoyed by, both UK residents and visitors. By providing a continuous and changing cultural display for London and other cities throughout the country, they help to keep the cities and their museums in high esteem, and attract significant revenues (which will cease if major exhibitions were to go elsewhere because of the lack of anti-seizure legislation). The Government has sought to facilitate such exhibitions in order to help to promote Britain's position as a pre-eminent cultural centre, with benefits both to the people of the UK, our image abroad and the tourism industries. The Government Indemnity Scheme, already provides a government backed alternative to the prohibitive cost of commercial insurance. The Government's view is that there would be clear benefits to providing immunity from seizure as well. As more countries provide such immunity from seizure it is necessary to be able to offer this in the UK in order to remain within the "club" of major lenders and borrowers
- 1.16. The effect of anti-seizure legislation would be to suspend a claimant's ability to be granted a particular form of relief for a strictly limited period of time, rather than removing it. However, in practice, the legislation is likely to prevent claims being made to works of art which are temporarily in this jurisdiction while they are in the jurisdiction, when, from the point of view of

a claimant, it would be most useful to bring such a claim. This may be argued to be a particular problem in the case of restitution claims, not least claims made by survivors of the holocaust and their heirs.³ It can however also be argued that by contributing to the mobility of collections, anti-seizure legislation may increase information available on the whereabouts of particular works of art, assisting claimants to make claims in the most appropriate jurisdiction.

1.17. Consideration must be given to human rights issues. Would the adoption of anti-seizure legislation contravene any human rights of such potential claimants? Two rights are particularly relevant: the right to an effective access to court under Article 6 of the European Convention on Human Rights⁴ and the right to the peaceful enjoyment of possessions under Article 1, protocol 1 to that Convention.

1.18. The right of access to court is not an absolute right, but subject to limitations. It must be regulated by the State⁵, and the State has a margin of appreciation in making such regulations, provided that any limitations imposed serve a legitimate aim, are proportionate to that aim and do not restrict or reduce the access left to the individual in such a way, or to such an extent that the very essence of the right is impaired. In this case, we are considering a temporary limitation on the forms of relief available to a claimant in this jurisdiction. This limitation would serve the legitimate aims of preserving the high standing of museums and galleries, including those sponsored by central Government and which overall form an important sector of the UK economy (especially in relation to the tourism industry), and by facilitating cultural awareness and educations through major exhibitions, which benefit UK residents and visitors from overseas and keep the UK within the group of countries mounting world class exhibitions.

³ Professor Norman Palmer has asked “whether anti-seizure statutes are worth the moral anguish they may cause to Holocaust claimants” in *Museums and the Holocaust* (2000), p 47.

⁴ Which guarantees the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law for the determination of civil rights and obligations or of any criminal charge.

⁵ The European Court of Human Rights has said that by its nature, the right of access to court calls for regulation by the State - *Golder v United Kingdom* (1975).

- 1.19. The limitation must also be proportionate to the aims pursued. Here it is relevant to consider the nature of claims which may be made. Where a claim stems from action taken in the Nazi era, there may already be serious doubt as to whether claimants would be able to bring a substantive claim in this jurisdiction (the expiry of limitation periods for claims which stems from action taken in the Nazi era, may have extinguished the original owner's title to the object being claimed). Claims to objects which have been nationalised or expropriated by a State act may also fail on the grounds of sovereign immunity.⁶ Where a claimant is seeking to enforce a judgment debt, the limitation proposed merely prevents execution of that debt against one form of asset – for a limited period. The limitation under consideration would not prevent potential claimants from bringing claims in the jurisdiction where the item is usually kept. Accordingly we do not consider that our proposals would contravene the rights of potential claimants under Article 6 of the Convention.
- 1.20. Interference with property will be justified under Article 1, Protocol 1 of the European Convention of Human Rights if it respects the requirements of lawfulness and can be regarded as pursuing the general or public interest, provided that it meets the requirements of proportionality and strikes a fair balance between the demands of the community and the protection of the individual's interests. Property, for the purposes of the Article, include existing possessions or assets, including claims, where the claimant can argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right. Where a claimant seeks to pursue a substantive claim to a work of art which is being loaned to this country for a temporary exhibition, the only relevant "property" is their claimed right to the work of art. In many cases, the claimant's surviving rights in such an object may not be sufficient to amount to property capable of being protected under Article 1.⁷ In some

⁶ Claims stemming from the expropriation of property by a State which is recognised under English law, where the property in question was at the time of the expropriation located in that State will fall within the scope of sovereign immunity. Accordingly, as *Princess Paley Olga v Weisz* [1929] 1 KB 718, CA illustrates, an action brought in England by the individual whose property has been expropriated would fail, even if the property in question was within this jurisdiction at the time the claim was brought.

⁷ Most notably, it was held by the European Court in Human Rights in *Prince Hans-Adam II of Liechtenstein v Germany* (2001), a case where Prince Hans Adam claimed that the rejection of his claims to a painting by Pieter van Laer, and the return of the painting to the Czech Republic violated

cases, the potential claimant's rights may be more substantial. However the limitation we are considering would not extinguish those rights, but imposes a limited control over their use. We consider that preventing a potential claimant from seeking a particular form of relief in this jurisdiction for a limited period of time does strike a fair balance between the rights of the claimant and the public interest.

1.21. It should be stressed that if any anti seizure legislation is adopted, it will have no effect on the ability of claimants to make restitution claims in relation to items which are in collections in the United Kingdom. Protection will only be granted in relation to items borrowed from other countries. The Government remains committed to the principles announced at the Washington Conference on Holocaust-era Assets,⁸ and supports the work of the Spoliation Advisory Panel, which will consider claims from anyone (or their heirs) who lost possession of a cultural object during the Nazi era, where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit.⁹ The provision of immunity of seizure as proposed for items on loan from abroad would have no effect on the Panel's work, because it will not apply to works in collections in this country. Where a claim is made to an item which forms part of an overseas collection however, we consider that it is more appropriate for that claim to be resolved in that jurisdiction.

1.22. Given the increasing reluctance of some museums abroad and, in some cases, their outright refusal, to lend objects for exhibitions in the UK in the absence of any UK immunity from seizure, Museums and galleries here need to be able to depend on such immunity in order to be able to continue to participate in the "club" of international borrowers for world class exhibitions. We consider

his rights under Article 1, Protocol 1, that "the hope of recognition of the survival of an old property right which it has long been impossible to exercise cannot be considered as a "possession" within the meaning of Article 1 of Protocol No 1..." (paragraph 83 of the judgment).

⁸ And members of the National Museum Directors Conference support the principle outlined in the MA Code of Practice for Governing Bodies dated 1994 which states that the 'Collections Management Policy should ensure, through the appropriate documentation, that the museum does not acquire or exhibit any stolen or illegally exported works and that it acquires legal title to items accessioned to its collections'. (See Statement of Principles on Spoliation of the NMDC.)

⁹ Spoliation Advisory Panel: Constitution and Terms of Reference.

that this justifies the limited and temporary restrictions on claimants' rights which we propose.

Private international law and Community law

(a) General

- 1.23. Private international law issues would arise in the context of the seizure of works of art if foreign law or a foreign judgment were relied upon by the party seeking seizure.
- 1.24. In the case of claims brought in the United Kingdom under foreign law, matters of procedure and enforcement (including the availability of seizure) would be determined by the law of the country in which the case is brought, so there would be no question of the application of a foreign law overriding any anti-seizure legislation. This would be so even in a contractual case where a foreign restitutionary remedy is sought under the applicable law determined by Article 10 of the Rome Convention. In such a case, even if the remedy were held to be applicable (which is doubtful), the availability of seizure would still be a matter for the law of the country in which the case is brought.
- 1.25. The position would be similar in the case of foreign judgments. A judgment registered in a court in the United Kingdom would fall to be enforced under the same rules as govern local judgments. This would apply in respect of judgments from other member states of the European Union recognised and declared enforceable under Chapter III, Section 2 of the Brussels I Regulation (No. 44/2001), and to uncontested judgments certified as European Enforcement Orders under Regulation (EC) No 805/2004. The availability or otherwise of seizure would still be a matter for the law of the forum, provided that law did not discriminate between foreign and local judgments.

(b) Cross-border insolvency

- 1.26. In some circumstances the powers of liquidators in cross-border insolvency matters will be governed by European Community law (for example Article 18 of Council Regulation 1346/2000 and its equivalents in the Directives

governing insolvency procedures for credit institutions and insurers). The operation of any anti-seizure legislation enacted in the United Kingdom would need to take account of these provisions, although we anticipate that cases of real difficulty would be very rare.

Proposals For A United Kingdom Anti-Seizure Act

(a) *Procedure for granting immunity*

1.27. The Annex to this Paper summarises the results of a Study prepared by Anna O'Connell (solicitor to the Art Loss Register) on anti-seizure legislation which has been adopted in other countries. Two different approaches have been followed. In some jurisdictions, protection is given automatically to those works which meet criteria set by the legislation. No further application needs to be made before a work of art or other cultural object is imported into the country concerned. In other jurisdictions, an application has to be made to the government before immunity can be given to any work lent to an exhibition. The application includes details of the exhibition, and all relevant information on the objects for which immunity is being sought. This would require the relevant department to assess whether it is appropriate for immunity to be granted in relation to each application. It would also require publicity to be given to the application, so that the public can be made aware what works are being brought into the country. In the case of the Swiss Federal Act, the legislation expressly allows objections to be made to the grant of protection, and it is only if no objection is made that the return guarantee may be issued.

1.28. The second approach would require substantially greater resources to implement (and may require charges to be made for each application to enable the government to recover its costs). The museums, or lender, would have to prepare an application in relation to each exhibition, listing all the works for which immunity was sought. It appears that the complexity of some of the schemes currently in force in other countries has meant that museums or lenders have decided not to apply for protection. Where no application is made, no protection could be given, and the effectiveness of the Act would be reduced. The Department would also need to make resources available to

review each application, and assess in the case of each item whether it meets the relevant criteria.

1.29. We have considered whether an opportunity should be given to make objections to the grant of immunity in relation to particular items. This would only be possible with a system requiring an advance application before immunity is granted, and publication of that application. If an objection was made, and as a consequence immunity was not granted in relation to a particular item, the lender, forewarned of a potential claim, would be unlikely to be prepared to lend that item to the exhibition. This could create problems for the organisers of the exhibition concerned. It is also unclear how any potential claimant would benefit from this. In addition a requirement to give advance publicity to a particular loan may act dissuade lenders from agreeing to lend their works to an exhibition. Many private lenders demand strict anonymity and would refuse to lend to an exhibition if the loan was to be made public. It is particularly important to attract loans from private lenders to exhibitions, as this often gives the public their only opportunity to see these works. On balance, we do not consider that the benefits of such an approach outweigh the costs which would be involved.

1.30. **Consultees are asked:**

(a) **Whether any anti-seizure legislation should offer potential claimants the opportunity to object to the grant of immunity in relation to a particular object?**

(b) **Whether the grant of immunity should be automatic, or depend on an advance application providing detailed information on the objects for which immunity is required?**

(b) *Should restrictions be placed on the museums which may benefit from immunity from seizure?*

1.31. Some jurisdictions have limited the immunity they offer to loans to exhibitions at state museums (for example, the French law only covers loans to the French State or a legal person designated by it). It would be possible to take a

similarly restricted approach in this country. Immunity from seizure could be granted to:

- (a) Only those exhibitions at national museums and galleries.
- (b) Only those exhibitions held at institutions which may benefit from the government indemnity scheme, as set out in section 16(2) of the National Heritage Act 1980, namely:
 - (i) a museum, art gallery or other similar institution in the United Kingdom which has as its purpose or one of its purposes the preservation for the public benefit of a collection of historic, artistic or scientific interest and which is maintained by monies provided by Parliament or by a local authority or University in the United Kingdom;
 - (ii) a library maintained by monies provided by Parliament or by a library authority (or whose main function is to serve the needs of teaching and research at a university in the United Kingdom);
 - (iii) The National Trust or the National Trust for Scotland;
 - (iv) Other bodies specifically approved by the Secretary of State with the consent of the Treasury.
- (c) Only those exhibitions held at museums, libraries or archives which have been designated under the MLA designation scheme (a drawback with this may be that the scheme does not extend to Northern Ireland or Wales, and may not apply in Scotland).

An alternative approach would provide immunity from seizure in relation to exhibitions at any museum, gallery and archive in the United Kingdom.

- 1.32. An approach which limits the grant of immunity to those items loaned for exhibitions at the national museums and galleries does not seem attractive. Many important exhibitions are held at other museums and galleries (the Royal Academy, for example, is a particularly important venue for

international exhibitions). If any restriction is to be imposed on the exhibitions which benefit from immunity from seizure, they should be related to the type of exhibition, not the type of venue. The United States Federal Act (and a number of the individual states) impose a requirement that exhibitions to which loans are made should be organised “without profit” if exemption from seizure is to be given to the object loaned. We can see considerable difficulties in defining precisely what “no-profit” meant in this concept although we appreciate that exhibitions rarely cover their costs. There should be a requirement that an exhibition should be to the benefit of the public. This would be satisfied in most cases where there is full access to the exhibition in question. However, we do not think that immunity from seizure should be available where the purpose of the exhibition, or the presence of a particular object at an exhibition, is to advertise objects for sale. Accordingly, we propose that immunity from seizure should not extend to any work being placed, or is intended to be placed on sale.¹⁰

1.33. Consultees are asked:

- (a) Whether immunity from seizure should be extended to objects borrowed by:**
 - (i) all museums and galleries;**
 - (ii) only museums and galleries entitled to benefit from the Government Indemnity Scheme;**
 - (iii) only museums and galleries accredited by the MLA?**
- (b) Whether immunity from seizure should only be given to objects loaned to exhibitions which are not organised for profit?**
- (c) Whether immunity from seizure should only be extended to objects which are lent to an exhibition benefiting the public, and not to objects which being exhibited for sale?**

¹⁰ A similar requirement is attached to objects which are entitled to state immunity under Article 21(1)(e) of the United Nations Convention on Jurisdictional Immunities of States and their Property (2005).

(c) *What exhibits are to be covered?*

1.34. We consider that immunity from seizure should be available for any object of artistic, cultural, historical or scientific interest. A restrictive approach, like that of France, would only extend to works which are publicly owned (i.e. by a foreign power, or foreign public or cultural entity). Belgium has adopted the same approach. However, this seems to be unduly restrictive. A number of works which museums wish to include in exhibitions in this country will be in private ownership. Occasionally entire exhibitions may be drawn from one private collection.¹¹ In other cases, such as monographic shows of contemporary artists, a large percentage of works are in private hands. Restricting protection offered under the statute to works in public ownership would reduce our chances of borrowing such works.

1.35. **Consultees are asked:**

Whether immunity from seizure should be available:

- (a) **only for loaned objects in public ownership or**
- (b) **whether it should be available to all loaned objects, provided that the exhibition for which the object is loaned can be shown to be for the benefit of the public?**

(d) *What protection should be granted?*

1.36. As noted in paragraphs 1.8 to 1.10 above, there are three main areas where protection may be needed:

- (a) Against applications for pre-judgment relief. This would cover the situation when someone wishes to claim ownership of a work of art, and brings legal proceedings to do so. It is possible for the claimant to make applications for interim relief, including an application for the work of art to be detained, or for a museum or any other party to be prevented from removing it from the jurisdiction. Applications made in legal proceedings in Australia in relation to aboriginal exhibits lent

¹¹ The Royal Academy has put on exhibitions devoted to particular private collections.

by the British Museum to Museum Victoria delayed the return of those exhibits to the British Museum for over a year.

- (b) Against applications to enforce any judgment or arbitration award. This is the situation where an individual or company (like Noga) is owed money by the owner of the works of art, and wishes to seize the work of art so that it can be sold to pay the debt due. The courts of this country will enforce judgments made against an owner of works of art in a number of other jurisdictions in the world. This protection should include possible applications by trustees in bankruptcy or creditors who are seeking to realise any assets belonging to the owner of a work of art who is bankrupt, or has gone into liquidation.
- (c) Against criminal seizure. This category would grant protection against any seizure by the police or HM Revenue & Customs or any other enforcement authority in the exercise of their powers. Though it may seem unlikely that such protection would be necessary, criminal powers of seizure have been used against works of art. Two Egon Schiele paintings lent to the Museum of Modern Art in New York were seized under subpoena issued by the District Attorney of New York in 1997. There was initially considerable doubt as to whether the New York anti-seizure legislation extended to criminal seizures (it was eventually decided that it did). Similar powers of seizure are available to the police in connection with criminal proceedings in this country.

1.37. The work should be covered both while at the institution hosting the exhibition, and while being transported to the exhibition or away from it. This could be done in two ways – if protection is to be automatic, it will be necessary for the legislation to spell out precisely what protection is given. However, if protection is dependent on an application being made, protection can be expressed to last between the dates set in relation to a particular exhibition - which will take account of time needed for transport.

1.38. We consider that an object should be covered by immunity from seizure in the following cases:

- (a) While it is en route to the location where the exhibition to which it is lent is being held;
- (b) While it is kept at that location for the purposes of the exhibition, and
- (c) While it is en route from that location to the place where it is usually kept or, where the exhibition is travelling to a new location, while it is en route to the next exhibition venue.

1.39. It may also be possible to grant immunity from seizure to a work which has been loaned to an institution in the United Kingdom for exhibition, and is being retained in the United Kingdom for restoration or conservation work required as a result of damage suffered at the exhibition. In all cases, immunity from seizure can only be given while the object concerned is within one of the jurisdictions of the United Kingdom. It will not therefore be possible for immunity to be given to an item at all points on its journey from the place where it is kept to the exhibition venue – the immunity will only take effect from the point at which it enters the United Kingdom (unlike the “nail to nail” coverage afforded in relation to objects indemnified under the Government Indemnity Scheme).

1.40. **Consultees are asked**

- (a) **If immunity from seizure should be given:**
 - (i) **In relation to applications for interim (pre-judgement) relief;**
 - (ii) **Against applications to enforce any judgments or arbitration award;**
 - (iii) **Against any form of seizure by the police, HM Revenue and Customs or any other enforcement authority?**
- (b) **Should immunity from seizure be limited to the three cases set out in paragraph 1.38 above, or should it also be available where a**

work is retained in the United Kingdom for conservation or restoration work to repair damage suffered during the exhibition?

SUMMARY OF QUESTIONS FOR CONSULTEES

Question 1: Consultees are asked:

- (a) Whether any anti-seizure legislation should offer potential claimants the opportunity to object to the grant of immunity in relation to a particular object?
- (b) Whether the grant of immunity should be automatic, or depend on an advance application providing detailed information on the objects for which immunity is required?

Question 2: Consultees are asked:

- (a) Whether immunity from seizure should be extended to objects borrowed by:
 - (i) all museums and galleries;
 - (ii) only museums and galleries entitled to benefit from the Government Indemnity Scheme;
 - (iii) only museums and galleries accredited by the MLA?
- (b) Whether immunity from seizure should only be given to objects loaned to exhibitions which are not organised for profit?
- (c) Whether immunity from seizure should only be extended to objects which are lent to an exhibition benefiting the public, and not to objects which being exhibited for sale?

Question 3: Consultees are asked:

Whether immunity from seizure should be available:

- (a) only for loaned objects in public ownership or

- (b) whether it should be available to all loaned objects, provided that the exhibition for which the object is loaned can be shown to be for the benefit of the public?

Question 4: Consultees are asked:

- (a) If immunity from seizure should be given:
 - (i) In relation to applications for interim (pre-judgement) relief;
 - (ii) Against applications to enforce any judgments or arbitration award;
 - (iii) Against any form of seizure by the police, HM Revenue and Customs or any other enforcement authority?
- (b) Should immunity from seizure be limited to the three cases set out in paragraph 1.38 above, or should it also be available where a work is retained in the United Kingdom for conservation or restoration work to repair damage suffered during the exhibition?

ANNEX: Protection available in other countries.

**This Annex draws heavily on the “Immunity from Seizure Study” prepared by
Anna O’Connell, Solicitor, Art Loss Register**

- 1.1. A number of countries have now enacted anti-seizure statutes.
- 1.2. **United States Federal Act.** This applies to any work of art or object of cultural significance which is imported from a foreign country. The following conditions must be satisfied:
 - (a) There must be an agreement between the foreign owner, or the custodian (which in many cases will be the museum in whose collection the object is exhibited) and the United States or any cultural or educational institution within the United States for the temporary exhibition of the object concerned at any “cultural exhibition, assembly, activity or festival”, provided that it is operated or sponsored “without profit”.
 - (b) Before importation, the President or his nominee must determine (a) that the object concerned is of cultural significance, and (b) that its temporary exhibition or display within the United States is in the national interest.
 - (c) Notice of that determination must be published in the Federal Register.
- 1.3. Fulfilment of these conditions requires an application to be made to the General Counsel of the United States at least six months before the date on which the object concerned enters the country, providing full details of the items being imported for exhibition, a copy of the lending agreement, a list of the places and dates of exhibition, the date the objects will arrive in the United States, a statement that the exhibition is being administered without profit, a statement giving information as to why anyone might want to attach the

property in the United States, an evaluation of the threat and a statement establishing the cultural significance of the objects.¹²

- 1.4. Once these conditions are fulfilled, the Act prevents any court in the United States or any of its possessions from making any order which would deprive either the institution hosting the exhibition or any carrier transporting the object within the United States of custody of the object.
- 1.5. In the event that any such order is made, the US Attorney for the judicial district within which the proceeding is pending is entitled to intervene as of right in the relevant proceedings seeking the denial, quashing or vacating of the relief (and is obliged to do so on the request of the institution or the direction of the Attorney General).
- 1.6. Actions for the enforcement of the agreement of the contract for the exhibition or for the transport of the object are excluded from this protection, as are actions by the institution or the US for or in aid of the fulfilment of any obligations assumed pursuant to the agreement.
- 1.7. **New York Exemption from Seizure Law.** This applies to works of fine art. The work is protected while en route to or from the exhibition, on exhibition or deposited by a non-resident exhibitor. The protection applies to any exhibition held under the auspices or supervision of any museum, college, university or other non-profit art gallery, institution or organisation within New York State, for cultural, educational, charitable or other purpose, provided that the exhibition is not conducted for the profit of the exhibitor. There do not appear to be any exceptions to this protection – in particular, it is expressly provided that:

“nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities or such exhibition or otherwise.”
- 1.8. Though this is widely expressed, but doubt was expressed as to whether it applied to the seizure of items in the course of a criminal investigation

¹² Anna O’Connell, *Immunity from Seizure Study*, p 7

(following the seizure of the Egon Schiele paintings in New York). The question was eventually resolved in favour of the Museum of Modern Art, but the seizure caused some consternation to potential lenders.

- 1.9. **Texas.** This provides for a similar restriction on the issue or service of any form of attachment on a work of fine art en route to an exhibition or in the possession of the exhibitor or on display as part of the exhibition. The Code limits the time during which the work of art is protected - the protection lasts no longer than the date six months after the date that the work was en route to the exhibition. This protection does not extend to the period where the work of art is en route from the exhibition, but a court issuing service of such process against the work of art is obliged to require the server to give the exhibitor notice not less than seven days before the date on which the protection ends.
- 1.10. The exhibition must be held under the auspices or supervision of an exempt organisation or a public or private institution of higher education, be held for a cultural, educational or charitable purpose, and not held for the profit of the exhibitor.
- 1.11. There are major exceptions to this protection. It appears that the same work of art may not be protected twice under this provision – it is not entitled to protection if it has previously been protected under the legislation. In addition, the protection does not apply where the theft of the work from its owner is alleged and found proven by the court.
- 1.12. The Texas Code also requires any court issuing process for the seizure of any work or art to require that the work of art is handled and transported in a “manner which complies with the accepted standards of the artistic community for works of fine art”.
- 1.13. **France.** The protection offered by the French loi No 94-679 du 8 aout 1994, Art 61 is comprehensive. No cultural object which is loaned by a foreign power, a foreign public or cultural entity for exhibition to the public in France can be seized while on loan to the French State or to any legal entity designated by it.

- 1.14. The French Minister of Culture and the Minister of Foreign Affairs issue a joint decree for each exhibition listing the cultural objects protected, determining the duration of the loan (and thus of the protection), and identifying the exhibition organisers. The decree has the force of a published administrative decision under French administrative law. It may be challenged by a third party within a period of 2 months from the date of publication in the *Journal Official*. Protection becomes effective if no claims are made within this period.¹³
- 1.15. **Germany.** The German law empowers the responsible highest county department, in agreement with the central office of the Federation, to give the lender a legally binding confirmation on the return of the item at an agreed time on any occasion when foreign cultural property enters the Federal Republic on a temporary basis for the purposes of an exhibition. The confirmation must be agreed in advance of the import of the cultural object, and it cannot be revoked or withdrawn. The effect is to ensure that a claim by the owner for the return of the object cannot be opposed by a third party, and until the object has been returned, no legal action for restitution, arrest, seizure or confiscation is admissible.
- 1.16. **Canada.** The Ontario Foreign Cultural Objects Immunity from Seizure Act 1978, is very similar to the US Federal Act. It applies to works of art or objects of cultural significance. It is dependent on:
- (a) An agreement between the foreign owner or custodian and the Government of Ontario or any cultural or educational institution in Ontario providing for the temporary exhibition or display of the object in Ontario;
 - (b) Determination by the Minister that (i) the work or object is of cultural significance and (ii) temporary exhibition or display thereof in Ontario is in the interest of the people of Ontario;
 - (c) Notice of that determination in the Ontario Gazette.

¹³ A O'Connell, op cit, p 12.

- 1.17. If the conditions are satisfied no proceedings can be taken, or judgment enforced if that would have the effect of depriving the Government, the institution or any carrier responsible for transporting the work of its custody or control. The same exceptions apply as in the case of the US Federal Act.
- 1.18. **Alberta's** foreign Cultural Property Immunity Act 1985 is very similar – the same three conditions apply (save that the Lieutenant Governor in Council who has the power to make the determination, need only determine that the cultural property is of significance). However, it defines “cultural property” in far more detail – identifying all possible categories of such property. Protection may also be afforded to property loaned for temporary use for research purposes. Where the Lieutenant Governor may rescind an order – in which case the protection ceases to apply.
- 1.19. **British Columbia's** law is more succinct: “Works of art or other objects of cultural or historical significance brought into British Columbia for temporary public exhibit are exempt from seizure or sale under any process at law or equity.” The two exceptions are execution on a judgment in relation to a contract for the transportation or warehousing or exhibition of the work or object, and where the work or object is being offered for sale.
- 1.20. **Quebec's** Code is also succinct, giving the Government significant powers. It applies to works of art or historical property which are not originally conceived, produced or created in Quebec. Provided that such works or historical property is placed, or intended to be placed on public exhibit in Quebec, it is exempt from seizure “if the Government declares them so, and for such time as it determines”. The Government determination must be made by order in council, which comes into force on its publication in the *Gazette officielle* of Quebec. As with British Columbia, the execution of judgments in relation to contracts for the transportation or warehousing or exhibition of the works and property are excepted from the protection.
- 1.21. **Manitoba's** Act follows the same pattern as Ontario, with the same exceptions.

- 1.22. **Belgium**'s law protects any cultural objects which are loaned by a foreign country, or a foreign public or cultural entity, which are to be exhibited in a Federal Scientific institution, and provides that such objects cannot be seized while they are on loan to the institution in question. The act provides for a list of the cultural goods to be communicated to the Minister responsible for Political Science, but not for the publication of that list. The Act does not explicitly protect the works while they are being transported to or from the institution concerned, but this may be implicit.
- 1.23. **Switzerland**'s Federal Act provides for the issue of a "return guarantee". Where cultural property of one contracting state is on temporary loan for an exhibition in a museum or another cultural institute in Switzerland, the lending institution may request that the specialised body issue a return guarantee for the period of the exhibition.
- 1.24. The request must be published in the Federal Bulletin, describing the cultural property and its origin. If the request fails to fulfil the conditions for issuing a return guarantee it will be denied before publication (the Act does not set out the conditions which have to be fulfilled before such a request may be published).
- 1.25. After publication, parties have thirty days within which to file a written objection to the issue of the return guarantee with the specialised body. If no such objection is filed, the party may not take any further action.
- 1.26. A return guarantee may be issued in the event that:
- (a) No person claims ownership to the cultural property through an objection;
 - (b) The import of the property is not illicit;
 - (c) The loan agreement stipulates that the cultural property will be returned to the contracting state of origin following the conclusion of the exhibition.

- 1.27. The effect of issue of a return guarantee is that neither private parties nor authorities may make legal claims to the cultural property as long as that property is located in Switzerland. This may explain the result in the Noga case. There Noga was not making any claim to the paintings themselves, in the sense that it was not contesting title. It was simply trying to enforce its judgment debt against them. The Swiss Act is more naturally interpreted to give protection against claims for interim relief than post judgment claims.
- 1.28. **Austria's** federal act gives the Federal Ministry of Education, Science and Culture the power to grant a "legally binding immunity from seizure" for any foreign cultural goods which are temporarily borrowed for an exhibition by federal museums (it does not apply to all museums in Austria). Application for such protection must be made by the responsible federal museum, and it must be made in sufficient time to enable confirmation that the immunity has been granted to be issued before the relevant goods are imported. The legal effect of this confirmation is that the lender's right to the return of the cultural good takes precedence over any third party rights, and until it has been returned to the lender, any action at court seeking possession, or seizure of the cultural goods, or measures of enforcement against it are inadmissible.