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Case Achaemenid Limestone Relief – Iran v. Berend

Iran – Denyse Berend – Archaeological object/objet archéologique – Pre 1970 restitution claims/demandes de restitution pre 1970 – Judicial claim/action en justice – Choice of law/droit applicable – Ownership/propriété – Judicial decision/décision judiciaire – Request denied/rejet de la demande

In 2005, the French collector Denyse Berend consigned a limestone fragment, known as the Achaemenid Relief, for auction in London. The fragment had been part of her collection since 1974. When the Republic of Iran was given notice about the forthcoming sale, it filed suit against the collector at the High Court of Justice in London, alleging that the fragment had been illicitly removed from its territory in the 1930s. The sale was temporarily halted by an injunction of the court. Nevertheless, Iran's ownership claim was eventually dismissed.

I. Chronology

Pre 1970 restitution claims

- **1930s:** The object at stake in the present case, a **fragment of an Achaemenid limestone relief**, was allegedly illicitly removed from the city of Persepolis, a listed UNESCO World Heritage site.[1]
- **1974:** The artefact was sold twice at auction in New York (at Sotheby's on 4 May 1974 and at Myers/Adams on 10 October 1974); the buyer at the second auction was **Denyse Berend**, **a French collector**. On **10 November 1974**, the limestone was delivered to her residence in France.
- **January 2005**: Denyse Berend decided to consign the limestone for **auction** which had been part of her collection for about 30 years. The French government allowed for its exportation to London, where the limestone was prepared to be sold by **Christie's**. The Iranian Embassy in London was given notice of the upcoming sale two months later in **March 2005**.[2] Subsequently, the **Islamic Republic of Iran filed suit** against Denyse Berend at the London **High Court** seeking to recover the limestone.
- **19 April 2005**: A day before the Christie's auction "Faces from the Ancient World – A European Private Collection," [3] Iran obtained an **injunction** from Silber Justice who temporarily withdrew the fragment from the sale.[4]
- **2006-2007**: Before the beginning of the trial, the parties signed an **agreement** narrowing the proceedings to a few main points of contention.
- **1 February 2007**: The High Court dismissed Iran's restitution claim.[5] Consequently, Denyse Berend was able to sell the limestone at auction in London on **25 October 2007** for £ 580,000.[6]

[1] It is believed that the limestone originates from the period during which the city of Persepolis was constructed, i.e. the first half of the fifth century B.C. Depicting a Persian guardsman with a spear, investigations showed that the limestone was part of the staircase of the Apadana Palace in Persepolis. The city of Persepolis has been listed in 1979 as UNESCO World Heritage site (see UNESCO World Heritage List, No. 114, accessed December 11, 2011, http://whc.unesco.org/en/list/114); see Derek Fincham, "Rejecting Renvoi for Movable Cultural Property: The Islamic Republic of Iran v. Denyse Berend," *International Journal of Cultural Property* 14 (2007): 113, accessed December 12, 2011, http://ssrn.com/abstract=993127.

[2] Soudabeh Sadigh, "Court of London Ignores Iran's Ownership of Archaemid Bas-relief," *Cultural Heritage News Agency*, January 21, 2007, accessed December 9, 2011, http://www.chnpress.com/news/?section=2&id=6950.

[3] Sale no. 7135, London, with an estimate price of 200'000 – 300'000; see Marc Weber, "Iran v. Berend – Renvoi for Movable Property?" *Art Antiquity and Law* XII, Iss. 1 (March 2007): 104, accessed December 12, 2011, http://www.lanter.biz/downloads/Marc_Weber_Iran_v_Berend.pdf

[4] Ibid.

[5] See *Islamic Republic of Iran v. Berend*, [2007] EWHC 132 (QB), HQ05X01103 (Transcript), February, 1, 2007.

[6] The lot was described in the Christie's Antiquities sale catalogue as "An Archaemenid Stone Relief Fragment" with an estimate range of £ 500'000 - £ 800'000, Sale no. 7521, Lot no. 100.

II. Dispute Resolution Process

Judicial claim – Judicial decision

- As soon as the Republic of Iran was given notice of the limestone's sale, it initiated legal proceedings seeking for its return. It does not seem that the government attempted to address the issue through diplomatic channels.
- Interestingly, prior to the commencement of the trial at the High Court of Justice, the counsels of both parties came to an agreement on twelve points serving as a basis for the resolution of the dispute (in the following: the agreement). The agreement considerably helped the High Court to narrow the issues which had to be addressed in the trial. Mainly, the parties agreed on factual matters, such as the temporal scope of the relevant facts which shall be considered ("The Defendant does not rely on any fact or event as defeating the Claimant's title to the fragment prior to her alleged acquisition of possession in Paris in November 1974", para. 2), and on legal matters, regarding the property right of the limestone fragment ("The fragment was the property of the Claimant immediately before it was exported from Iran", para. 1; "As a matter of English law and of French law the fragment is to be characterised as movable property", para. 3).[7] Moreover, the accord underlined that the UNIDROIT as well as UNESCO Conventions[8] would not directly apply to the case (para. 8),[9] and it provided an overview of the legal possibilities in choice of law matters as well as of the outcome on the question of ownership to the fragment.[10] Finally, the agreement also comprised clarification as to several contentious advances by the claimant which had never been addressed by a French court (para. 7), including compliance with the *lex originis* rule for property which qualifies as "national treasure" in the state of origin.
- It is the High Court with their decision who brought an end to the dispute between the parties.

[7] See *Iran v. Berend* (Transcript), para. 5.
[8] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome 24 June 1995 (hereafter UNIDROIT Convention of 1995); Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property adopted at the General Conference of UNESCO on 14 November 1970 (hereafter UNESCO Convention of 1970).
[9] The clause has, however, not restrained the Islamic Republic of Iran to argue that the High Court should be inspired by these Conventions (see below chapter III).
[10] In short, the agreement enunciates the following forecast: should ownership be determined based on Iranian domestic law, then the claimant will retain title to the fragment (para. 4); on the other hand, should the High Court decide pursuant to French domestic law, the defendant may have obtained title to the fragment deriving from a good faith or prescriptive acquisition (para. 9 – 11; see also below chapter III).

III. Legal Issues

Choice of law – Ownership

- Before the commencement of the court proceedings, the defendant filed a letter clarifying two essential aspects. First, she asserted having acquired the artefact in good faith, alluding to one of the constituent elements of the *bona fide* acquisition of property under French law (art. 2279 French Civil Code). Secondly, the statement insisted on the fact that the fragment had been displayed in the living room of her Parisian residency since its acquisition, thus referring to the requirement of "public possession" for an acquisition of title by prescription (art. 2224 and 2261 French Civil Code; formerly art. 2262 respectively art. 2229 French Civil Code).
- Essentially, the parties disagreed on (1) the choice of law rules which should determine the applicable substantive law answering (2) the question of ownership to the fragment. The High Court's decision highlights these two intertwined legal issues. In fact, as explicitly stated in the parties' agreement (para. 4), the choice of the applicable law has a direct impact on determining who is the legitimate owner of the limestone fragment.[11]
- (1) The Islamic Republic of Iran argued that French conflict of law rules should apply. As held in para. 5 of the agreement, "title to a movable is governed by the *lex situs*, i.e. the law where the object is situated at the time of the event(s) said to confer title".[12] However, Iran submitted that the High Court should apply the doctrine of *renvoi*, which consists of the following rule: "when by its rules of the conflict of laws a court must apply the law of some other legal unit, it must apply not only the internal law of that unit, but also its rules of the conflict of laws".[13] (2) Therefore, the claimant contended that Iranian law was the applicable law. It argued that an exception to the French *lex situs* rule would find support in the international treaties that France had agreed to, including the UNESCO Convention of 1970 (art. 3) and the UNIDROIT Convention of 1995 (art. 5(i)), emphasizing the qualification of the fragment as Iranian national treasure and the various arguments in favour of the *lex originis* rule.[14] Notwithstanding the fact that none of these conventions would directly concern the fragment as they are not retroactive, Iran suggested that a French judge would "be inspired by the underlying policy that the most appropriate law to govern questions of title is the law of the state of origin".[15] (1) The defendant on the other hand contended that the High Court should refer the dispute to English conflict of law rules. (2) Since the fragment had to be characterised as movable property, these rules dictate that the question of ownership title is governed by French domestic law.

[11] See also n. 10 above.
[12] See also *Iran v. Berend* (Transcript), para. 8.
[13] Fincham, "Rejecting Renvoi for Movable Cultural Property," 113.
[14] See *Iran v. Berend* (Transcript), para. 9 and 34, including the following reasoning: "since French law would have regard to a policy that questions of title in relation to illicitly exported artistic or cultural property is most appropriately to be determined by reference to the law of the state of origin; since French law would regard the state of origin (Iran) as exclusively competent to determine the status of goods assigned to its activities as a public authority; since the origin of artistic or cultural goods is a key element in the decision made by a prospective buyer to purchase them."
[15] Ibid, para. 13.

- (1) According to the High Court's decision (Justice Eady), "there is no binding authority to the effect that English private international law will apply the *renvoi* doctrine to such questions".[16] Notwithstanding the possible benefits the general application of the law of the state of origin national treasures or monuments would enjoy, such a decision would be "a matter for governments to determine and implement if they see fit",[17] and not for the judges. But the court refused to consider *renvoi* and instead applied the *lex situs* rule.
- (2) The question of title to the fragment had hence to be determined according to the law of the state where the object was located at the time of the last transaction, i.e. French domestic law (the relevant date in the underlying case being 10 November 1974).[18] Justice Eady ruled against the claimant's contention according to which a French court would apply Iranian domestic law on several grounds. He notably concluded that both the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995, if considered by a French judge, notwithstanding their actual implementation into French law, "would not adversely affect the Defendant's title in this case"[19]. The High Court also ruled for Denyse Berend on the issue of ownership of the fragment in application of French law.

IV. Adopted Solution

Request denied

- In their pre-trial agreement, the parties agreed that if the defendant was recognized as the true owner, she would be "entitled to be compensated for any loss she has sustained by reason of the granting of the injunction on 19 April 2005 to restrain the sale of the fragment at Christie's on 20 April 2005" (para. 12).
- As Iran's claim for ownership was denied by the High Court, Denyse Berend was eligible for such compensation. She sold the limestone at a Christie's auction a few months later in October 2007.

V. Comment

- *Iran v. Berend* exemplifies the ongoing debate dividing private international law scholars about the *lex situs* and the *lex originis* rules. Market nations especially fear that applying the *lex originis*, i.e. the law of the state of origin of a contested object, would undermine the trade in antiquities and oblige museums to relinquish parts of their collections.

[16] Ibid, para 20.
[17] Ibid, para. 30.
[18] Ibid, para. 32.
[19] Ibid, para. 40. Iran contended that a French judge would indeed give effect to these Conventions as they would be part of private international law. The latter argument was rejected by Justice Eady (para. 56); see also Fincham, "Rejecting Renvoi for Movable Cultural Property," 116.

- As stated in the decision, *renvoi* had never been applied in England to movable property. Judge Eady was reluctant to upset the precedent in this regard, i.e. to "reach into unknown territory"[20] and apply the traditional *lex situs* rule.
- Finally, it is interesting to highlight the relevance of the pre-trial agreement between the parties' counsels, which enabled the judge to focus on the key issues of the case. Moreover, the agreement included possible outcomes of the disputes (such as the defendant's entitlement to a financial compensation in case of a ruling in her favour on the question of ownership title). One may wonder why the parties did not go even further when bilaterally negotiating all of their issues in the case which might have led to an out-of-court resolution of the dispute. In view of the costly litigation, which involved several art and private international law experts, and the incisive outcome of the trial for Iran (i.e. the dismissal of its ownership entitlement to the fragment by a legally binding decision), Iran and Denyse Berend certainly had incentives to do so.

VI. Sources

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c. Media

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[20] See also Fincham, "Rejecting Renvoi for Movable Cultural Property," 116.